

RULE MAKING ACTIVITIES

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

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

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

Department of Audit and Control

EMERGENCY RULE MAKING

Reporting Requirements of Service, Salary and Deduction Information for Employers to NYSLRS

I.D. No. AAC-17-08-00002-E
Filing No. 644
Filing date: July 1, 2008
Effective date: July 1, 2008

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

Action taken: Amendment of sections 315.2 and 315.3 of Title 2 NYCRR.

Statutory authority: Retirement and Social Security Law, sections 11, 34, 311 and 334

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

Specific reasons underlying the finding of necessity: Recently conducted audits by the Office of the State Comptroller have raised substantial issues with respect to whether local governments and school districts are correctly classifying certain professionals engaged by local governments and school districts as employees eligible for membership in the NYSLRS and for service credit. The State Comptroller's Office has promulgated

these amendments to regulations governing NYSLRS to provide additional guidance to local governments and school districts, to help them determine whether an individual is an employee or an independent contractor. A certification of the determination that an individual is an employee will now be required when a local government or school district initially reports to the NYSLRS certain covered professionals-- those persons providing services as an attorney, physician, architect, engineer, accountant or auditor.

Promulgation of these regulations on an emergency basis is necessary to assist employers and the NYSLRS to prevent potential fraud, abuse or error from occurring in records for newly hired individuals that could otherwise result in taxpayers paying retirement contributions for persons who are not eligible for membership or credit in the NYSLRS.

Subject: Reporting requirements of service, salary, and deduction information for employers to NYSLRS.

Purpose: To provide guidance to participating employees concerning whether an individual is an employee or independent contractor.

Text of emergency rule: Section 315.2 is amended to read as follows:

§ 315.2 [Definition] *Definitions.*

(a) As used in this Part, the term employer shall mean the State, a participating employer, and any other unit of government or organization obligated or agreeing to make contributions to the retirement system on behalf of its employees.

(b) *The term employee shall mean an individual performing services for the employer for which the employer has the right to control the means and methods of what work will be done and how the work will be done.*

(c) *The term independent contractor shall mean a consultant or other individual engaged to achieve a certain result who is not subject to the direction of the employer as to the means and methods of accomplishing the result. For purposes of this part, when making a determination as to whether an individual is an employee or an independent contractor, the factors set forth hereinafter in § 315.3 (c) (2) shall be considered by the employer.*

Subdivision (c) of section 315.3 is amended to read as follows:

(c) Employees to be reported.

(1) Only persons who are active members of the New York State and Local Employees' Retirement System or the New York and Local Police and Fire Retirement System and who have been assigned a registration number shall be included in the above reporting requirements. In the case of employees who are in the process of being registered to membership, all service, salary and deductions data and mandatory contributions shall be accumulated by each employer and such accumulation shall be included with the first monthly report which is due after the employee's registration number has been assigned. Members of the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System must be reported on separate reports.

(2) *Determination by Employer. An individual serving the employer as an independent contractor or consultant is not an employee and should not be reported to the retirement system. The employer has the primary responsibility for determining whether an individual is rendering services as an employee or as an independent contractor. When making such a determination, the employer must consider the following:*

(i) *Factors supporting the conclusion that an individual is an employee rather than an independent contractor:*

(A) *the employer controls, supervises or directs the individual performing the services, not only as to result but as to how assigned tasks are to be performed;*

(B) the individual reports to a certain person or department at the beginning or during each work day;

(C) the individual receives instructions as to what work to perform each day;

(D) the individual's decisions are subject to review by the employer;

(E) the employer sets hours to be worked;

(F) the individual works at established and fixed hours;

(G) the employer maintains time records for the individual;

(H) the employer has established a formal job description;

(I) the employer's governing board formally created the position with the approval of the local civil service commission where necessary;

(J) the employer prepares performance evaluations;

(K) the employer requires that the individual attend training;

(L) the employer provides permanent workspace and facilities (including, but not limited to, office, furniture and/or utilities);

(M) the employer provides the individual with equipment and support services (including, but not limited to, computer, telephone, supplies and/or clerical assistance);

(N) the individual is covered by a contract negotiated between a union and the employer;

(O) the individual is paid salary or wages through the employer's payroll system;

(P) tax withholding and employee benefit deductions are made from the individual's paycheck; and

(Q) the individual is entitled to fringe benefits (including, but not limited to, vacation, sick leave, personal leave, health insurance and/or grievance procedures).

(ii) Factors supporting the conclusion that an individual is an independent contractor rather than an employee:

(A) the individual has a personal employment contract with the employer;

(B) the employer pays the individual for the performance of services through the submission of a voucher;

(C) the individual is authorized to hire others, at the expense of the individual or a third party, to assist the individual in performing work for the employer;

(D) the individual provides similar services to the public;

(E) the individual is concurrently performing substantially the same services for other public employers; and

(F) the individual is also employed or associated with another entity that provides services to the employer by contract, retainer or other agreement.

(iii) Presumption:

In the case of an individual whose service has been engaged by an employer in the capacity of attorney, physician, engineer, architect, accountant or auditor and who is also a partner, associate, including an attorney in an "of counsel" relationship, or employee of another organization or entity that has a contract, retainer or other agreement to provide professional services to the participating employer, it shall be presumed that the individual is an independent contractor and not an employee of the participating employer;

(iv) Examples:

(A) An attorney who, in providing services to a participating employer, sets his own hours, is not supervised in the manner in which the work is performed, uses his or her own office and staff and has no deductions from salary is considered to be an independent contractor.

(B) A physician who in performing examinations and providing medical services for a school district, is provided with office space in the school, has set hours, is provided with supplies and receives a fixed salary with regular payroll deductions is considered to be an employee;

(3) Written explanation by participating employers; certain professions. In the case of an individual whose service has been engaged by a participating employer in the capacity of attorney, physician, engineer, architect, accountant or auditor and the participating employer has determined that the individual is rendering service as an employee and, therefore, may be eligible for credit with a retirement system, such employer shall submit to the retirement system, in a form prescribed by the Comptroller and certified by the chief fiscal officer of the employer, an explanation of the factors that led to the conclusion that the individual is an employee and not an independent contractor or consultant. Such certification shall be submitted to the retirement system at the time the individual is registered to membership or, in the case of an individual who is already a member of the retirement system, at the time the individual is first reported

by the participating employer to the system. In addition, such employer shall submit copies of documentation pertaining to the appointment of the individual as an employee and the decision to report the individual to the retirement system as well as the acceptance of the appointment by the local civil service commission where necessary. In the event appointments are made by a governing board of the participating employer, such documentation shall include a copy of the minutes of the meeting of such employer's governing board.

(4) Explanation at the request of the retirement system. In the case of any individual who is currently a member or a retiree of a retirement system, the retirement system may require that an employer submit to the retirement system an explanation of the factors that led to the conclusion that an individual engaged by the employer was an employee. An employer receiving such a request shall submit a response within thirty days of the date of the request or provide an explanation as to why it is unable to do so.

(5) Adjustment reports. In the event the retirement system or an employer determines that an individual has been incorrectly reported to a retirement system, the employer, upon notification from the retirement system, or upon its own initiative, shall promptly file salary and service adjustment reports with the retirement system to correct the error.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency/ proposed rule as a permanent rule making, having previously published a notice of emergency/ proposed rule making, I.D. No. AAC-17-08-00002-EP, Issue of April 23, 2008. The emergency rule will expire August 29, 2008.

Text of emergency rule and any required statements and analyses may be obtained from: Jamie Elacqua, Office of the State Comptroller, 110 State St., Albany, NY 12236, (518) 474-9024, e-mail: JElacqua@osc.state.ny.us

Regulatory Impact Statement

1. Statutory authority: Sections 34 and 334 of the Retirement and Social Security Law, as added by chapter 510 of the Laws of 1974, require that the Comptroller adopt rules and regulations, which shall have the force and effect of law, for the reporting of service, salary and deductions information for all member-employees of employers which participate in the New York State Employees' Retirement System and the New York State Police and Fire Retirement System. Said statutes further provide that the chief fiscal officer of the participating employer, or other officer exercising similar duties, shall file the required report in such form and at such times as may be prescribed in the said rules and regulations. Sections 34 and 334 make the refusal or willful neglect to file the required report a violation which shall subject the officer so refusing or neglecting to a penalty of \$5 per day for each day's delay beyond seven days. Sections 11 and 311 of the Retirement and Social Security Law establish the Comptroller as the administrative head of the retirement system and authorize him to adopt and amend rules and regulations for the administration and transactions of the business of the retirement system.

2. Legislative objectives: Elected officials, public officers and employees of participating employers are eligible for membership in the retirement system; independent contractors are not. Public employers participating in the retirement system are required to report service and salary information for all their employees so that the retirement system may accurately determine the employers' obligation to contribute to the funding of the retirement system, the employees' entitlement to the benefits provided to members of the retirement system and, ultimately, calculate the amount of benefits due to members upon retirement or death. To prevent the assessment of unnecessary employer contributions and the unauthorized distribution of retirement funds, individuals providing services to a public employer who are not in an employment relationship with the employer should not be reported to the retirement system. The existing regulation instructs employers to report employees who are active members of the retirement system or who are in the process of being registered to membership and it provides some instructions for the reporting of these individuals.

3. Needs and benefits: The amendment to the existing regulation provides employers with more specific guidance to aid them in determining whether an individual is an employee and, therefore, eligible to be reported to the retirement system, or an independent contractor who should not be reported to the retirement system. The amendment includes a list of factors to be considered in making this determination as well as examples of individuals serving employers in both capacities. Furthermore, the amendment requires that, when an individual is engaged by a participating employer in the capacity of attorney, physician, engineer, architect, accountant or auditor and is first reported to the retirement system, the employer

submit to the retirement system a certified form explaining the factors that led to the conclusion that the individual is serving as an employee and not an independent contractor. Finally, it requires an employer to submit a certified form in response to a request from the retirement system and requires employers to file salary and service adjustment reports to correct errors.

4. Costs: While there may be a modest administrative cost for employers associated with the preparation and submission of the form explaining the conclusion to consider certain individuals to be employees and not independent contractors, we anticipate that any such cost will be offset by the savings to employers resulting from the reduction in incorrect reporting of independent contractors and the associated contributions to the retirement system.

5. Local government mandates: The proposed rule imposes a duty on county, city, town, village, school district, fire district or other special district participating employers to submit to the retirement system a form explaining the factors that led to the conclusion that individuals in certain professions are serving as an employee and not an independent contractor.

6. Paperwork: To reduce the incorrect reporting of independent contractors, the proposed amendment will require the employer to complete and submit a form when deciding to report individuals providing certain professional services.

7. Duplication: This action does not conflict with or duplicate any state or federal requirements.

8. Alternatives: No significant alternatives were considered.

9. Federal standards: Not applicable

10. Compliance schedule: Not applicable

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because the proposal will not impose any adverse economic impact or significant reporting, record keeping or compliance requirements on small businesses or local governments. Rather, this proposal may result in an economic savings by local governments as a result of the reduction in incorrect reporting of independent contractors and the associated contributions to the retirement system.

Rural Area Flexibility Analysis

This action will not impose any adverse economic impact, reporting, record keeping or other compliance requirements on public or private entities in rural areas.

Department of Correctional Services

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Department of Correctional Services publishes a new notice of proposed rule making in the *NYS Register*.

Inmate Legal Visits

I.D. No.	Proposed	Expiration Date
COR-26-07-00005-P	June 27, 2007	June 26, 2008

Education Department

**EMERGENCY
RULE MAKING**

Contracts for Excellence

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

Filing No. 637

Filing date: July 1, 2008

Effective date: July 1, 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) and (2), 211-d(1-9); and L.2007, ch. 57, part A, section 12 and L.2008, ch. 58, part A, section 2

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 and amended by Chapter 57 of the Laws of 2008, 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 certain school districts identified in the statute to prepare a contract for excellence, which shall describe how the total foundation aid and supplemental educational improvement plan grants shall be used to support new programs and new activities or expand the use of programs and activities demonstrated to improve student achievement. The statute requires the Commissioner to establish by regulation the allowable programs and activities for such purposes. The statute also requires the Commissioner to prescribe a format by which each affected school district shall publicly report its expenditures of total foundation aid.

Chapter 57 of the Laws of 2008 amended Education Law section 211-d to revise the criteria for determining which school districts are required to prepare a contract for excellence, and to add model programs for students with limited English proficiency as a sixth category of allowable programs and services.

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, October 23, 2007 and January 14-15, 2008 meetings, 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.

At their March 17-18, 2008 meeting, the Board of Regents made substantial revisions to the proposed rule, in response to the Department's experience with the implementation of the Contracts for Excellence and discussions held with educational advocates and representatives from school boards and school administrators. A Notice of Revised Rule Making, reflecting these revisions, was published in the State Register on March 5, 2008.

At their May 19-20, 2008 meeting, the Board of Regents made substantial revisions to the proposed rule in response to public comment on the March 5, 2008 revised rule making and in response to Chapter 57 of the Laws of 2008, and adopted the revised rule as an emergency action, effective May 20, 2008. A Notice of revised Rule Making was published in the State Register on May 28, 2008. Subsequently, an additional revision has been made in section 100.11(d)(2) to clarify that each school district's contract for excellence shall be developed, as appropriate, consistent with 8 NYCRR section 100.11, relating to the shared-decision making process. A Notice of Revised Rule Making was published in the State Register on June 18, 2008. Pursuant to 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 July 28-29, 2008 Regents meeting. However, the May emergency adoption will expire on July 18, 2008, 60 days after its filing with the Department of State on May 20, 2008. A lapse in the rule's effectiveness would disrupt implementation of the contract for excellence program under Education Law section 211-d, and adversely affect the preparation and approval of contracts for the 2008-2009 school year.

A ninth emergency adoption is therefore necessary for the preservation of the general welfare in order to immediately adopt a revision to the rule to ensure contracts for excellence are developed, as appropriate, consistent with the shared decision making provisions in 8 NYCRR, and to otherwise ensure that the emergency rule that was adopted at the April 2007 Regents meeting, revised and readopted at the June and July 2007 Regents meetings, readopted at the September and October 2007, and January 2008 Regents meetings, revised and readopted at the March 2008 Regents meeting, and revised and readopted at the May 2008 Regents meeting, remains continuously in effect until the effective date of its adoption as a permanent rule.

It is anticipated that the proposed rule will be presented for permanent adoption at the July 28-29, 2008 Regents meeting, which is the first scheduled meeting after expiration of the 30-day public comment period for revised rule makings.

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 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 proposed rule was adopted as an emergency measure at the April Regents 2007 meeting, revised and readopted as an emergency rule at the June and July Regents meetings, readopted as an emergency action at the September and October 2007 and January 2008 Regents meetings, and revised and readopted as an emergency action at the March 2008 and May 2008 Regents meetings.

At their June meeting, the Board of Regents readopted the May 2008 emergency rule, effective July 19, 2008, in order to ensure that the rule remains continuously in effect until the effective date of its adoption as a permanent rule. 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; (7) response to intervention program and (8) students with low academic achievement.

Section 100.13(b) provides that each contract shall be prepared pursuant to the requirements of subdivision (d), 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(c); and specify how the contract amount will be distributed in accordance with 100.13(b)(3);

(2) specify the new or expanded programs, from the allowable programs and activities and/or authorized experimental programs pursuant to section 100.13(c), 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, (c) students with disabilities, and (d) students with low academic achievement;

(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.

Paragraph (3) of section 100.13(b) prescribes requirements for the use of contract for excellence funds.

The Commissioner shall approve each contract meeting the provisions of section 100.13 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;

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

Section 100.13(c)(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(c)(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(c)(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(c)(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(c)(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(c)(2)(v) is added to provide that allowable programs and activities for model programs for student with limited English proficiency include: (1) programs serving limited English proficiency students to address their learning needs by providing education in their native language, provide targeted programs to student who have resided in the United States for 7 years or longer and who are below grade level in reading, writing and other targeted areas, and provide support services to students transitioning into mainstream educational settings; (2) native language support; (3) new immigrant programs; (4) recruitment and retention programs for bilingual teachers and personnel staff; and (5) parent involvement programs.

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

Section 100.13(c)(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(d) 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(e) 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(f) 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 proposed 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 August 29, 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

Summary of Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law sections 101, 207, 215, 305(1) and (2) and 211-d, and section 12 of Part A of Chapter 57 of the Laws of 2007 and section 2 of Part A of Chapter 57 of the Laws of 2008.

LEGISLATIVE OBJECTIVES:

The rule is necessary to implement Chapter 57 of the Laws of 2007 and Chapter 58 of the Laws of 2008.

NEEDS AND BENEFITS:

The rule establishes allowable programs and activities, reporting criteria, and other requirements for contracts for excellence.

COSTS:

a. Costs to State government: None.

b. Costs to local governments:

(i) Sustained Professional Development

Estimated costs to school districts of \$400,000/year, assuming two extra days per year of sustained professional development for one to two dozen teachers per district at a cost of \$125 per teacher per day.

(ii) Other Costs

Estimated costs to school districts of \$9,435,000/year, depending upon allowable programs and activities selected, and assuming average need of each district to hire two new teachers at \$53,000 per year/per teacher (salary plus benefits).

(iii) Public Process Costs

Cost scope and size will vary by district size, State region, contract allocation, and the nature of the proposed interventions, from an estimated lower cost of \$1000 or less, based upon costs to a small rural district with the smallest total contract amount award Statewide, and a single school in accountability status, to an estimated upper cost of over \$100,000, based upon costs to the New York City School district.

We anticipate minimal costs for preparation of the public comment record and assessment to be absorbed using existing staff and resources.

(iv) Complaint Process Costs

We anticipate additional, marginal costs for creating a complaint form and providing notice of complaint procedures, which are anticipated to be absorbed using existing staff and resources.

Translation costs for a small-to-medium size district may amount to a few hundred dollars. New York City might need several translations into the more than 100 languages spoken there. It is anticipated that translations for the complaint process can be included within other translating functions performed by the City's Department of Education, including centralized service in-house, in a cost-effective manner. However, any concomitant economies of scale this district might benefit from, would be offset by the higher costs of doing business there and the sheer number of languages to be translated. These two documents could also be posted to the district's

website, or be sent out via other mailings, thereby incurring a small marginal cost.

Investigation, determination and appeal will vary by the size and scope of the contract and its allowable program activities. Assuming if initially two days of investigation were required for each million dollars of Foundation Aid subject to Contract for Excellence requirements, and districts paid, on average, \$500 for a day of investigative services, and total Foundation Aid subject to Contract for Excellence requirements were \$400 million in 2008-09 (this figure was \$428 million in 2007-08), the cost statewide would be \$400,000.

c. Costs to private, regulated parties: None.

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

There may be additional costs for convening an expert panel by the Commissioner to determine class size ranges, the cost of which will vary depending on the "formality" of the process.

LOCAL GOVERNMENT MANDATES:

Each district identified in the statute must prepare a contract for excellence pursuant to the rule's provisions. Depending on the allowable programs and activities chosen, the rule mandates or requires certain actions.

Each school district shall post its contract for excellence, and any amended contract, on its website within 48 hours of submission to the commissioner for approval.

School districts must establish a 30-day period for receipt of written public comment, and procedures for the conduct of public hearings on their proposed contracts, and provide reasonable notice to parents and persons in parental relation, teachers, administrators, and any distinguished educator appointed pursuant to Education Law section 211-c. The rule requires school districts to provide reasonable notice to the public of each public hearing held as part of the public process to develop contracts for excellence; to require school districts provide public notice of the hearings to the news media and conspicuously post public notice, consistent with the notice and time provisions of the Open Meetings Law; and to provide for the participation in public hearings of any interested party.

Districts shall provide translations of the notices into languages other than English most commonly spoken in the district.

Districts shall prepare, and make available upon request, a record of public comment received. Not later than 12 days after expiration of the public comment period or conclusion of public hearings, whichever occurs later, each district shall prepare a public comment assessment. The public comment assessment shall be posted on a district website and made available upon request.

Districts shall develop a complaint form and instructions for use.

Districts shall provide reasonable notice to parents of students or persons in parental relation to students of the procedures for bringing a complaint concerning implementation of the contract for excellence, and provide translations of the complaint form and procedures into the languages other than English most commonly spoken in the district.

Each district shall post, and make available for downloading, its notice of complaint procedures and complaint form on a district website, and make them available in schools and school district offices. Districts may use additional methods to provide notice, including providing copies in district mailings and distributions.

PAPERWORK:

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

Notice of the written public comment period and public hearing shall include:

- (1) a general description of the contract;
- (2) a detailed description of proposed allocations, on a school level, by program area, including details concerning proposed program additions and/or enhancements, by student achievement performance targets, and by affected student population groupings, including students with limited English proficiency and students who are English language learners, students in poverty, students with disabilities; and students with low academic achievement;
- (3) information where to obtain a copy of the proposed contract; and
- (4) a description of the public comment process and public hearing process.

Districts shall provide translations of the notices into languages other than English most commonly spoken in the district.

The rule requires school districts to provide reasonable notice to the public of each public hearing held as part of the public process to develop contracts for excellence; to require school districts provide public notice of the hearings to the news media and conspicuously post public notice,

consistent with the notice and time provisions of the Open Meetings Law; and to provide for the participation in public hearings of any interested party.

Districts shall prepare, and make available upon request, a record of public comment received. Not later than 20 days after expiration of the public comment period or conclusion of public hearings, whichever occurs later, each district shall prepare a public comment assessment containing a summary of the substance of the comments received, grouped by subject matter, and the district's response to each substantive comment, including a statement of any changes made to the contract as a result of such comment, or an explanation why the comment's suggestions were not incorporated into the contract. The public comment assessment shall be posted on a district website and made available upon request.

Districts shall develop a complaint form and instructions for its use, including the locations and deadline for filing, and provide reasonable notice to parents or persons in parental relation, of the procedures for bringing a complaint concerning implementation of the district's contract.

Districts shall provide translations of the form and notice into languages other than English most commonly spoken in the district, and shall post, and make available in schools and school district offices, its notice of complaint procedures and complaint form on a district website, and may use additional methods to provide notice.

The building principal, community superintendent or superintendent, as applicable shall notify the complainant in writing of his or her complaint determination, including the basis for such determination within 30 days from the date of receipt of the complaint, and an explanation of appeal procedures.

Upon appeal, the superintendent or community superintendent, as applicable, shall notify the complainant in writing of the appeal determination, including the basis for such determination, and an explanation of the appeal procedures.

Upon appeal of the complaint determination, or an appeal determination of a superintendent or community superintendent, to the trustees/board of education or chancellor, written notice shall be provided the appeal determination, the basis for the determination, and a statement that the determination may be appealed to the Commissioner pursuant to Education Law section 310.

DUPLICATION:

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

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 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:

Contracts for 2007-2008 were approved in November 2007 and will apply to expenditures through June 30, 2008. Districts will need to prepare and submit reports to the Department during Fall 2008 summarizing program activities, expenditures and results under their programs, and will need to have an independent audit performed and submitted to the Department.

Planning for the second year of the program (2008-2009) is ongoing and occurring concurrently. Changes in program regulations and requirements may occur as a result of the budgetary and legislative process. It is anticipated that a similar compliance scheduler under Chapter 57 of the Laws of 2008 will pertain, with districts required to submit or update their contracts by July 1, 2008 and the Department approving such contracts or updates by August 1, 2008.

Regulatory Flexibility Analysis

(a) Small Businesses:

The rule is necessary to implement Education Law '211-d, relating to contracts for excellence by certain specified school districts, and does not impose any adverse economic impact, reporting, record keeping or other compliance requirements on small businesses. Because it is evident from

the 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.

Local governments:

EFFECT OF RULE:

The rule applies to 56 school districts in the State determined to meet the statutory requirements in Education Law '211-d necessitating submission of a contract.

COMPLIANCE REQUIREMENTS:

Each district identified in statute must prepare a contract for excellence pursuant to the rule's provisions. Depending on allowable programs and activities chosen, the rule mandates or requires certain actions.

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

Each district must post its contract for excellence, and any amended contract, on its website within 48 hours of submission to the commissioner.

Districts must establish a 30-day public comment period, and procedures for public hearings on proposed contracts, and provide reasonable notice to parents/persons in parental relation, teachers, administrators, and any distinguished educator appointed pursuant to Education Law '211-c.

Notice of the public comment period and public hearing shall include:

(1) a general description of the contract;

(2) a detailed description of proposed allocations, on a school level, by program area, including details concerning proposed program additions and/or enhancements, by student achievement performance targets, and by affected student population groupings, including students with limited English proficiency and students who are English language learners, students in poverty, students with disabilities; and students with low academic achievement;

(3) information where to obtain a copy of the proposed contract; and

(4) a description of the public comment and public hearing process.

The rule requires school districts to provide reasonable notice to the public of each public hearing; to provide public notice of hearings to the news media and conspicuously post public notice, consistent with the notice and time provisions of the Open Meetings Law; and provide for participation by any interested party.

Districts shall provide translations of the notices into languages other than English most commonly spoken in the district.

Districts shall prepare, and make available upon request, a record of public comment received. Not later than 12 days after expiration of the public comment period or conclusion of public hearings, whichever occurs later, each district shall prepare a public comment assessment containing a summary of the substance of the comments received, grouped by subject matter, and the district's response to each substantive comment, including a statement of any changes made to the contract as a result of such comment, or an explanation why the comment's suggestions were not incorporated into the contract. The public comment assessment shall be posted on a district website and made available upon request.

Districts shall develop a complaint form for complaints concerning contract implementation, and instructions for use, including locations and filing deadline. Districts shall provide translations of the form and notice into languages other than English most commonly spoken in the district, and post its notice of complaint procedures and complaint form on a district website, make them available in schools and school district offices, and may use additional methods to provide notice.

The building principal, community superintendent or superintendent, as applicable, shall notify complainant in writing of the complaint determination, including the basis for such determination, within 30 days from the date of receipt of the complaint, and an explanation of appeal procedures.

Upon appeal, the superintendent or community superintendent, as applicable, shall notify complainant in writing of the appeal determination, including the basis for such determination, and an explanation of appeal procedures.

Upon appeal to the trustees/board of education or chancellor, written notice shall be provided of the appeal determination, the basis for the determination, and a statement that the determination may be appealed to the Commissioner pursuant to Education Law '310.

PROFESSIONAL SERVICES:

Depending on allowable programs and activities chosen, districts may be required to 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 Education Law '211-d and does not impose any significant, additional costs beyond those inherent in the statute.

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

(i) Sustained Professional Development

Assuming the need for 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 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, there may be additional costs. Particular activities where the cost could be large include: the requirement that additional instruction under any allowable program must be provided by appropriately certified or highly qualified teachers; that allowable programs 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. If 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.

(iii) Public Process Costs

Costs are associated with providing notice of the public comment period and public hearings, including translations where applicable, and preparation of the public comment record and assessment. Cost scope and size will vary by district size, State region, contract allocation, and the nature of the proposed interventions.

For example, in the case of Alexander, a small rural district with the smallest total contract amount award Statewide, and a single school in accountability status, the costs should be a few thousand dollars or less. District mailings, newspaper advertising and website postings can be included with existing, similar routine district tasks, resulting in marginal added expense; and there should be little/no need for translations. The average cost of a column inch of advertising space in similar rural is around \$7. A half page, posted twice during the comment period, results in about \$1,000 costs: (\$7 per inch X 70 inches X 2 days = \$980).

In New York City, the costs would be much greater, including translation services, and greater reliance on print media to reach individuals lacking computer access. A half page advertisement posted twice in the following publications would impose a cost in excess of \$115,000: African-American Observer (\$59 per inch X 70 inches X 2 = \$8,260); El Diario/La Prensa (\$60 X 70 X 2 = \$8,400); and the New York Post (\$711 X 70 X 2 = \$99,540).

We anticipate minimal costs for preparation of the public comment record and assessment, to be absorbed using existing staff and resources.

(iv) Complaint Process Costs

We anticipate additional, marginal costs for creating a complaint form and providing notice of complaint procedures, which are anticipated to be absorbed using existing staff and resources.

Translation costs for a small-to-medium size district may amount to a few hundred dollars: professional translation of a 1000-word legal document into Latin-American Spanish could be procured for \$165; and the same document for Korean, Haitian-Creole, Caribbean-Spanish and Chinese could cost \$650. New York City might need several translations into the more than 100 languages spoken there. It is anticipated that translations for the complaint processes can be included within other translating functions performed by the City's Department of Education, including centralized service in-house, in a cost-effective manner. However, any concomitant economies of scale this district might benefit from, would be offset by the higher costs of doing business there and the sheer number of languages to be translated. These documents could be posted to the district's website, or sent out via other mailings, thereby incurring a small marginal cost.

The rule requires districts make reasonable efforts to investigate complaints by parents and notify complainants of their determination within 30 days of its receipt, and provides for appeal procedures. Costs are hard to estimate and should vary by size and scope of the contract and allowable program activities. We anticipate the amount of professional, including legal and perhaps investigative or inspector general staff time (in the case of the NYC Department of Education) would not be insignificant in light of the importance of the contract for excellence and its prominence as a

school improvement initiative. We might expect more complaints initially and fewer over time as the public process for developing contracts results in more public buy-in to the programs in which districts are investing. So, for example, if initially two days of investigation were required for each million dollars of Foundation Aid subject to Contract for Excellence requirements, and districts paid, on average, \$500 for a day of investigative services, and total Foundation Aid subject to Contract for Excellence requirements were \$400 million in 2008-09 (this figure was \$428 million in 2007-08), the cost statewide would be \$400,000.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The rule imposes very few compliance and no paperwork requirements not already imposed by the authorizing statute. Those reporting requirements imposed by the statute are made feasible in that they are generally automated and web-based, using data entry screens and edit checks. Nothing would prohibit districts 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 rule is necessary to implement Education Law '211-d and is applicable to all identified school districts throughout the State. Consequently, the major provisions of the rule are statutorily imposed and it is not feasible to establish differing compliance or reporting requirements or timetables or to exempt districts from the rule's coverage. A substantial effort was made to involve districts in the development of this rule, and to the extent possible, the rule has been drafted incorporating their comments, to provide flexibility in implementing many of the provisions.

LOCAL GOVERNMENT PARTICIPATION:

The Department sent guidance memos to school districts and their component schools on April 4, April 9, June 21 and June 25, 2007, seeking the input, impact, questions and feedback of the 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. Department staff were available to respond to questions from 9 AM to 7:30 PM, from April 9-12. Copies of the rule were also provided to District Superintendents with the request they distribute it to school districts for review and comment.

Following approval of the contracts by the Commissioner in November 2007, a meeting was held in Troy, New York on December 19, 2007 to engage in collaborative discussions with representatives of each Contract for Excellence school districts. 82 superintendents and school district representatives attended the full-day session, along with many others participating via a web cast. Constructive feedback was sought and received on what worked well in the first year and areas for improvement. Changes to the proposed 2008-2009 legislation, regulations and the on-line contract system have been made and will continue to develop as a direct result of these meetings and discussions.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed rule applies to school districts in the State identified pursuant to Education Law '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:

Each district identified in statute must prepare a contract for excellence pursuant to the rule's provisions. Depending on allowable programs and activities chosen, the rule mandates or requires certain actions.

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

Each district must post its contract for excellence, and any amended contract, on its website within 48 hours of submission to the commissioner.

Districts must establish a 30-day public comment period, and procedures for public hearings on proposed contracts, and provide reasonable notice to parents/persons in parental relation, teachers, administrators, and any distinguished educator appointed pursuant to Education Law '211-c.

Notice of the public comment period and public hearing shall include:

- (1) a general description of the contract;
- (2) a detailed description of proposed allocations, on a school level, by program area, including details concerning proposed program additions and/or enhancements, by student achievement performance targets, and by

affected student population groupings, including students with limited English proficiency and students who are English language learners, students in poverty, students with disabilities; and students with low academic achievement;

- (3) information where to obtain a copy of the proposed contract; and
- (4) a description of the public comment and public hearing process.

The rule requires school districts to provide reasonable notice to the public of each public hearing; to provide public notice of hearings to the news media and conspicuously post public notice, consistent with the notice and time provisions of the Open Meetings Law; and provide for participation by any interested party.

Districts shall provide translations of the notices into languages other than English most commonly spoken in the district.

Districts shall prepare, and make available upon request, a record of public comment received. Not later than 12 days after expiration of the public comment period or conclusion of public hearings, whichever occurs later, each district shall prepare a public comment assessment containing a summary of the substance of the comments received, grouped by subject matter, and the district's response to each substantive comment, including a statement of any changes made to the contract as a result of such comment, or an explanation why the comment's suggestions were not incorporated into the contract. The public comment assessment shall be posted on a district website and made available upon request.

Districts shall develop a complaint form for complaints concerning contract implementation, and instructions for use, including locations and filing deadline. Districts shall provide translations of the form and notice into languages other than English most commonly spoken in the district, and post its notice of complaint procedures and complaint form on a district website, make them available in schools and school district offices, and may use additional methods to provide notice.

The building principal, community superintendent or superintendent, as applicable, shall notify complainant in writing of the complaint determination, including the basis for such determination, within 30 days from the date of receipt of the complaint, and an explanation of appeal procedures.

Upon appeal, the superintendent or community superintendent, as applicable, shall notify complainant in writing of the appeal determination, including the basis for such determination, and an explanation of appeal procedures.

Upon appeal to the trustees/board of education or chancellor, written notice shall be provided of the appeal determination, the basis for the determination, and a statement that the determination may be appealed to the Commissioner pursuant to Education Law '310.

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.

COSTS:

The rule is necessary to implement Education Law '211-d and does not impose any significant, additional costs beyond those inherent in the statute.

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

(i) Sustained Professional Development

Assuming the need for 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 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, there may be additional costs. Particular activities where the cost could be large include: the requirement that additional instruction under any allowable program must be provided by appropriately certified or highly qualified teachers; that allowable programs 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. If 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.

(iii) Public Process Costs

Costs are associated with providing notice of the public comment period and public hearings, including translations where applicable, and preparation of the public comment record and assessment. Cost scope and size will vary by district size, State region, contract allocation, and the nature of the proposed interventions.

For example, in the case of Alexander, a small rural district with the smallest total contract amount award Statewide, and a single school in accountability status, the costs should be a few thousand dollars or less. District mailings, newspaper advertising and website postings can be included with existing, similar routine district tasks, resulting in marginal added expense; and there should be little/no need for translations. The average cost of a column inch of advertising space in similar rural is around \$7. A half page, posted twice during the comment period, results in about \$1,000 costs: (\$7 per inch X 70 inches X 2 days = \$980).

In New York City, the costs would be much greater, including translation services, and greater reliance on print media to reach individuals lacking computer access. A half page advertisement posted twice in the following publications would impose a cost in excess of \$115,000: African-American Observer (\$59 per inch X 70 inches X 2 = \$8,260); El Diario/La Prensa (\$60 X 70 X 2 = \$8,400); and the New York Post (\$711 X 70 X 2 = \$99,540).

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Translation costs for a small-to-medium size district may amount to a few hundred dollars: professional translation of a 1000-word legal document into Latin-American Spanish could be procured for \$165; and the same document for Korean, Haitian-Creole, Caribbean-Spanish and Chinese could cost \$650. New York City might need several translations into the more than 100 languages spoken there. It is anticipated that translations for the complaint processes can be included within other translating functions performed by the City’s Department of Education, including centralized service in-house, in a cost-effective manner. However, any concomitant economies of scale this district might benefit from, would be offset by the higher costs of doing business there and the sheer number of languages to be translated. These documents could be posted to the district’s website, or sent out via other mailings, thereby incurring a small marginal cost.

The rule requires districts make reasonable efforts to investigate complaints by parents and notify complainants of their determination within 30 days of its receipt, and provides for appeal procedures. Costs are hard to estimate and should vary by size and scope of the contract and allowable program activities. We anticipate the amount of professional, including legal and perhaps investigative or inspector general staff time (in the case of the NYC Department of Education) would not be insignificant in light of the importance of the contract for excellence and its prominence as a school improvement initiative. We might expect more complaints initially and fewer over time as the public process for developing contracts results in more public buy-in to the programs in which districts are investing. So, for example, if initially two days of investigation were required for each million dollars of Foundation Aid subject to Contract for Excellence requirements, and districts paid, on average, \$500 for a day of investigative services, and total Foundation Aid subject to Contract for Excellence requirements were \$400 million in 2008-09 (this figure was \$428 million in 2007-08), the cost statewide would be \$400,000.

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. Guidance memos to 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, April 9, June 21

and June 25, 2007. In these 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 were also provided to District Superintendents with the request that they distribute it to school districts within their supervisory districts for review and comment.

Following approval of the contracts by the Commissioner in November 2007, a meeting was held in Troy, New York on December 19, 2007 to engage in collaborative discussions with representatives of each Contract for Excellence school districts. 82 superintendents and school district representatives attended the full-day session, along with many others participating via a web cast. Constructive feedback was sought and received on what worked well in the first year and areas for improvement. Changes to the proposed 2008-2009 legislation, regulations and the on-line contract system have been made and will continue to develop as a direct result of these meetings and discussions.

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 and amended by Chapter 57 of the Laws of 2008, to establish allowable programs and activities, criteria for public reporting by school districts of their total foundation aid expenditures and other requirements for purposes of preparation of contracts for excellence by certain specified school districts. The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the rule that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

The agency received no public comment.

**EMERGENCY
RULE MAKING**

Teacher Tenure Determinations

I.D. No. EDU-14-08-00009-E

Filing No. 636

Filing date: July 1, 2008

Effective date: July 1, 2008

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

Action taken: Amendment of Part 30 and section 100.2 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 3012-b; L.2008, ch. 57

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

Specific reasons underlying the finding of necessity: The purpose of the proposed amendment is to establish minimum standards for tenure determinations for teachers in all school districts and boards of cooperative educational services (“BOCES”) in New York State, in order to implement the requirements of Section 3012-b of the Education Law, as amended by Chapter 57 of the Laws of 2008. Section 3012-b of the Education Law requires that the minimum standards outlined in the proposed amendment be utilized by all school districts and BOCES in teacher tenure determinations made for teachers whose probationary periods commence on or after July 1, 2008.

The recommended action is proposed as an emergency measure because such action is necessary to preserve the general welfare in order to establish necessary regulatory standards to implement on a timely basis the requirements of Chapter 57 of the Laws of 2008 concerning the minimum standards for teacher tenure determinations. An emergency action is necessary to ensure that the requirements are in place on July 1, 2008, so that school districts and BOCES can comply with the requirements of Chapter 57 of the Laws of 2008.

Subject: Teacher tenure determinations.

Purpose: Establishing minimum standards and procedures for teacher tenure determinations.

Text of emergency rule: 1. The title of Part 30 is amended, effective July 1, 2008, to read as follows:

Part 30
Tenure [Areas]

2. Each respective section of Part 30 of the Rules of the Board of Regents is renumbered to be a respective section of a new Subpart 30-1 of the Rules of the Board of Regents, effective July 1, 2008.

3. The title of new Subpart 30-1 is added, effective July 1, 2008, to read as follows:

Subpart 30-1
Tenure Areas

4. Subdivision (h) of renumbered section 30-1.1 is amended, effective July 1, 2008, to read as follows:

(h) Tenure area means the administrative subdivision within the organizational structure of a school district in which a professional educator is deemed to serve in accordance with the provisions of this [Part] *Subpart*.

5. Renumbered section 30-1.2 is amended, effective July 1, 2008, to read as follows:

30-1.2 Applicability.

(a) The provisions of this [Part] *Subpart* shall apply to all probationary appointments to professional education positions made by a board of education or a board of cooperative educational services by resolution on or after August 1, 1975 and to appointments on tenure based upon such probationary appointments.

(b) Each board of education or board of cooperative educational services shall on and after the effective date of this [Part] *Subpart* make probationary appointments and appointments on tenure in accordance with the provisions of this [Part] *Subpart*.

(c) This [Part] *Subpart* shall not be applicable to city school districts located within cities having a population in excess of 400,000 inhabitants or to school districts employing fewer than eight teachers.

6. Subdivisions (a), (c) and (d) of renumbered section 30-1.9 are amended, effective July 1, 2008, to read as follows:

(a) A board of education or a board of cooperative educational services shall appoint and assign a professional educator in such a manner that he shall devote a substantial portion of his time throughout the probationary period in at least one designated tenure area except that a professional educator who teaches in an experimental program as defined in subdivision (i) of section [30.1] *30-1.1* of this [Part] *Subpart* and who does not devote 40 percent or more of his time to service in any one tenure area may be appointed to a tenure area for which he holds the proper certification.

(c) If a professional educator possesses certification appropriate to more than a single tenure area and the board of education or board of cooperative educational services proposes at the time of initial appointment to assign such individual in such a manner that he will devote a substantial portion of his time during each of the school years constituting the probationary period in more than one of the tenure areas established by this [Part] *Subpart*, the board shall in its resolution of appointment designate each such tenure area and shall thereafter separately confer or deny tenure to such individual in the manner prescribed by statute in each designated tenure area.

(d) Where a board of education or board of cooperative educational services proposes to assign a professional educator having tenure or in probationary status in a tenure area created by this [Part] *Subpart* in such a manner that he will devote a substantial portion of his time in a tenure area to which he has not previously been appointed, the board shall prior to such assignment confer a probationary appointment in accordance with section [30.3] *30-1.3* of this [Part] *Subpart*, designating such additional tenure area. Thereafter, the board shall separately confer or deny tenure to such individual in the designated tenure area in the manner prescribed by statute.

7. Renumbered section 30-1.10 is amended, effective July 1, 2008, to read as follows:

Where a professional educator acquires tenure in a tenure area created by this [Part] *Subpart*, he shall retain such tenure while he remains continuously employed by the board of education or board of cooperative educational services as a full-time member of the professional staff of the district, notwithstanding subsequent appointments to tenure or to probation in other tenure areas.

8. Renumbered section 30-1.12 is amended, effective July 1, 2008, to read as follows:

Subject to the provisions of sections 2510 and 2585 of the Education Law, where a board of education, on or after the effective date of this [Part]

Subpart, modifies the organizational structure of a school in such a manner that instruction in the core academic subjects is departmentalized in a grade or grades previously taught by professional educators deemed to serve in the middle grades tenure area, each tenured professional educator or probationer serving in such grade or grades at the time of such departmentalization shall retain such status and shall be eligible to teach any core academic subject or special subject for which such professional educator possesses appropriate certification; provided that such tenure shall pertain only to grade levels not higher than those formerly associated with the middle grades tenure area in such school district.

9. Subdivision (c) of renumbered section 30.13 is amended, effective July 1, 2008, to read as follows:

(c) Should the individual so identified have tenure or be in a probationary status in additional tenure areas created by this [Part] *Subpart*, he shall be transferred to such other tenure area in which he has greatest seniority and shall be retained in such area if there is a professional educator having less seniority than he in such other tenure area.

10. A new Subpart 30-2 is added, effective July 1, 2008, to read as follows:

Teacher Tenure Determinations

§ 30-2.1 Definitions.

As used in this Subpart:

(a) *Teacher* means a teacher in the classroom teaching service, as that term is defined in section 80-1.1 of the Regulations of the Commissioner.

§ 30-2.2 Applicability.

(a) *This Subpart shall apply only to the extent Education Law section 3012-b remains in effect.*

(b) *The provisions of this Subpart shall apply to tenure determinations for teachers of all school districts and boards of cooperative educational services whose probationary periods commence on or after July 1, 2008.*

(c) *Nothing herein shall be construed to make the requirements of this Subpart applicable to teaching assistants, administrative or supervisory staff or pupil personnel service providers.*

(d) *Each school district and board of cooperative educational services shall in accordance with section 3012-b of the Education Law make tenure determinations for teachers whose probationary periods commence on or after July 1, 2008 in accordance with the provisions of this Subpart.*

§ 30-2.3 Minimum Standards for Tenure Determinations for Teachers.

(a) *A superintendent of schools or district superintendent of schools, prior to recommending tenure for a teacher, shall evaluate all relevant factors, including the teacher's effectiveness over the applicable probationary period, or over three years in the case of a regular substitute with a one-year probationary period, in contributing to the successful academic performance of his or her students. When evaluating a teacher for tenure, each school district and board of cooperative educational services shall utilize a process that complies with subdivision (b) of this section.*

(b) *The process for evaluation of a teacher for tenure shall be consistent with article 14 of the Civil Service Law and shall include a combination of the following minimum standards:*

(1) *evaluation of the extent to which the teacher successfully utilized analysis of available student performance data (for example: State test results, student work, school-developed assessments, teacher-developed assessments, etc.) and other relevant information (for example: documented health or nutrition concerns, or other student characteristics affecting learning) when providing instruction but the teacher shall not be granted or denied tenure based on student performance data;*

(2) *peer review by other teachers, as far as practicable; and*

(3) *an assessment of the teacher's performance by the teacher's building principal or other building administrator in charge of the school or program, which shall consider all the annual professional performance review criteria set forth in section 100.2(a)(2)(iii)(b)(1) of the Regulations of the Commissioner.*

(c) *Nothing herein shall be construed to impose a mandatory collective bargaining obligation, over any locally developed standards, that is not required by article 14 of the Civil Service Law.*

(d) *The trustees and board of education of every school district and every board of cooperative educational services, and the chancellor of a city school district of a city with a population of one million or more shall, consistent with existing contractual provisions, make any changes in local rules, regulations and policies that are necessary to ensure that tenure determinations for teachers whose probationary periods commence on or after July 1, 2008 shall be made in compliance with section 3012-b of the Education Law and this section.*

11. Item (vi) of subclause (1) of clause (b) of subparagraph (iii) of paragraph (2) of subdivision (o) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective July 1, 2008, as follows:

(vi) student assessment, the teacher shall demonstrate that he or she implements assessment techniques based on appropriate learning standards designed to measure students' progress in learning *and that he or she successfully utilizes analysis of available student performance data (for example: State test results, student work, school-developed assessments, teacher-developed assessments, etc.) and other relevant information (for example: documented health or nutrition needs, or other student characteristics affecting learning) when providing instruction;*

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. EDU-14-08-00009-P, Issue of April 2, 2008. The emergency rule will expire September 28, 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

1. STATUTORY AUTHORITY:

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

Section 3012-b of the Education Law, as added by Section 9 of Part A of Chapter 57 of the Laws of 2007 and amended by Chapter 57 of the Laws of 2008, establishes the minimum standards for tenure determinations for teachers whose probationary period commences on or after July 1, 2008.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative objectives of the above-referenced statutes by establishing minimum standards for tenure determinations for teachers whose probationary period commences on or after July 1, 2008.

3. NEEDS AND BENEFITS:

The purpose of the proposed amendment is to implement the requirements of Section 3012-b of the Education Law, as amended by Chapter 57 of the Laws of 2008, by establishing the minimum standards for tenure determinations for teachers whose probationary period commences on or after July 1, 2008.

4. COSTS:

(a) Costs to State government: The proposed amendment will not impose any additional costs on State government, including the State Education Department.

(b) Costs to local governments: Section 3012-b of the Education Law, as amended by Chapter 57 of the Laws of 2008, may impose costs on local governments, over and above the current costs for making tenure determinations, depending on the current practices followed by school districts and BOCES. However, the proposed amendment will not impose any additional costs, beyond those imposed by the statute.

(c) Costs to private regulated parties: The proposed amendment will not impose any additional costs on private regulated parties, beyond those imposed by the statute.

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

5. LOCAL GOVERNMENT MANDATES:

Section 3012-b of the Education Law, as amended by Chapter 57 of the Laws of 2008, requires a superintendent of schools or district superintendent of schools, to evaluate all relevant factors prior to recommending a teacher for tenure, including an evaluation of the candidate's effectiveness over the applicable probationary period, or over three years in the case of a regular substitute with a one-year probationary period, in contributing to the successful academic performance of his or her students.

Section 3012-b of the Education Law, as amended by Chapter 57 of the Laws of 2008, requires all school districts and boards of cooperative educational services, when evaluating a teacher for tenure to: (1) evaluate the extent to which the teacher successfully utilized analysis of available student performance data and other relevant information when providing instruction but the teacher shall not be granted or denied tenure based on student performance data; (2) consider peer review by other teachers, as far as practicable; and (3) provide an assessment of the teacher's performance by the teacher's building principal or other building administrator. The proposed amendment aligns the Regents Rules with the statutory require-

ments and requires the use of the Annual Professional Performance Review criteria set forth in Section 100.2 of the Regulations of the Commissioner of Education in tenure determinations, which has been a regulatory requirement since 2000.

Consistent with the statute, the proposed Rule would permit the consideration of locally developed standards. This approach would not prescribe the types of locally developed standards designed to measure a teacher's effectiveness in contributing to the successful academic performance of his or her students but does prohibit a teacher being granted or denied tenure based on student performance data. Such locally developed standards may or may not be mandatory subjects of collective bargaining.

The proposed amendment further clarifies that school districts and BOCES shall, when making a tenure determination, consider available student performance data (for example: State test results, student work, school-developed assessments, etc.) and other relevant information (for example: documented health or nutrition concerns or other student characteristics affecting learning) but the teacher shall not be granted or denied tenure based on student performance data.

To be consistent with the new statute, an amendment was also made to Section 100.2 of the Regulations of the Commissioner of Education, to the "student assessment" factor of the Annual Professional Performance Review regulations to explicitly mention the teacher's use of available student performance data and other relevant information when providing instruction.

6. PAPERWORK:

The amendment does not impose additional paperwork requirements upon school districts or boards of cooperative education.

7. DUPLICATION:

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

8. ALTERNATIVES:

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

9. FEDERAL STANDARDS:

There are no Federal standards that establish minimum standards for tenure determinations for teachers.

10. COMPLIANCE SCHEDULE:

School districts and boards of cooperative educational services will be required to comply with the proposed amendment on its stated effective date in order to comply with section 3012-b of the Education Law, as amended by Chapter 57 of the Laws of 2008.

Regulatory Flexibility Analysis

(a) Small Businesses:

The proposed amendment applies to school districts and boards of cooperative educational services (BOCES) and relates to standards for teacher tenure determinations in order to implement the requirements of section 3012-b of the Education Law, as amended by Chapter 57 of the Laws of 2008. The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that 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.

(b) Local Governments:

1. EFFECT OF RULE:

The proposed amendment applies to the 698 school districts and seven BOCES located in New York State and relates to standards for teacher tenure determinations in order to implement the requirements of section 3012-b of the Education Law, as amended by Chapter 57 of the Laws of 2008.

2. COMPLIANCE REQUIREMENTS:

Section 3012-b of the Education Law, as amended by Chapter 57 of the Laws of 2008, requires a superintendent of schools or district superintendent of schools, to evaluate all relevant factors prior to recommending a teacher for tenure, including an evaluation of the candidate's effectiveness over the applicable probationary period, or over three years in the case of a regular substitute with a one-year probationary period, in contributing to the successful academic performance of his or her students.

Section 3012-b of the Education Law requires all school districts and BOCES, when evaluating a teacher for tenure to: (1) evaluate the extent to which the teacher successfully utilized analysis of available student performance data and other relevant information when providing instruction but the teacher shall not be granted or denied tenure based on student performance data; (2) conduct peer review by other teachers, as far as

practicable; and (3) provide an assessment of the teacher's performance by the teacher's building principal or other building administrator. The proposed amendment aligns the Regents Rules with the statutory requirements and requires the use of the Annual Professional Performance Review criteria set forth in Section 100.2 of the Regulations of the Commissioner of Education when making tenure determinations, which has been a regulatory requirement since 2000.

The proposed amendment also clarifies that school districts and BOCES shall consider available student performance data (for example: State test results, student work, school-developed assessments, etc.) and any other relevant information (for example: documented health or nutrition concerns, or other student characteristics affecting learning) when making teacher tenure determinations but the teacher shall not be granted or denied tenure based on student performance data.

To be consistent with the new statute, an amendment was also made to Section 100.2 of the Regulations of the Commissioner of Education, to the "student assessment" factor of the Annual Professional Performance Review regulations, to explicitly mention the teacher's use of student performance data and other relevant information when providing instruction but the teacher shall not be granted or denied tenure based on student performance data.

3. PROFESSIONAL SERVICES:

The proposed amendment does not mandate that school districts or BOCES contract for additional professional services to comply.

4. COMPLIANCE COSTS:

The proposed amendment does not impose any additional compliance costs on school districts or BOCES, beyond those imposed by the statute.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional technological requirements. Economic feasibility is addressed under the Compliance Costs section above.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment establishes minimum standards and procedures for teacher tenure determinations in New York State. Because these statutory requirements specifically apply to school districts and BOCES, it is not possible to exempt them from the proposed amendment or impose a lesser standard. The proposed amendment has been carefully drafted to meet statutory requirements while minimizing the impact on school districts and BOCES. Moreover, the State Education Department has determined that uniform requirements for teacher tenure determinations are necessary to ensure the quality of the State's teaching workforce.

7. LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from the State Professional Standards and Practices Board for Teaching. This is an advisory group to the Board of Regents and the Commissioner of Education on matters pertaining to teacher education, certification, and practice. The Board has representatives of school districts and BOCES. Comments were also solicited from school districts across the State, and the City School District of the City of New York.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment will affect candidates seeking tenure as a teacher in the 698 school districts and seven boards of cooperative services in all areas of New York State, including the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

Section 3012-b of the Education Law, as amended by Chapter 57 of the Laws of 2008, requires a superintendent of schools or district superintendent of schools, to evaluate all relevant factors prior to recommending a teacher for tenure, including an evaluation of the candidate's effectiveness over the applicable probationary period, or over three years in the case of a regular substitute with a one-year probationary period, in contributing to the successful academic performance of his or her students.

Section 3012-b of the Education Law requires all school districts and BOCES, when evaluating a teacher for tenure to: (1) evaluate the extent to which the teacher successfully utilized analysis of available student performance data and other relevant information when providing instruction but the teacher shall not be granted or denied tenure based on student performance data; (2) conduct peer review by other teachers, as far as practicable; and (3) provide an assessment of the teacher's performance by the teacher's building principal or other building administrator. The proposed amendment aligns the Regents Rules with the statutory requirements and requires the use of the Annual Professional Performance Review

criteria set forth in Section 100.2 of the Regulations of the Commissioner of Education when making tenure determinations, which has been a regulatory requirement since 2000.

The proposed amendment also clarifies that school districts and BOCES shall consider available student performance data (for example: State test results, student work, school-developed assessments, etc.) and any other relevant information (for example: documented health or nutrition concerns or other student characteristics affecting learning) when providing instruction but the teacher shall not be granted or denied tenure based on student performance data.

To be consistent with the new statute, an amendment was also made to Section 100.2 of the Regulations of the Commissioner of Education, to the "student assessment" factor of the Annual Professional Performance Review regulations, to explicitly mention the teacher's use of student performance data to inform future instruction.

The amendment does not impose recordkeeping requirements or require candidates seeking certification to retain professional services in order to comply.

3. COSTS:

Section 3012-b of the Education Law, as amended by Chapter 57 of the Laws of 2008, may impose costs on private regulated parties, over and above the current costs for making tenure determinations, depending on the current practices followed by school districts and BOCES. However, the proposed amendment will not impose any additional costs, beyond those imposed by the statute.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment establishes minimum standards for teacher tenure determinations in New York State. Because these statutory requirements specifically apply to teachers, school districts and BOCES located in all areas of the State, it is not possible to exempt them from the proposed amendment or impose a lesser standard. The proposed amendment has been carefully drafted to meet statutory requirements while minimizing the impact on teachers, school districts and BOCES. Moreover, the State Education Department has determined that uniform requirements for teacher tenure determinations are necessary to ensure the quality of the State's teaching workforce.

5. RURAL AREA PARTICIPATION:

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

Job Impact Statement

The purpose of the proposed amendment is to establish minimum standards for tenure determinations made by all school districts and boards of cooperative educational services in New York State for teachers whose probationary periods commence on or after July 1, 2008.

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

EMERGENCY RULE MAKING

School Bus and Vehicle Engine Idling

I.D. No. EDU-14-08-00012-E

Filing No. 640

Filing date: July 1, 2008

Effective date: July 1, 2008

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

Action taken: Addition of section 156.3(h) to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 3264 (not subdivided) and 3267(1), (2), and (3); and L. 2007, ch. 670

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

Specific reasons underlying the finding of necessity: The proposed rule is necessary to implement Chapter 670 of the Laws of 2007 by prescribing requirements for minimizing the idling of school buses and other vehicles. Education Law section 3637, as added by Chapter 670 of the Laws of 2007, directs the Commissioner to promulgate, on or before July 1, 2008,

regulations requiring school districts to minimize, to the extent practicable, the idling of the engine of any school bus and other vehicles owned or leased by the school district while such bus or vehicle is parked or standing on school grounds, or in front of any school.

New York State has the largest fleet of school buses and vehicles in the nation. With such a large student population and amount of miles transported, our children are being exposed to sizeable hazards from school bus emissions. The diesel exhaust from a school bus can be harmful to adults but even more so for our children, because their respiratory systems are still developing and they have a faster breathing rate. Diesel exhaust contains billions of small particles that are so small that several thousand of them could fit on the period at the end of this sentence. When children breathe in the exhaust from school buses, these particles can cause lung damage and aggravate asthma, bronchitis and other health problems.

Furthermore, the exhaust from an idling school bus does not just target children, but also pollutes the air in the entire community. The United States Environmental Protection Agency (EPA) has reported that exhaust fumes pollute the air in our communities and can enter school buildings through fresh air intakes, doors and open windows (See *There are 25 Million Reasons Why it is Important to Reduce Idling*, April 2006 - <http://www.epa.gov/cleanschoolbus/documents/420f06018.pdf>). One-third of our student population resides in areas of the State where the air quality is compromised. By minimizing the amount of time school buses and other vehicles idle on or near school grounds, we will improve the health of students, parents, area residents and employees of school districts across the State.

The United States Environmental Protection Agency Region 2 performed a study on school bus idling in New York State using the Katonah-Lewisboro School District located in Cross River, New York. The study was specifically designed to determine which of several different methods of running a school bus engine during the winter months was the most effective in reducing emissions while providing cost efficient and safe pupil transportation services. The study results clearly showed that "turning off the bus engine is the preferred operating choice." The study also showed that the short burst of emissions that occurs when restarting an engine that was turned off, is still less than keeping an engine idling. (The study has been posted at the following website: <http://www.epa.gov/region02/cleanschoolbus/r2schoolbusstudy.pdf>)

The United States Environmental Protection Agency has identified 21 chemicals in truck and bus exhaust that are known or suspected to cause cancer or other serious health conditions. Some of these chemicals include formaldehyde, acetaldehyde and benzene. Emissions also contain other pollutants linked to respiratory diseases including particulate matter, nitrogen oxides and carbon monoxide. Particulate matter consists of both black soot that you can see and tiny, invisible particles that are a fraction of the width of a human hair which can lodge deep in your lungs. Pollutants in bus exhaust can cause or trigger lung cancer, cardiovascular disease, asthma attacks, chronic bronchitis, impaired immune system function, decreased lung function and shortness of breathe. These adverse health effects can hurt the entire population not just school children. This can lead to increased hospital admissions, emergency room use, school absences, and work loss, which all increase our health care costs. Idling from diesel engines damages our environment by adding to smog. It reduces crop yields and acid rain means fewer fish in our lakes and streams in the Adirondacks and Finger Lakes. It increases the growth of algae and harms the coastal waters in Long Island Sound. For these reasons it is important that we not limit the protection afforded our children to those whose respiratory health is already compromised, but take firm steps to insure that all of our children and citizenry are protected from the harmful effects of pollutants from idling school buses.

Furthermore, limiting the idling time of a school bus is also cost efficient. Unnecessary idling of school bus engines taxes the mechanical health of the engine and uses more fuel than turning the bus engine off and on. Running an engine at low speed causes twice the wear on internal parts compared to driving at regular speed. While some may suggest that idling for lengthy periods is important to warm up the engine for in cold weather, engine manufacturers routinely suggest a warm up time of less than five minutes. In especially severe winter weather bus heaters or engine block heaters are more effective than unnecessary idling.

For these reasons, and consistent with the statute's directive to minimize the idling of school buses and other vehicles, the proposed rule has been drafted to apply to all school districts.

The proposed rule was published in the State Register on April 2, 2008. Further additional revisions to the rule are now proposed, as set forth in the Notice of Revised Rule Making published in the State Register on June 11,

2008. Pursuant to 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 July 28-29, 2008 Regents meeting. Pursuant to SAPA section 202, the earliest the proposed rule can become effective is after the Notice of Adoption is published in the State Register on August 20, 2008. However, a delay in the rule's effective date is contrary to Education Law section 3637, as added by Chapter 670 of the Laws of 2007, which directs the Commissioner to promulgate regulations requiring school districts to minimize school vehicle idling, on or before July 1, 2008, and will result in children and others being unnecessarily exposed to harmful vehicle exhaust.

Emergency action is necessary for the preservation of the public health, safety and the general welfare to immediately prescribe requirements for minimizing the idling of school buses and other vehicles owned or leased by school districts, consistent with the requirements of Education Law section 3637, as added by Chapter 670 of the Laws of 2007, and thus reduce the exposure of children and others from harmful vehicle exhaust.

It is anticipated that the proposed rule will be presented for permanent adoption at the July 28-29, 2008 Regents meeting, which is the first scheduled meeting after expiration of the 30-day public comment period for revised rule makings.

Subject: School bus and vehicle engine idling.

Purpose: To minimize the idling of school buses and other vehicles.

Text of emergency rule: Subdivision (h) of section 156.3 of the Regulations of the Commissioner of Education is added, effective July 1, 2008, as follows:

(h) *Idling school buses on school grounds.*

(1) *General provisions.*

(i) *Except as provided in paragraph (2) of this subdivision, each school district shall ensure that each driver of a school bus, as defined in Vehicle and Traffic Law section 142, or other vehicle owned, leased or contracted for by such school district, shall turn off the engine of such school bus or vehicle while waiting for passengers to load or off load on school grounds, or while such vehicle is parked or standing on school grounds or in front of or adjacent to any school.*

(ii) *School districts shall consider adopting policies which provide for the prompt loading and unloading of individual school buses rather than a policy of waiting for all buses to arrive before loading or unloading.*

(2) *Exceptions. Notwithstanding the provisions of paragraph (1) of this subdivision and unless otherwise required by State or local law, the idling of a school bus or vehicle engine may be permitted to the extent necessary to achieve the following purposes: (i) for mechanical work; or (ii) to maintain an appropriate temperature for passenger comfort; or (iii) in emergency evacuations where necessary to operate wheelchair lifts.*

(3) *Driver requirements. Each school district shall ensure that each driver of a school bus shall:*

(i) *instruct pupils on the necessity to board the school bus promptly in the afternoon in order to reduce loading time;*

(ii) *whenever possible, park the school bus diagonally in school loading areas to minimize the exhaust from adjacent buses that may enter the school bus and school buildings; and*

(iii) *turn off the bus engine during sporting or other events.*

(4) *Notice. Each school district shall annually provide their school personnel, no later than five school days after the start of school, with notice of the provisions of Education Law section 3637 and of this section, in a format prescribed and provided by the Commissioner to such school districts for dissemination.*

(5) *Monitoring and reports. Each school district shall periodically but at least semi-annually monitor compliance with the provisions of this subdivision by school bus drivers and drivers of vehicles owned, leased or contracted for by such school district. Each school district shall prepare a written report of such review, which shall describe the actions taken to review compliance and the degree of adherence found with the provisions of this subdivision. Copies of the report shall be retained in the school district's files for a period of six years and made available upon request. The Commissioner may also require specific school districts to provide additional information as necessary to address health concerns related to their compliance with the provisions of this subdivision.*

(6) *Private vendor transportation contracts. All contracts for pupil transportation services between a school district and a private vendor that*

are entered into on or after July 1, 2008, shall include a provision requiring such vendor's compliance with the provisions of this subdivision.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. EDU-14-08-00012-P, Issue of April 2, 2008. The emergency rule will expire September 28, 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 207 empowers the Board of Regents and the Commissioner of Education to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the State Education Department by law.

Education Law section 3624 authorizes the Commissioner of Education to establish and define qualifications of school bus drivers and to make rules and regulations governing the operation of transportation facilities used by pupils. Such rules and regulations shall include acts or conduct which would affect the safe operation of such transportation facilities.

Education Law section 3637, as added by Chapter 670 of the Laws of 2007, directs the Commissioner to promulgate regulations requiring school districts to minimize, to the extent practicable, the idling of the engine of any school bus and other vehicles owned or leased by the school district while such bus or vehicle is parked or standing on school grounds, or in front of any school.

LEGISLATIVE OBJECTIVES:

The proposed rule is necessary to implement Chapter 670 of the Laws of 2007 by prescribing requirements for minimizing the idling of school buses and other vehicles.

NEEDS AND BENEFITS:

New York State has the largest fleet of school buses and vehicles in the nation. Over 50,000 vehicles are used in the State each day to transport over 2.5 million school children to and from school. Simply stated, New York State transports ten percent of all the nation's pupils. In a year, our school buses travel over 225 million miles.

With such a large student population and amount of miles transported, our children are being exposed to sizeable hazards from school bus emissions. The diesel exhaust from a school bus can be harmful to adults but even more so for our children. This is because children are more susceptible to air pollution than adults because their respiratory systems are still developing and they have a faster breathing rate. Diesel exhaust contains billions of small particles that are so small that several thousand of them could fit on the period at the end of this sentence. When children breathe in the exhaust from school buses, these particles can cause lung damage and aggravate asthma, bronchitis and other health problems.

Furthermore, the exhaust from an idling school bus does not just target children, but also pollutes the air in the entire community. The United States Environmental Protection Agency (EPA) has reported that exhaust fumes pollute the air in our communities and can enter school buildings through fresh air intakes, doors and open windows (See *There are 25 Million Reasons Why it is Important to Reduce Idling*, April 2006 - <http://www.epa.gov/cleanschoolbus/documents/420f06018.pdf>). One-third of our student population resides in areas of the State where the air quality is compromised. By minimizing the amount of time school buses and other vehicles idle on or near school grounds, we will improve the health of students, parents, area residents and employees of school districts across the State.

The United States Environmental Protection Agency Region 2 performed a study on school bus idling in New York State using the Katonah-Lewisboro School District located in Cross River, New York. The study was specifically designed to determine which of several different methods of running a school bus engine during the winter months was the most effective in reducing emissions while providing cost efficient and safe pupil transportation services. The study results clearly showed that "turning off the bus engine is the preferred operating choice." The study also showed that the short burst of emissions that occurs when restarting an engine that was turned off, is still less than keeping an engine idling. (The study has been posted at the following website: <http://www.epa.gov/region02/cleanschoolbus/r2schoolbusstudy.pdf>)

The United States Environmental Protection Agency has identified 21 chemicals in truck and bus exhaust that are known or suspected to cause cancer or other serious health conditions. Some of these chemicals include

formaldehyde, acetaldehyde and benzene. Emissions also contain other pollutants linked to respiratory diseases including particulate matter, nitrogen oxides and carbon monoxide. Particulate matter consists of both black soot that you can see and tiny, invisible particles that are a fraction of the width of a human hair which can lodge deep in your lungs. Pollutants in bus exhaust can cause or trigger lung cancer, cardiovascular disease, asthma attacks, chronic bronchitis, impaired immune system function, decreased lung function and shortness of breathe. These adverse health effects can hurt the entire population not just school children. This can lead to increased hospital admissions, emergency room use, school absences, and work loss, which all increase our health care costs. Idling from diesel engines damages our environment by adding to smog. It reduces crop yields and acid rain means fewer fish in our lakes and streams in the Adirondacks and Finger Lakes. It increases the growth of algae and harms the coastal waters in Long Island Sound. For these reasons it is important that we not limit the protection afforded our children to those whose respiratory health is already compromised, but take firm steps to insure that all of our children and citizenry are protected from the harmful effects of pollutants from idling school buses.

Furthermore, limiting the idling time of a school bus is also cost efficient. Unnecessary idling of school bus engines taxes the mechanical health of the engine and uses more fuel than turning the bus engine off and on. Running an engine at low speed causes twice the wear on internal parts compared to driving at regular speed. While some may suggest that idling for lengthy periods is important to warm up the engine for in cold weather, engine manufacturers routinely suggest a warm up time of less than five minutes. In especially severe winter weather bus heaters or engine block heaters are more effective than unnecessary idling.

For these reasons, and consistent with the statute's directive to minimize the idling of school buses and other vehicles, the proposed rule has been drafted to apply to all school districts.

COSTS:

(a) Costs to the state: The proposed rule is necessary to implement the requirements of Chapter 670 of the Laws of 2007 and does not impose any additional costs beyond those intrinsic to the statute. The effect on State aid will be minimal. The additional time necessary for staff to semi-annually check school bus driver compliance should be minimal as the monitoring may be part of other school bus driver and contract monitoring functions performed by district supervisory staff.

(b) Costs to local government: The proposed rule is necessary to implement the requirements of Chapter 670 of the Laws of 2007 and does not impose any additional costs beyond those intrinsic to the statute. School districts are responsible for annually providing employees with copies of materials on minimizing idling. The cost of such activity is expected to be minimal since the content of the materials will be supplied by the Commissioner and is estimated to be four pages in length. Notice to employees may be by handouts, group meetings or postings. Districts will monitor school bus driver compliance twice annually and record the results. The cost of this activity should be minimal as it can be made part of routine school bus driver performance checks and monitoring of contract provider compliance.

(c) Costs to private regulated parties: None.

(d) Costs to the regulation agency for implementation and central administration: The proposed rule implements the requirements of Chapter 670 of the Laws of 2007 and does not impose any additional costs beyond those intrinsic to the statute. The materials concerning minimizing idling of school buses and vehicles have previously been developed as part of the State Education Department "Anti-Idling Campaign" for the 2004 School Bus Driver Safety Training Program. A copy of those materials will be supplied to all school districts.

LOCAL GOVERNMENT MANDATES:

The proposed rule is necessary to implement the requirements of Chapter 670 of the Laws of 2007 and does not impose any additional program, service, duty or responsibility on school districts beyond those intrinsic to the statute. The proposed rule generally requires that all school districts work to minimize idling of school buses and vehicles on school grounds or adjacent to the school. It requires school districts to annually provide school bus drivers and employees with information concerning the dangers of idling of vehicles. The materials may be supplied as paper copy, or the information may be covered in an employee staff meeting. In addition, to insure compliance, school districts must monitor driver adherence to the policy semi-annually and record the results, but are not required to submit written reports to the Commissioner. Such reports shall be retained in the school district's files for a period of six years and shall be made available upon request. The Commissioner may also require specific school districts

to provide additional information as necessary to address health concerns related to their compliance with the rule.

PAPERWORK:

The proposed rule requires school districts to complete a semi-annual monitoring check of driver compliance and record the results. It does not specify any particular forms or require the filing of paperwork with the Department. School districts are responsible for annually providing employees with copies of materials on minimizing idling. However, the content of the materials will be supplied by the Commissioner and is currently estimated to be four pages in length.

In addition, all contracts for pupil transportation services between a school district and a private vendor that are entered into on or after the effective date of the proposed rule shall include a provision requiring such vendor's compliance with the provisions of the rule.

DUPLICATION:

The proposed rule is necessary to implement Education Law section 3637, as added by Chapter 670 of the Laws of 2007, and will not duplicate any other State or Federal statute or regulation. Section 217 (3.2b) of the Regulations of the Commissioner of Environmental Conservation applies a 5 minute maximum time for idling of diesel buses while the bus is not in traffic. There may be local codes that apply a more stringent requirement such as New York City Administrative Code 24-163, which restricts idling of diesel engines to three minutes within New York City. Consistent with the statute, the rule allows idling to the extent necessary for mechanical work, or to maintain an appropriate temperature for passenger comfort, or in emergency evacuations where necessary to operate wheelchair lifts, unless otherwise prohibited by State or local law.

ALTERNATIVES:

Consideration was given to limiting the provisions of the proposed rule to those school districts identified as having a significant number of children with asthma or other similar health conditions. However, as discussed in more detail in the Needs and Benefits section of this Regulatory Impact Statement, exhaust from idling school buses and other vehicles is harmful not only to children with these health conditions, but is harmful to all children, as well as to adults and the environment. Limiting the idling time of a school bus is a win-win situation. It improves the air quality for all the State's citizenry, is environmentally sound, and cost efficient. For these reasons, and consistent with the statute's directive to minimize the idling of school buses and other vehicles, the proposed rule has been drafted to apply to all school districts.

FEDERAL STANDARDS:

The proposed rule relates to State standards for school districts. There are no Federal standards for school districts concerning idling of school buses and vehicles.

COMPLIANCE SCHEDULE:

The proposed rule requires the Commissioner to provide school districts with a copy of Education Law section 3637, information concerning minimizing idling and a copy of this regulation. School districts are annually required to provide those materials to all school bus drivers and other drivers of school vehicles. Districts are then required to monitor compliance with the anti-idling provisions on a semi-annual basis to be determined by each district. We do not anticipate any difficulty for school districts to comply with the proposed rule by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed rule is necessary to implement Chapter 670 of the Laws of 2007 by prescribing requirements for minimizing the idling of school buses and other vehicles. It does not impose any adverse economic impact, reporting, recordkeeping, or other compliance requirements on small businesses. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Government:

EFFECT OF RULE:

The proposed rule applies to all public school districts in the State. It requires all school districts to implement a program to reduce idling of school buses and vehicles on school grounds.

COMPLIANCE REQUIREMENTS:

The proposed rule is necessary to implement the requirements of Chapter 670 of the Laws of 2007, and generally requires that all school districts work to minimize idling of school buses and vehicles on school grounds or adjacent to the school. It requires school districts to annually provide school bus drivers and employees with information concerning the dangers of idling vehicles. The materials for the annual notice to school bus drivers and other drivers for implementation of the program are to be developed and provided by the Department. School districts may provide paper cop-

ies of the materials to all drivers and school employees or they may provide annual notice of the requirements through staff meetings. They may provide notice of the anti-idling program requirements via staff meetings, school handbooks, calendar and web-sites. Districts are responsible for monitoring compliance semi-annually but are not required to submit written reports to the Commissioner. Such reports shall be retained in the school district's files for a period of six years and shall be made available upon request.

PROFESSIONAL SERVICES:

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

COMPLIANCE COSTS:

The proposed rule is necessary to implement the requirements of Chapter 670 of the Laws of 2007 and does not impose any additional costs beyond those intrinsic to the statute. School districts are responsible for annually providing employees with copies or notice of Education Law section 3637, of this regulation and training materials in ways to minimize the idling of vehicles on school grounds. The cost of such activity is expected to be minimal since the content of the materials will be supplied by the Commissioner. Notice to employees may be by handouts, group meetings or postings. The cost of monitoring compliance by drivers semi-annually should be minimal as it can be made part of routine school bus driver performance checks and monitoring of contract provider compliance.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule implements the requirements of Chapter 670 of the Laws of 2007 and does not impose any costs beyond those intrinsic to the statute or impose requirements for which there are technological feasibility barriers. The materials concerning minimizing idling of school buses and vehicles have previously been developed and piloted as part of the State Education Department "Anti-Idling Campaign" for the 2004 - 2005 school year as part of the School Bus Driver Safety Training Program. A copy of those materials will be supplied to all school districts.

MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Education Law section 3637, as added by Chapter 670 of the Laws of 2007. The materials for the annual notice to school bus drivers and other drivers for implementation of the program are to be developed and provided by the Department to school districts. The proposed rule lessens adverse impact upon school districts by permitting school districts to either provide paper copy of the materials to all drivers, or provide annual notice of the requirements through staff meetings, employee handbook or district website. The proposed rule, while requiring compliance monitoring, does not require submission of written compliance reports to the Department, but requires that they be made available upon request. The cost of monitoring compliance by drivers semi-annually should be minimal as it can be made part of routine school bus driver performance checks and monitoring of contract provider compliance.

LOCAL GOVERNMENT PARTICIPATION:

Department staff met with public interest groups, including the American Lung Association of New York State, concerning the importance of reducing harmful emissions for school buses and other vehicles on and around school grounds in order to reduce the hazard to pupils and the general population.

Staff also requested comments and advice from statewide pupil transportation associations such as the New York Association for Pupil Transportation, and the New York School Bus Contractors Association. Copies of draft language have been shared with these groups, as well as, the New York State School Boards Association and the Department's Rural Education Advisory Committee.

The Anti-Idling campaign that was developed and implemented in the 2004-2005 school year was part of the School Bus Driver Safety Training Program. The campaign was developed by a non-profit pupil transportation training agency with suggestions from Master Instructors and School Bus Driver Instructors from across the State.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

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

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

The proposed rule is necessary to implement the requirements of Chapter 670 of the Laws of 2007, and generally requires that all school districts

work to minimize idling of school buses and vehicles on school grounds or adjacent to the school. It requires school districts to annually provide school bus drivers and employees with information concerning the dangers of idling vehicles. The materials for the annual notice to school bus drivers and other drivers for implementation of the program are to be developed and provided by the Department. School districts may provide paper copies of the materials to all drivers or they may provide annual notice of the requirements through staff meetings. They may provide notice of the anti-idling program requirements to student, parent and business delivery agent drivers via student assemblies, school handbook, calendar and web-site. Districts are responsible for monitoring compliance semi-annually but are not required to submit written reports to the Commissioner. Such reports shall be retained in the school district's files for a period of six years and shall be made available upon request.

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

COSTS:

The proposed rule is necessary to implement the requirements of Chapter 670 of the Laws of 2007 and does not impose any additional costs beyond those intrinsic to the statute. School districts are responsible for annually providing employees with copies or notice of Education Law section 3637, of this regulation and training materials in ways to minimize the idling of vehicles on school grounds. The cost of such activity is expected to be minimal since the content of the materials will be supplied by the Commissioner. Notice to employees may be by handouts, group meetings or postings. The cost of monitoring compliance by drivers semi-annually should be minimal as it can be made part of routine school bus driver performance checks and monitoring of contract provider compliance.

MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Education Law section 3637, as added by Chapter 670 of the Laws of 2007. The materials for the annual notice to school bus drivers and other drivers for implementation of the program are to be developed and provided by the Department to school districts. The proposed rule lessens adverse impact upon school districts by permitting school districts to either provide paper copy of the materials to all drivers, or provide annual notice of the requirements through staff meetings, employee handbook or district website. The proposed rule, while requiring compliance monitoring, does not require submission of written compliance reports to the Department, but requires that they be made available upon request. The cost of monitoring compliance by drivers semi-annually should be minimal as it can be made part of routine school bus driver performance checks and monitoring of contract provider compliance.

RURAL AREA PARTICIPATION:

The proposed rule has been provided for review, discussion and comment to the State Education Department's Rural Education Advisory Committee, which includes representatives of school districts in rural areas.

Department staff met with public interest groups, including the American Lung Association of New York State, concerning the importance of reducing harmful emissions for school buses and other vehicles on and around school grounds in order to reduce the hazard to pupils and the general population.

Staff have also requested comments and advice from statewide pupil transportation associations such as the New York Association for Pupil Transportation, and the New York School Bus Contractors Association. Copies of draft language have been shared with these groups, as well as, the New York State School Boards Association.

The Anti-Idling campaign that was developed and implemented in the 2004-2005 school year was part of the School Bus Driver Safety Training Program. The campaign was developed by a non-profit pupil transportation training agency with suggestions from Master Instructors and School Bus Driver Instructors from across the State.

Job Impact Statement

The proposed rule is necessary to implement Chapter 670 of the Laws of 2007 by prescribing requirements for minimizing the idling of school buses and other vehicles. The proposed rule will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Employment of Retired Persons

I.D. No. EDU-29-08-00004-EP

Filing No. 631

Filing date: June 27, 2008

Effective date: June 27, 2008

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

Action taken: Repeal of section 80-5.5 and addition of new section 80-5.5 to Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1), (2), 3003(1) and 3004(1); Retirement and Social Security Law, section 210 (not subdivided), 211(2) and (8)

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

Specific reasons underlying the finding of necessity: The purpose of the proposed amendment is to strengthen the standards for approval by the Commissioner of Education for the employment of retired persons in public school districts, boards of cooperative educational services and county vocational education and extension boards, as prescribed in Section 211 of the Retirement and Social Security Law. In order to address recent concerns over the approval process, on May 22, 2008, the Commissioner of Education suspended the approval process for 60 days to conduct a thorough review of the process and make any necessary improvements, with a particular focus on transparency, effectiveness and legislative intent. The proposed amendment incorporates several actions that the Commissioner believes will improve the approval process.

The recommended action is proposed as an emergency measure because such action is necessary to preserve the general welfare in order to strengthen the current regulatory standards relating to the approval process prescribed under Section 211 of the Retirement and Social Security Law and to ensure that such standards are in place immediately, so that the Commissioner may begin reviewing requests from the districts or boards for the employment of retired persons prior to the new school year.

Subject: Employment of retired persons.

Purpose: To employ retired persons in public schools, boards of cooperative educational services, and county vocational education and extension boards.

Text of emergency/proposed rule: Section 80-5.5 of the Regulations of the Commissioner of Education is repealed and a new section 80-5.5 of the Regulations of the Commissioner of Education is added, effective June 27, 2008 as follows:

§ 80-5.5 *Employment of retired public employees.*

(a) *Definition. As used in this section:*

(1) *"High need school" means a school designated by the commissioner of education as a high need school. Such term shall include, but not be limited to, schools under registration review, low performing schools, and other high need schools, in which there was a shortage of certified teachers in the previous school year and there is a projected shortage in the current school year.*

(2) *"Teacher shortage area" means a subject area designated by the commissioner of education as a having a shortage of certified teachers in the previous school year and a projected shortage in the current school year.*

(3) *"Retired person" means a retired person as defined in section 210 of the Retirement and Social Security Law.*

(b) *Applicability.*

(1) *The approval of the commissioner to the employment of a retired person by any school district (other than the city school district of the city of New York), or by any board of cooperative educational services ("BOCES") or any county vocational education and extension board, in the unclassified service pursuant to section 211 of the Retirement and Social Security Law, shall be obtained in accordance with the requirements prescribed in this section.*

(2) *The approval of the commissioner shall not be given for the employment of a retired person in any school district, BOCES or county vocational education and extension board if the retired person was employed by such district or board within the one-year period immediately preceding his/her date of retirement, except that a teacher in the classroom teaching service, as defined in section 80-1.1, may be approved by the*

commissioner to work in a high need school or a teacher shortage area provided that such employment does not commence for a period of six-months from the date of his/her retirement.

(c) Written request for approval.

(1) The prospective employer shall file with the commissioner a written request for approval, which shall certify to the commissioner the following:

(i) That the retired person is duly qualified and competent.

(ii) That the retired person is physically fit to perform the duties to be assigned.

(iii) That the retired person is properly certified as a teacher where such certification is required.

(iv) Specific reasons why there is a need for the services of the particular retired person.

(v) Specific reasons why the employment of the particular retired person is in the best educational interests of the district, or the board.

(vi) That there are not readily available other persons who are not retired persons qualified to perform the duties to be assigned, in accordance with section 211 of the Retirement and Social Security Law.

(2) The written request shall also include satisfactory documentation to establish either of the following:

(i) That the district or board conducted a thorough and good faith search for a certified and qualified candidate; considered all certified non retired candidates before requesting approval from the commissioner; and advertised for the particular position in a sufficiently broad manner appropriate for that position, based on the geographic location of the district or board and on any prior historical shortages for that position in the district or board; or

(ii) That an emergency existed requiring an immediate interim appointment, precluding the district or board from conducting a thorough recruitment search. In such cases of emergency interim appointments, the district or board shall describe the selection process employed for the interim appointment.

(3) Each written request for the approval of employment of a retired person shall be accompanied by:

(i) a copy of the resolution of the board authorizing such employment, subject to the approval of the Commissioner;

(ii) a recruitment plan, detailing how the prospective employer plans to replace the retired person with a certified and qualified person by the conclusion of the approved temporary employment period. The recruitment plan shall specify the selection criteria, the media outlets the district or board will utilize to recruit a candidate and contingency plans for expanded recruitment if the initial recruitment procedures do not yield sufficient, certified non retired candidates; and

(iii) if a school district is seeking the commissioner's approval of employment of a retired person to the position of superintendent of schools, the district shall certify that the retired person may participate in, but shall not lead the review and selection process for a permanent candidate of such position.

(4) The written request shall be signed by the prospective employer and the retired person and filed with the commissioner prior to employment, but in no event more than 30 days after employment commences.

(e) Duration of Approval.

(1) Approval of the commissioner shall be for a period of up to one school year; and may be renewed once for up to an additional school year, but only in instances of demonstrated extreme hardship or other unexpected and unforeseen circumstances beyond the control of the district or board.

(2) The commissioner may grant the initial approval or the renewed approval for a period of less than one school year.

(3) Upon expiration of any renewal from the commissioner for the employment of a retired person, the district or board shall not apply to the commissioner for additional approval under this section for the same retired person, unless the retired person is employed in a position as a certified teacher in a teacher shortage area or in a high need school, and such employment has been approved pursuant to this section.

(f) Notification to Taxpayers. Upon employment of a retired person under this section, the district, BOCES or county vocational education and extension board shall notify all resident taxpayers that a retired person has received the approval of the commissioner of education for employment in the district pursuant to section 211 of the Retirement and Social Security Law and the district shall notify such taxpayers of the retired person's compensation package and of the retired person's right to receive a pension while employed with the district or board.

This notice is intended to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire September 24, 2008.

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

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Section 101 of the Education Law charges the Department with the general management and supervision of all the educational work of the State and establishes the Regents as the head of the Department.

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

Section 305 (1) of the Education Law authorizes the Commissioner of Education to enforce all laws relating to the educational system of the State and execute all educational policies determined by the Board of Regents.

Section 305 (2) of the Education Law provides that the Commissioner shall have general supervision over all schools and shall advise and guide the school officers of all school districts in relation to their duties and the general management of schools under their control.

Section 3003(1) of the Education Law authorizes the Commissioner of Education to certify school superintendents employed in the public schools of the State.

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

Section 211 (2) of the Retirement and Social Security Law permits a retired person to be employed in the unclassified service of a school district other than the city of New York, a board of cooperative education services or a county vocational education and extension board upon approval of the Commissioner of Education.

Section 211 (8) of the Retirement and Social Security Law authorizes the Commissioner of Education to promulgate regulations governing the employment of retired persons in public school districts, boards of cooperative educational services and county vocational education and extension boards.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the intent of the aforementioned statutes by strengthening the standards for approval by the Commissioner of Education for the employment of retired persons in public school districts, boards of cooperative educational services and county vocational education and extension boards, as prescribed in Section 211 of the Retirement and Social Security Law.

3. NEEDS AND BENEFITS:

The purpose of the proposed amendment is to strengthen the standards for approval by the Commissioner of Education for the employment of retired persons in public school districts, boards of cooperative educational services and county vocational education and extension boards, as prescribed in Section 211 of the Retirement and Social Security Law. In order to address recent concerns over the approval process, on May 22, 2008, the Commissioner of Education suspended the approval process for 60 days to conduct a thorough review of the process and make any necessary improvements, with a particular focus on transparency, effectiveness and legislative intent. The proposed amendment incorporates several actions that the Commissioner believes will improve the approval process.

4. COSTS:

(a) Costs to State Government: The amendment will not impose any additional costs on State government.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

(d) Cost to the regulatory agency: As stated above in Costs to State Government, the proposed amendment does not impose additional costs on the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment requires all school districts, BOCES and county vocational education and extension boards seeking approval by the

Commissioner to employ retired persons in such districts or boards to submit a written request, including satisfactory documentation to establish either of the following: (1) that the district or board conducted a thorough and good faith search for a certified and qualified candidate; considered all non retired candidates before requesting approval from the commissioner; and advertised for the particular position in a sufficiently broad manner appropriate for that position, based on the geographic location of the district or board and on any prior historical shortages for that position in the district or board; or (2) that an emergency existed requiring an immediate interim appointment, precluding the district or board from conducting a thorough recruitment search. In such cases of emergency interim appointments, the district or board shall describe the selection process employed for the interim appointment. Each written request shall be accompanied by: (i) a copy of the resolution of the board authorizing such employment, subject to the approval of the Commissioner; (ii) a recruitment plan, detailing how the prospective employer plans to replace the retired person with a certified and qualified person by the conclusion of the approved temporary employment period; and (iii) if a school district or board is seeking the Commissioner's approval of employment of a retired person to the position of superintendent of schools, the district shall certify that the retired person may participate in, but shall not lead the review and selection process for a permanent candidate of such position.

The proposed amendment also requires that, upon employment of a retired person under this section, a district, BOCES or county vocational education and extension board shall notify all resident taxpayers that a retired person has received the approval of the Commissioner of Education for employment in the district pursuant to section 211 of the Retirement and Social Security Law and the district shall notify such taxpayers of the retired person's compensation package and of the retired person's right to receive a pension while employed with the district or board.

6. PAPERWORK:

The proposed amendment requires all school districts, BOCES and county vocational education and extension boards seeking approval by the Commissioner to employ retired persons in such districts or boards to submit a written request, including satisfactory documentation to establish either of the following: (1) that the district or board conducted a thorough and good faith search for a certified and qualified candidate; considered all non retired candidates before requesting approval from the commissioner; and advertised for the particular position in a sufficiently broad manner appropriate for that position, based on the geographic location of the district or board and on any prior historical shortages for that position in the district or board; or (2) that an emergency existed requiring an immediate interim appointment, precluding the district or board from conducting a thorough recruitment search. In such cases of emergency interim appointments, the district or board shall describe the selection process employed for the interim appointment. Each written request shall be accompanied by: (i) a copy of the resolution of the board authorizing such employment, subject to the approval of the Commissioner; (ii) a recruitment plan, detailing how the prospective employer plans to replace the retired person with a certified and qualified person by the conclusion of the approved temporary employment period; and (iii) if a school district or board is seeking the Commissioner's approval of employment of a retired person to the position of superintendent of schools, the district shall certify that the retired person may participate in, but shall not lead the review and selection process for a permanent candidate of such position.

The proposed amendment also requires that, upon employment of a retired person under this section, a district, BOCES or county vocational education and extension board shall notify all resident taxpayers that a retired person has received the approval of the Commissioner of Education for employment in the district pursuant to section 211 of the Retirement and Social Security Law and the district shall notify such taxpayers of the retired person's compensation package and of the retired person's right to receive a pension while employed with the district or board.

7. DUPLICATION:

There are no other State or Federal requirements on the subject matter of this amendment. Therefore, the amendment does not duplicate other existing State or Federal requirements.

8. ALTERNATIVES:

An earnings limitation on retiree's salaries was considered and was rejected due to the need to attract qualified candidates, particularly in emergency circumstances when an immediate interim appointment may be necessary.

Consideration was also given to the alternative of requiring a district or board to provide the Commissioner with their rationale for not selecting a qualified, non-retired candidate. This alternative was rejected because the

Department believes that such a provision would be duplicative of existing provisions in the regulation, i.e., the requirement that a district or board provide satisfactory evidence that it conducted a thorough and good faith search for a certified and qualified candidate and that the district or board considered all certified non retired candidates before requesting approval from the commissioner.

The Department also considered prohibiting superintendents from participating in the selection process of an interim superintendent. This prohibition was clarified to permit superintendents to participate in the selection process, but prohibit superintendents from leading the review process.

Another alternative considered was to prohibit a retired person from seeking employment in any district/board from which the retired person was employed in the two-year period preceding retirement. This requirement was adjusted to prohibit a retired person from seeking employment in the district/board from which he/she retired from for a year following retirement.

9. FEDERAL STANDARDS:

There are no Federal standards concerning the subject matter of this amendment.

10. COMPLIANCE SCHEDULE:

The proposed amendment must be complied with on its effective date. No additional period of time is necessary to enable regulated parties to comply.

Regulatory Flexibility Analysis

(a) Small Businesses:

The proposed amendment establishes the regulatory standards relating to the process for approval by the Commissioner of Education for the employment of retired persons in school districts, boards of cooperative educational services and county vocational education and extension boards, as required by section 211 of the Retirement and Social Security Law. The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that 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.

(b) Local Governments:

1. EFFECT OF RULE:

The proposed amendment applies to the 698 school districts and seven BOCES located in New York State and establishes the regulatory standards relating to the process for approval by the Commissioner of Education for the employment of retired persons in school districts, boards of cooperative educational services and county vocational education and extension boards, as required by section 211 of the Retirement and Social Security Law.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment requires all school districts, BOCES and county vocational education and extension boards seeking approval by the Commissioner to employ retired persons in such districts or boards to submit a written request, including satisfactory documentation to establish either of the following: (1) that the district or board conducted a thorough and good faith search for a certified and qualified candidate; considered all non retired candidates before requesting approval from the commissioner; and advertised for the particular position in a sufficiently broad manner appropriate for that position, based on the geographic location of the district or board and on any prior historical shortages for that position in the district or board; or (2) that an emergency existed requiring an immediate interim appointment, precluding the district or board from conducting a thorough recruitment search. In such cases of emergency interim appointments, the district or board shall describe the selection process employed for the interim appointment. Each written request shall be accompanied by: (i) a copy of the resolution of the board authorizing such employment, subject to the approval of the Commissioner; (ii) a recruitment plan, detailing how the prospective employer plans to replace the retired person with a certified and qualified person by the conclusion of the approved temporary employment period; and (iii) if a school district or board is seeking the Commissioner's approval of employment of a retired person to the position of superintendent of schools, the district shall certify that the retired person may participate in, but shall not lead the review and selection process for a permanent candidate of such position.

The proposed amendment also requires that, upon employment of a retired person under this section, a district, BOCES or county vocational education and extension board shall notify all resident taxpayers that a retired person has received the approval of the Commissioner of Education

for employment in the district pursuant to section 211 of the Retirement and Social Security Law and the district shall notify such taxpayers of the retired person's compensation package and of the retired person's right to receive a pension while employed with the district or board.

3. PROFESSIONAL SERVICES:

The proposed amendment does not mandate that school districts or BOCES contract for additional professional services to comply.

4. COMPLIANCE COSTS:

The proposed amendment does not impose any additional compliance costs on school districts or BOCES, beyond those imposed by the Retirement and Social Security Law.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional technological requirements. Economic feasibility is addressed under the Compliance Costs section above.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment strengthens current regulatory standards relating to the approval process for the employment of retired persons in school districts, BOCES or county vocational education and extension boards, as prescribed in Retirement and Social Security Law § 211. Because the statutory requirements specifically apply to school districts and BOCES, it is not possible to exempt them from the proposed amendment or impose a lesser standard. The proposed amendment has been carefully drafted to meet statutory requirements while minimizing the impact on school districts and BOCES.

7. LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment were solicited from school districts across the State.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The Department estimates that it receives approximately 400 written requests for approval of employment under Section 211 of the Retirement and Social Security Law per year from school districts, boards of cooperative educational services (BOCES) and county vocational education and extension boards in all areas of New York State, including the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

The proposed amendment requires all school districts, BOCES and county vocational education and extension boards seeking approval by the Commissioner to employ retired persons in such districts or boards to submit a written request, including satisfactory documentation to establish either of the following: (1) that the district or board conducted a thorough and good faith search for a certified and qualified candidate; considered all non retired candidates before requesting approval from the commissioner; and advertised for the particular position in a sufficiently broad manner appropriate for that position, based on the geographic location of the district or board and on any prior historical shortages for that position in the district or board; or (2) that an emergency existed requiring an immediate interim appointment, precluding the district or board from conducting a thorough recruitment search. In such cases of emergency interim appointments, the district or board shall describe the selection process employed for the interim appointment. Each written request shall be accompanied by: (i) a copy of the resolution of the board authorizing such employment, subject to the approval of the Commissioner; (ii) a recruitment plan, detailing how the prospective employer plans to replace the retired person with a certified and qualified person by the conclusion of the approved temporary employment period; and (iii) if a school district is seeking the Commissioner's approval of employment of a retired person to the position of superintendent of schools, the district shall certify that the retired person may participate in, but shall not lead the review and selection process for a permanent candidate of such position.

The proposed amendment also requires that, upon employment of a retired person under this section, a district, BOCES or county vocational education and extension board shall notify all resident taxpayers that a retired person has received the approval of the Commissioner of Education for employment in the district pursuant to section 211 of the Retirement and Social Security Law and the district shall notify such taxpayers of the retired person's compensation package and of the retired person's right to receive a pension while employed with the district or board.

3. COSTS:

The proposed amendment will not impose costs beyond those currently required to comply with statutory and regulatory requirements

for the employment of retired persons in school districts, BOCES and county vocational education and extension boards.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment strengthens the approval process for a school district, BOCES or county vocational educational and extension board seeking approval by the Commissioner for the employment of retired persons in such districts or boards. These requirements are in place to insure that school districts have the best available leadership and to improve the approval process with a particular focus on transparency, effectiveness and legislative intent. Because these statutory requirements specifically apply to school districts and BOCES located in all areas of the State, it is not possible to exempt them from the proposed amendment or impose a lesser standard.

5. RURAL AREA PARTICIPATION:

The proposed rule was submitted for comment to the Department's Rural Education Advisory Committee that includes representatives of school districts in rural areas.

Job Impact Statement

The purpose of the proposed amendment is to strengthen the standards for approval by the Commissioner of Education for the employment of retired persons in public school districts, boards of cooperative educational services and county vocational education and extension boards, as prescribed in Section 211 of the Retirement and Social Security Law. Because it is evident from the nature of the rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

NOTICE OF ADOPTION

Standing Committees of the Board of Regents

I.D. No. EDU-09-08-00009-A

Filing No. 634

Filing date: July 1, 2008

Effective date: July 17, 2008

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

Action taken: Amendment of sections 3.2 and 4-1.5 of Title 8 NYCRR.

Statutory authority: Education Law, section 207 (not subdivided)

Subject: Standing committees of the Board of Regents.

Purpose: To conform the Rules of the Board of Regents to a recent reorganization of the committee structure of the board.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-09-08-00009-P, Issue of February 27, 2008.

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

Revised rule making(s) were previously published in the State Register on May 14, 2008.

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

Educational Requirements relating to Tuition Assistance Program (TAP) Awards

I.D. No. EDU-09-08-00011-A

Filing No. 639

Filing date: July 1, 2008

Effective date: July 17, 2008

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

Action taken: Amendment of sections 145-2.2 and 145-2.9 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 602(1), (2), 661(2), and 665(2), (6)

Subject: Educational requirements relating to Tuition Assistance Program (TAP) awards.

Purpose: To update the academic achievements.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-09-08-00011-P, Issue of February 27, 2008.

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

Reasonable and Necessary Expenses

I.D. No. EDU-14-08-00010-A

Filing No. 638

Filing date: July 1, 2008

Effective date: July 17, 2008

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

Action taken: Addition of section 100.15 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 211-b(2)(a), (b) and 211-c(7); and L. 2007, ch. 57

Subject: Reasonable and necessary expenses.

Purpose: To establish criteria for determining the reasonable and necessary expenses to be paid by school districts.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-14-08-00010-P, Issue of April 2, 2008.

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

State Aid

I.D. No. EDU-14-08-00011-A

Filing No. 643

Filing date: July 1, 2008

Effective date: July 17, 2008

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

Action taken: Repeal of sections 100.1(q) and (r), 100.2(u) and (v), 110.6 and amendment of section 110.3 and Parts 144 and 175 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1), (2), (20) and 3602; and L. 2007, ch. 57

Subject: State aid.

Purpose: To establish criteria for determining the reasonable and necessary expenses to be paid by school districts.

Text or summary was published in the notice of proposed rule making, I.D. No. EDU-14-08-00011-P, Issue of April 2, 2008.

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

EMERGENCY/PROPOSED

RULE MAKING

NO HEARING(S) SCHEDULED

Lobster Maximum Size Limit for Lobster Conservation Management Area 4 and V-Notch Definition for Lobster Harvest

I.D. No. ENV-29-08-00005-EP

Filing No. 632

Filing date: July 1, 2008

Effective date: July 1, 2008

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

Action taken: Amendment of section 44.6(b) and addition of section 44.7 to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301, 13-0105, 13-0329(5)(e) and (16)

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

Specific reasons underlying the finding of necessity: This rule making is necessary to implement a maximum size for Lobster Management Area (LMA) 4 and establish a V-notch definition for lobster harvest. These adjustments are necessary in order for New York to maintain compliance with the Fishery Management Plan (FMP) for American Lobster as adopted by the Atlantic States Marine Fisheries Commission (ASMFC).

Pursuant to section 13-0371 of the ECL, New York State is a party to the Atlantic States Marine Fisheries Compact which established the Atlantic States Marine Fisheries Commission. The Commission facilitates cooperative management of marine, shell and anadromous fish species among the fifteen member states. The principal mechanism for implementation of cooperative management of migratory fish are ASMFC's Interstate Fishery Management Plans for individual species or groups of fish. The Fisheries Management Plans (FMPs) are designed to promote the long-term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

Under the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), ASMFC determines if states have implemented provisions of FMPs pursuant to established deadlines. If ASMFC determines that a state is non-compliant with an FMP, it so notifies the U.S. Secretary of Commerce. If the Secretary concurs in the non-compliance determination, the Secretary promulgates and enforces a complete prohibition on all fishing for the subject species in the waters of the non-compliant state until the state comes into compliance with the FMP.

Environmental Conservation Law sections 13-0329(5)(e) and 13-0329(16), which authorize the Department to adopt regulations for the management of lobster in LMA 4 and modify the V-notch definition for lobster harvest, provides that such regulations must be consistent with the fishery management plans for lobster adopted by ASMFC.

Addendum XI to the Fishery Management Plan (FMP) for American Lobster requires New York to implement an increased minimum size limit of 3 $\frac{3}{8}$ " carapace length (CL), a maximum size of 5 $\frac{1}{4}$ " CL, and a V-notch definition of $\frac{1}{8}$ " with or without setal hairs. LMA 4 is currently at the required minimum size limit.

Failure by New York to adopt these amendments could result in a determination of non-compliance by ASMFC and the Secretary of Commerce and the imposition of a lobster fishery closure - a complete ban on fishing for lobster in New York. The promulgation of this regulation on an emergency basis is necessary in order for the Department to meet the July 1, 2008 deadline and avoid closure of the lobster fishery and the economic hardship that would be associated with such closure. During 2007, New York's 412 resident commercial lobster license holders harvested over 900,000 pounds of lobsters for a value of approximately \$4.6 million. In addition, there were 1,216 non-commercial lobster license holders.

Subject: Lobster maximum size limit for Lobster Conservation Management Area 4 and V-notch definition for lobster harvest.

Purpose: Reduce harvest of lobster consistent with the fishery management plan.

Text of emergency/proposed rule: Title 6 of the Official Compilation of New York Codes, Rules and Regulations, Part 44 entitled "Lobsters and Crabs," is amended to read as follows:

Section 44.10 is renumbered as section 44.11.

Section 44.9 is renumbered as section 44.10.

Section 44.8 is renumbered as section 44.9.

Section 44.7 is renumbered as section 44.8

Existing subdivision 44.6 (b) is amended to read as follows:

(b) No person who is the holder of a New York State Commercial Lobster Permit or a New York State Commercial Lobster Landing license may possess or land, in the New York State waters of LMA 4, any [female] lobster with a carapace which exceeds five and one quarter inches in length.

New section 44.7 is adopted to read as follows:

44.7 V-Notch Definition

A V-notched lobster is defined as any female lobster that bears a notch or indentation in the base of the flipper that is at least as deep as 1/8 inch, with or without setal hairs. V-notched female lobster also means any female which is mutilated in a manner which could hide, obscure, or obliterate such a mark.

This notice is intended to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire September 28, 2008.

Text of rule and any required statements and analyses may be obtained from: Kim McKown, Department of Environmental Conservation, 205 N. Belle Mead Rd., Suite 1, East Setauket, NY 11733-3400, (631) 444-0444, e-mail: kamckown@gw.dec.state.ny.us

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

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

Additional matter required by statute: A Programmatic Impact Statement is on file with the Department of Environmental Conservation.

Regulatory Impact Statement

1. Statutory authority:

Environmental Conservation Law (ECL) sections 3-0301, 13-0105, 13-0329(5)(e), and 13-0329(16) authorize the Department of Environmental Conservation (Department) to establish, by regulation, size limits for Lobster Conservation Management Area 4 and V-notch definition for American Lobster.

2. Legislative objectives:

It is the objective of the above-cited legislation that the Department manage marine fisheries to optimize resource use for commercial and recreational harvesters, consistent with marine fisheries conservation and management policies and interstate Fishery Management Plans (FMPs).

3. Needs and benefits:

This rule making is necessary to implement a maximum size in Lobster Management Area (LMA) 4 and establish a V-notch definition for lobster harvest. These adjustments are necessary in order for New York to maintain compliance with the Fishery Management Plan (FMP) for American Lobster as adopted by the Atlantic States Marine Fisheries Commission (ASMFC).

Pursuant to section 13-0371 of the ECL, New York State is a party to the Atlantic States Marine Fisheries Compact which established the Atlantic States Marine Fisheries Commission. The Commission facilitates cooperative management of marine, shell and anadromous fish species among the fifteen member states. The principal mechanism for implementation of cooperative management of migratory fish are ASMFC's Interstate Fishery Management Plans for individual species or groups of fish. The Fisheries Management Plans (FMPs) are designed to promote the long-term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

Under the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), ASMFC determines if states have implemented provisions of FMPs with which they are required to comply. If ASMFC determines that a state is non-compliant with an FMP, it so notifies the U.S. Secretary of Commerce. If the Secretary concurs in the non-compliance determination, the Secretary promulgates and enforces a complete prohibition on all fishing for the subject species in the waters of the non-compliant state until the state comes into compliance with the FMP.

Environmental Conservation Law sections 13-0329(5)(e) and 13-0329(16), which authorize the Department to adopt regulations for the management of lobster in LMA 4 and modify the V-notch definition for lobster harvest, provides that such regulations must be consistent with the fishery management plans for lobster adopted by ASMFC.

Addendum XI to the Fishery Management Plan (FMP) for American Lobster requires New York to implement an increased minimum size limit of 3 3/8" carapace length (CL), a maximum size of 5 1/4" CL, and a V-notch definition of 1/8" with or without setal hairs. LMA 4 is currently at the required minimum size limit.

Failure by New York to adopt these amendments could result in a determination of non-compliance by ASMFC and the Secretary of Commerce and the imposition of a lobster fishery closure - a complete ban on fishing for lobster in New York. The promulgation of this regulation on an emergency basis is necessary in order for the Department to meet compliance deadlines and avoid closure of the lobster fishery and the economic hardship that would be associated with such closure. During 2007, New York's 412 resident commercial lobster license holders harvested over 900,000 pounds of lobsters for a value of approximately \$4.6 million. In addition, there were 1,216 non-commercial lobster license holders.

4. Costs:

(a) Cost to State government:

There will be no costs to State governments.

(b) Cost to Local government:

There will be no costs to local governments.

(c) Cost to private regulated parties:

There will be costs due to decreased harvest to lobster license holders associated with the implementation of the new V-notch definition and maximum size. Both are necessary measures for management of the depleted Southern New England stock of American lobsters.

5. Local government mandates:

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

6. Paperwork:

None.

7. Duplication:

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

8. Alternatives:

(1) Alternative management measures.

Addendum XI to the Atlantic States Marine Fisheries Commission (ASMFC) American lobster Fishery Management Plan established a comprehensive Southern New England (SNE) Management program. This program is a common biological management strategy, which utilizes suites of management measures applied throughout the SNE stock area to address the rebuilding requirements of the stock. Alternative measures would defeat the comprehensive strategy.

In spite of this, a conservation equivalency V-notch program was approved by the ASMFC Lobster Board for Long Island Sound in lieu of the minimum size limit increase mandated by Addendum XI. Additional alternative management measures would erode the conservation benefits of the comprehensive strategy and were rejected.

(2) No Action.

The "no action" alternative would leave current regulations in place and put New York in a position to exceed the fishing mortality target and over-harvest the resource. This result would be contrary to the objectives of the FMP and subject New York to the potential for a determination of non-compliance and a federally imposed closure of the fishery for lobster in New York. For these reasons, this alternative was rejected.

9. Federal standards:

The amendments to Part 44 are in compliance with the ASMFC fishery management plan for American lobster.

10. Compliance schedule:

The emergency regulations will take effect immediately upon filing with the Department of State. Regulated parties will be notified of the changes to the regulations by mail, through appropriate news releases and via the Department's website.

Regulatory Flexibility Analysis

1. Effect of rule:

These amendments to 6 NYCRR Part 44 implement a maximum size limit for male lobsters in Lobster Conservation Area 4 and establish a more restrictive V-notch definition for lobster harvest. These rules will effect both commercial and non-commercial lobster license holders. These regulations do not apply directly to local governments, and will not have any direct effects on local governments.

Addendum XI to the Fishery Management Plan (FMP) for American lobster requires that New York implement measures to rebuild the Southern New England Lobster stock, which includes New York. These measures include a minimum size limit of 3 3/8" carapace length (CL), a maximum size limit of 5 1/4" CL, and a more restrictive V-notch definition of 1/8"

with or without setal hairs for all New York waters. New York waters contain parts of Lobster Management Areas (LMA) 4 and 6. LMA 4 is at the required minimum size limit, and has the required maximum size limit for female lobsters. The regulatory changes address the maximum size limit for male lobsters in LMA 4 and the V-notch definition. Failure by New York to adopt these amendments by July 1, 2008 could result in a determination of non-compliance by ASMFC and the Secretary of Commerce and the imposition of a lobster fishery closure - a complete ban on fishing for lobster in New York.

In 2007, there were 412 licensed resident commercial lobster fishers in New York, most are self-employed. The maximum size limit for males in LMA 4 will decrease license holders harvest to some degree. The amount cannot be quantified, but it is not expected to be exceptionally large. Less than one percent of the lobsters measured from LMA 4 during 2006 Port sampling were greater than 5/4" CL. The change in V-notch definition will decrease lobster harvest in the short-term, by protecting notched lobsters for an additional year. The delayed harvest will impact fishers in the short-term, but increase the yield in weight in the long-term. The regulatory changes also apply to non-commercial harvesters. There were 1,216 non-commercial lobster license holders in 2007. The diving community has voiced concern about the maximum size limit, since many divers are interested in harvesting "trophy" sized lobsters. In 2006, 26 percent of the reports from non-commercial lobster license holders indicated diving as their gear. The maximum size limit may impact the dive community, in particular dive boats.

In the long-term, the maintenance of sustainable fisheries will have a positive effect on small businesses in the fisheries in question. Any short-term losses in participation, harvest and sales will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. Protection of the lobster resource is essential to the survival of the commercial and non-commercial fisheries. These regulations are designed to protect stocks while allowing appropriate harvest, to prevent over-harvest, and to continue to rebuild or maintain them for future utilization.

2. Compliance requirements:

None.

3. Professional services:

None.

4. Compliance costs:

There are no initial capital costs that will be incurred by a regulated business or industry to comply with the proposed rule.

5. Economic and technological feasibility:

The proposed regulations do not require any expenditures on the part of affected businesses in order to comply with the changes. The changes required by this action have been determined to be economically feasible for the affected parties.

There is no additional technology required for small businesses, and this action does not apply to local governments. Therefore, there are no economic or technological impacts for any such bodies.

6. Minimizing adverse impact:

The promulgation of this regulation is necessary in order for the Department to maintain compliance with the FMP for lobster. The regulations are intended to protect the lobster resource and avoid the adverse impacts that would be associated with closure of the fishery for non-compliance with the FMP.

Ultimately, the maintenance of long-term sustainable fisheries will have a positive effect on employment for the fisheries in question, as well as wholesale and retail outlets and other support industries. Failure to comply with an FMP and take required actions to protect a marine fishery could cause the collapse of the stock and have a severe adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries. These regulations are being adopted in order to provide the appropriate level of protection and allow for harvest consistent with the capacity of the resource to sustain such effort.

7. Small business and local government participation:

The Atlantic States Marine Fisheries Commission had public hearings on Addendum XI where all resident commercial lobster license holders were invited. In addition, the Area 6 Lobster Conservation Management Team had several meetings on implementation of this Addendum.

Local governments were not contacted because the rule does not affect them.

Rural Area Flexibility Analysis

The Department of Environmental Conservation has determined that this rule will not impose an adverse impact on rural areas. The lobster fishery directly affected by the emergency rule is entirely located within

the marine and coastal district, and is not located adjacent to any rural areas of the state. There are no rural areas within the marine and coastal district. Further, the emergency rule does not impose any reporting, record-keeping, or other compliance requirements on public or private entities in rural areas.

Since no rural areas will be affected by the emergency amendments of Part 44, the Department has determined that a Rural Area Flexibility Analysis is not required.

Job Impact Statement

These amendments to 6 NYCRR Part 44 reduce the harvest of lobsters through implementation of a maximum size for lobsters in Lobster Management Area (LMA) 4 and by establishing a more restrictive V-notch definition. These adjustments are necessary in order for New York to maintain compliance with the Fishery Management Plan (FMP) for American Lobster as adopted by the Atlantic States Marine Fisheries Commission (ASMFC).

Addendum XI to the Fishery Management Plan (FMP) for American Lobster requires New York to implement an increased minimum size limit of 3 3/8" carapace length (CL), a maximum size of 5 1/4" CL, and a V-notch definition of 1/8" with or without setal hairs. LMA 4 is currently at the required minimum size, and has the required maximum size for female lobsters.

This rule making affects both commercial and non-commercial harvest of lobsters in New York waters. In 2007, there were 412 licensed resident commercial lobster fishers in New York, most are self-employed. The maximum size limit for male lobsters in LMA 4 will decrease license holders harvest to some degree. The amount can not be quantified, but it is not expected to be exceptionally large. Less than one percent of the lobsters measured from LMA 4 during 2006 Port sampling were greater than 5/4" CL. The change in V-notch definition will decrease lobster harvest in the short-term, by protecting notched lobsters for an additional year. The delayed harvest will impact fishers in the short-term, but increase the yield in the long-term. The regulatory changes also apply to non-commercial harvesters. There were 1,216 non-commercial lobster licence holders in 2007. The diving community has voiced concern about the maximum size limit, since many divers are interested in harvesting trophy sized lobsters. In 2006, 26 percent of the reports from non-commercial lobster license holders indicated diving as their gear. The maximum size limit may impact the dive community, in particular dive boats.

This rule making will avoid the potential for closure of the lobster fishery in New York. If the fishery were to close, a significantly higher number of jobs could be affected. Thus, the restrictions are in fact an effort to minimize the potential for job loss due to a closure of the fishery. In the long-term, the maintenance of sustainable fisheries will have a positive effect on lobster fishers. Any short-term losses in participation, harvest and sales will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. Protection of the lobster resource is essential to the survival of the lobster fishers and the businesses that support in these fisheries.

Based on the above and Department staff's knowledge and past experience with similar regulations, the Department has concluded that there will not be any substantial adverse impacts on jobs or employment opportunities as a consequence of this rule-making. Therefore, a job impact statement is not required.

Department of Health

EMERGENCY RULE MAKING

DRGs, SIWs, Trimpoints and the Mean LOS

I.D. No. HLT-29-08-00014-E

Filing No. 635

Filing date: July 1, 2008

Effective date: July 1, 2008

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

Action taken: Amendment of sections 86-1.55, 86-1.62 and 86-1.63 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2803(2), 2807(3), 2807-c(3) and (4)

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

Specific reasons underlying the finding of necessity: 86-1.55 Development of Outlier Rates of Payment

The Department of Health and Human Services (HHS), Office of Inspector General, has issued to the New York State Department of Health a final audit report (A-02-04-01022, June 2006) on the State's hospital outlier payment methodology. This report addressed vulnerabilities in the methodology that may result in excessive payments to certain hospitals. HHS noted that NYS does not use the most accurate cost-to-charge data in determining the outlier payments, and that if it had done so there could be savings for the Medicaid program. After reviewing the report and HHS's recommendations, the Department of Health concurs with the findings and has agreed to update the outlier payment methodology to reflect a calculation based on cost-to-charge data from the year of the patient discharge. However, revised regulations need to be adopted in order to implement the HHS recommendations because current regulation does not provide for the use of updated data.

86-1.62 Service Intensity Weights and Group Average Arithmetic Lengths of Stay

86-1.63 Non-Medicare Trim Points

The Department finds that the immediate adoption of this amendment is necessary to make current regulations consistent with changes made to the diagnosis related group (DRG) classification system used by the Medicare prospective payment system (PPS). This is required by Section 2807-c(3) of the Public Health Law, which states, "The Commissioner shall establish as a basis for case classification for case based rates of http://dosnet/payment the same system of diagnosis-related groups for classification of hospital discharges as established for purposes of reimbursement of inpatient hospital service pursuant to Title XVIII of the Federal Social Security Act (Medicare) in effect on the first day of July in the year preceding the rate period." Additionally, such amendments modify existing DRGs and add new DRGs to reflect medically appropriate patterns of health resource use. The current service intensity weights (SIWs) and trimpoints are also updated to be consistent with the proposed DRG modifications.

In addition, the SIWs and group average inlier length of stays (LOS) were updated to reflect 2004 costs and statistics reported to the Department for a representative sample of hospitals. The current SIWs and LOS are based on twelve year old data and need to be updated for hospital payment to reflect prevailing patterns of health use and services. This update ensures a reflection of more current clinical practices, advances in technology, changes in patient resource consumption, and changes in hospital length of stay patterns.

The SIWs and non-Medicare trimpoints are an integral part of the hospital Medicaid and like payor inpatient rates. The amendments provide payors of inpatient hospital services with the new values used to determine the correct case based payment for each DRG for each hospital so hospital claims can be submitted and paid in a timely manner. Additionally, the Legislature sought to have the DRGs used in the hospital reimbursement methodology be consistent with those used in Medicare reimbursement and reflect medically appropriate, efficient and economic patterns of health use and services. Such requirements warrant adoption of these amendments as soon as practicable.

Subject: DRGs, SIWs, Trimpoints and the Mean LOS.

Purpose: To update the calculation of outlier payments based on HHS audit findings and recommendations.

Substance of emergency rule: 86-1.55 - Development of Outlier Rates of Payment

The proposed amendment of section 86-1.55 of Title 10 (Health) NYCRR is intended to update the calculation of cost outlier payments to reflect a cost to charge ratio which is based on data for the year in which the discharge occurred. Currently the payments are calculated based on the most recent information available, generally two year old cost to charge data.

This amendment is the result of a final audit report by the Department of Health and Human Services on Medicaid hospital outlier payments.

86-1.62 - Service Intensity Weights and Group Average Arithmetic Inlier Lengths of Stay

The proposed amendments of section 86-1.62 of Title 10 (Health) NYCRR are intended to change the diagnosis related group (DRG) classification system for inpatient hospital services and the corresponding ser-

vice intensity weight (SIWs) and group average arithmetic inlier length of stay (LOS) for each DRG.

The DRG classification system used in the hospital case payment system is updated to incorporate those changes made by Medicare for use in the prospective payment system, and additional changes to identify medically appropriate patterns of health resource use for services that are efficiently and economically provided. The SIWs were revised accordingly to reflect the costs of the redistributed cases.

In addition, the SIWs and group average inlier length of stays were updated to reflect 2004 costs and statistics reported to the Department for a representative sample of hospitals. This update ensures a reflection of more current clinical practices, advances in technology, changes in patient resource consumption, and changes in hospital length of stay patterns. The revised service intensity weights based on 2004 data are being phased-in over a three year period. The weights effective for the period January 1, 2008 through December 31, 2008 will be based on 75% of the service intensity weights in effect as of December 31, 2007 that are based on 1992 data, and 25% of the service intensity weights based on 2004 data. The service intensity weights effective for the period January 1, 2009 through December 31, 2009, will be based on 33% of the service intensity weights in effect as of December 31, 2007 that are based on 1992 data, and 67% of the service intensity weights based on 2004 data. Effective January 1, 2010 and thereafter, the service intensity weights will be based on 2004 data. Effective July 1, 2008, the service intensity weights and group average arithmetic lengths of stay are being revised to incorporate several methodological changes.

86-1.63 - Non-Medicare Trimpoints

The proposed amendments of section 86-1.63 of Title 10 (Health) NYCRR are intended to change the non-Medicare trimpoints used to determine the outlier days in the hospital case based payment system to be based on 2004 data. In addition, the trimpoints are being revised effective July 1, 2008 to reflect the methodological changes referenced above.

General Summary for 86-1.62 and 1.63

The changes in the DRG classification system and service intensity weights described above (Section 86-1.62 of Title 10 (Health) NYCRR) cause a modification of the non-Medicare trimpoints to reflect the redistribution of cases from the existing DRGs to the new DRGs. These new trimpoint values are provided in Section 86-1.63.

The changes to the DRG classification system will enable providers to place patients in the most appropriate DRG and, therefore, they will receive adequate reimbursement for services provided. In the aggregate, these changes will have a budget-neutral impact on the reimbursement system.

The Department is statutorily required to update the grouper to be consistent with changes made to the DRG classification system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to more accurately reflect patterns of health resource use.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 28, 2008.

Text of emergency rule and any required statements and analyses may be obtained from: Katherine E. Ceroalo, Department of Health, Office of Regulatory Affairs, Corning Tower, Rm. 2438, Empire State Plaza, Albany, NY 12237-0097, (518) 473-7488, fax: (518) 473-2019, e-mail: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

The authority for the subject regulations is contained in sections 2803(2), and 2807(3) and 2807(4) of the Public Health Law (PHL), which require the State Hospital Review and Planning Council (SHRPC), subject to the approval of the Commissioner, to adopt and amend rules and regulations for hospital reimbursement rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities. PHL section 2807-c (3) authorizes the SHRPC to adopt rules subject to the Commissioner's approval, to adjust the diagnosis related groups (DRGs) or establish additional DRGs to reflect subsequent revisions applicable to reimbursement for discharges of Medicare beneficiaries or to identify medically appropriate patterns of health resource use efficiently and economically provided and to subsequently amend the service intensity weights (SIWs) and trimpoints for each DRG. Sections 34, 34-a and 34-b, of Part C of Chapter 58 of the Laws of 2007 authorizes the SHRPC and the Commissioner to update the cost and statistical base used to determine the SIWs and trimpoints to calendar year 2004 data and to provide for a phase-in of the new weights. PHL section 2807-c (4)

authorizes the SHRPC to adopt rules, subject to the Commissioner's approval, for exceptions to case based payments for cost outliers.

Legislative Objectives:

The Legislature sought to have the DRGs used in the hospital reimbursement methodology be consistent with those used in Medicare reimbursement and reflect medically appropriate, efficient and economic patterns of health resource use and services.

Needs and Benefits:

The proposed amendment to section 86-1.55 of Title 10 (Health) NYCRR is intended to revise the methodology for calculating hospital cost outlier payments. The proposed methodology is based on more current and appropriate cost to charge ratios for determining the outlier expense, which is consistent with the method used in Medicare reimbursement. The proposal will provide for an update to the ratio from the initial payments based on two year old data, to data from the year in which the discharge occurred. This will cause the outlier payments to more accurately reflect reasonable costs incurred by each hospital, and address the problem of excessive over payments.

The proposed amendments to sections 86-1.62 and 86-1.63 of Title 10 (Health) NYCRR are intended to make current regulations consistent with changes made to the diagnosis related group (DRG) classification system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to reflect medically appropriate patterns of health resource use. The current service intensity weights (SIWs) and trimpoints are also updated to be consistent with the proposed DRG modifications. Additionally, the SIWs and trimpoints are updated from the current 1992 cost and statistic base to 2004 data reported to the Department and being phased-in over a three year period.

The SIWs and non-Medicare trimpoints are an integral part of the hospital Medicaid and like payor inpatient rates. The Department makes changes to the grouper used to assign inpatient cases to the appropriate DRG. As part of this process, the Department may make modifications, revisions and create new DRGs that reflect the current resources consumed by inpatients. After the grouper is modified, the SIWs and trimpoints must be recalculated consistent with the newly created and updated list of DRGs, and to incorporate the 2004 cost and statistical basis, thus creating new values for the SIWs and trimpoints in sections 86-1.62 and 86-1.63. Lastly, the amendments provide payors of inpatient hospital services with the new values used to determine the correct case base payment for each DRG so hospital claims can be submitted and paid in a timely manner.

COSTS:

Costs to State Government:

The proposed amendment to 86-1.55, development of outlier payments, is estimated to produce savings to the State.

The amendments to 86-1.62 and 86-1.63 revising the DRGs, SIWs and trimpoints has been legislated as budget neutral; therefore there is no additional costs to the State as a result of these regulation changes.

Costs of Local Government:

No increase or decrease in costs to local governments is anticipated as a result of these amendments.

Costs to Private Regulated Parties:

In the aggregate, there will be no increases or decreases in hospital revenues as a result of these amendments. Changes to the DRG classification system will cause a realignment of cases among the DRGs. Those cases that require more intensive provision of care will realize an increase in the SIW (and reimbursement) for that DRG. The removal of such cases from the DRG to which they were previously assigned will decrease the SIW (and reimbursement) for that DRG. Therefore, revenues will shift among individual hospitals depending upon the diagnosis of and procedures performed on the patients they treat. The extent of the shift in revenues cannot be determined because it will depend upon future patient services.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of these amendments.

Local Government Mandates:

This regulation affects the costs to counties and New York City for services provided to Medicaid beneficiaries as described above. It imposes no program, service, duty or other responsibility upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

There is no additional paperwork required of providers as a result of these amendments.

Duplication:

These regulations do not duplicate existing State and Federal regulations.

Alternatives:

The change to the outlier payment methodology is based on an audit by the Department of Health and Human Services. The Department concurs with the findings of the audit and HHS's recommended methodology change.

Based upon suggestions/recommendations received from hospital industry representatives, the Department has included adjustments that provide more appropriate recognition of the costs related to current clinical practices, new medical technologies, changes in patient resource consumption, and changes in hospital length of stay patterns. Two alternatives were considered for the means of adjusting the revised SIWs to ensure budget neutrality. The first alternative was to apply a neutrality adjustment in the calculation of the SIWs. However, since the SIWs are formulated on non-Medicare costs and the budget neutrality provision in statute applies to Medicaid expenditures, this approach was rejected. Instead, budget neutrality for Medicaid expenditures will be achieved by applying an adjustment to the Medicaid hospital inpatient rates.

Federal Standards:

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

Compliance Schedule:

The proposed rule establishes rates of payment as of July 1, 2008; there is no period of time necessary for regulated parties to achieve compliance.

Contact Person: Katherine E. Ceroalo, Department of Health, Office of Regulatory Affairs, Corning Tower, Rm. 2438, Empire State Plaza, Albany, NY 12227-0097, (518) 473-7488, fax: (518) 473-2019, e-mail: regsqna@health.state.ny.us

Comments submitted to Department personnel other than this contact person may not be included in any assessment of public comment issued for this regulation.

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the Institutional Cost Report, seven hospitals were identified as employing fewer than 100 employees.

Compliance Requirements:

No new reporting, record keeping or other compliance requirements are being imposed as a result of these rules.

Professional Services:

No new or additional professional services are required in order to comply with the proposed amendments.

Economic and Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are intended to make current regulations consistent with changes made to the outlier payments; the DRG classification system used by the Medicare prospective payment system (PPS), and add new DRGs to reflect medically appropriate patterns of health resource use. The current SIWs and trimpoints are also updated to be consistent with the proposed DRG modifications, and the new cost and statistical base.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. As a result of the amendment to 86-1.55, there may be a decrease to specific hospitals' revenues. In the aggregate, as a result of the amendments to 86-1.62 and 86-1.63 there will be no anticipated increases or decreases in hospitals' Medicaid revenues. However, revenues will shift among individual hospitals depending upon the diagnoses of and procedures performed on the patients they treat and the extent to which they would be classified into the modified diagnosis related groups.

Minimizing Adverse Impact:

The proposed amendments will be applied to all general hospitals. The Department of Health considered approaches specified in section 202-b (1) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given the reimbursement system mandated in statute.

Small Business and Local Government Participation:

Local governments and small businesses were given notice of these proposals by its inclusion in the agenda of the Fiscal Policy Committee of the State Hospital Review and Planning Council for its May 22, 2008 meeting. That agenda is mailed to general hospitals qualifying as small

businesses, providers, members of the Fiscal Policy Committee, the New York State Legislature and representatives of the hospital associations, among others. The associations are member organizations that represent the interests and concerns of hospitals across New York State, including small businesses and local governments. This outreach resulted in the Department of Health receiving comments and suggestions related to additional changes that industry representatives recommended be implemented. Based on this feedback, the Department did make additional changes to the service intensity weights to incorporate several of these comments and suggestions.

Rural Area Flexibility Analysis

Effect on Rural Areas:

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

No new reporting, record keeping, or other compliance requirements are being imposed as a result of this proposal.

Professional Services:

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. As a result of the amendment to 86-1.55, there may be a decrease to specific hospitals' revenues. In the aggregate, as a result of the amendments to 86-1.62 and 86-1.63 there will be no increases or decreases in hospitals' revenues. Revenues will shift among individual hospitals depending upon the diagnoses of and approved procedures performed on the patients they treat.

Minimizing Adverse Impact:

The proposed amendments will be applied to all general hospitals. The Department of Health considered the approaches specified in section 202-bb (2) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given the reimbursement system mandated in statute.

Opportunity for Rural Area Participation:

Rural areas were given notice of this proposal by its inclusion in the agenda of the Fiscal Policy Committee of the State Hospital Review and Planning Council for its May 22, 2008 meeting. That agenda is mailed to members of the Fiscal Policy Committee, the New York State Legislature and representatives of the hospital associations, among others. The associations are member organizations, which represent the needs and concerns of providers across New York State, including rural areas. The amendment was described at meetings of the Fiscal Policy Committee prior to the filing of the notice of proposed rulemaking.

This outreach resulted in the Department of Health receiving comments and suggestions related to additional changes that industry representatives recommended be implemented. Based on this feedback, the Department did make additional changes to the service intensity weights to incorporate several of these comments and suggestions.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rules, that they will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations revise the calculation of cost outlier payments and update the diagnosis related group (DRG) classification system for inpatient hospital services as well as the corresponding service intensity weights and length of stay standards. The cost outlier payments are exceptions to the case payment rates for high cost or long stay cases and have been in effect since 1988 in New York State. The DRG classification system, which also has been in effect since 1988, is utilized to reimburse hospitals for inpatient services rendered to Medicaid beneficiaries. The proposed regulations have no implications for job opportunities.

Department of Labor

EMERGENCY RULE MAKING

Provision of Safety Rope and System Components for Firefighters at Risk of being Trapped at Elevations

I.D. No. LAB-29-08-00013-E

Filing No. 633

Filing date: June 30, 2008

Effective date: June 30, 2008

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

Action taken: Addition of section 800.7 to Title 12 NYCRR.

Statutory authority: Labor Law, art. 2, sections 27 and 27a; art. 7, section 200

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

Specific reasons underlying the finding of necessity: To give fire departments sufficient time to conduct risk assessments regarding the type of safety ropes and rescue systems needed, to purchase needed equipment, and to train firefighters in their use before effective date of the statutory requirement.

Subject: Provision of safety rope and system components for firefighters at risk of being trapped at elevations.

Purpose: To insure that firefighters are provided with appropriate ropes and system components for self-rescue and emergency escape.

Text of emergency rule: 800.7 *Emergency Escape and Self Rescue Ropes and System Components for Firefighters*

(a) *Title and Citation:* Within and for the purposes of the Department of Labor, this part may be known as Code Rule 800.7, *Emergency Escape and Self Rescue Ropes and System Components for Firefighters, specifying the requirements for safety ropes and associated system components.*

(b) *Purpose and Intent:* This rule is intended to ensure that firefighters are provided with necessary escape rope and system components for self rescue and emergency escape and to establish specifications for such ropes and system components.

(c) *Application:* This part shall apply throughout the State of New York to the State, any political subdivision of the State, Public Authorities, Public Benefit Corporations or any other governmental agency or instrumentality thereof employing firefighters within the meaning of § 27-a of the Labor Law.

This Part shall not apply to such employers located in a city with a population of over one million.

(d) **DEFINITIONS.** Within this part, the following terms shall have the meanings indicated:

(1) "System Components" means safety harnesses, belts, ascending devices, carabiners, descent control devices, rope grab devices, and snap links.

(2) "Escape Rope" means a single purpose, single use, emergency escape (Self-rescue) rope.

(3) "Interior Structural Fire Fighting" means the physical activity of fire suppression, rescue or both, inside of buildings or enclosed structures which are involved in a fire situation beyond the incipient stage.

(4) "Interior Structural Fire Fighter" means a firefighter who is designated by their employer to perform interior structural firefighting duties in an immediately dangerous to life and health (IDLH) atmosphere and is medically qualified to use self-contained breathing apparatus (SCBA) as defined in 29 CFR 1910.134.

(5) "Entrapment at Elevations" means a situation where a firefighter finds the normal route of exit is made unusable by fire, or other emergency situation, that requires the firefighter to immediately exit the structure from an opening not designed as an exit, that is above the ground floor and at an elevation above the surrounding terrain which would reasonably be expected to cause injury should the firefighter be required to exit.

(e) Specifications for Escape Ropes and System Components

Escape ropes and system components provided to firefighters shall conform to the requirements of "The National Fire Protection Association Standard 1983, Standard on Fire Service Life Safety Rope and Equipment for Emergency Services" in effect at the time of their manufacture. Escape ropes and system components purchased after the effective date of this Part shall conform to the 2006 edition (NFPA1983- 2006) of such standard.

(f) Risk Assessment and Equipment Selection

(1) Each employer who employs firefighters shall develop a written risk assessment to be used to determine under what circumstances escape ropes and system components will be required and what type will be required to protect the safety of firefighters in its employ. In performing the assessment, the employer shall:

(i) Identify the types and heights of buildings and other structures in the area the firefighters are expected to work. Such area shall include the regular scope of the fire district or other area covered by the fire department in question as well as any other districts or communities to which the fire department provides mutual aid with a reasonably predictable frequency.

(ii) Assess the standard operating procedures followed by the department with regard to rescue of firefighters from elevations.

(iii) Identify the risks to firefighters of being trapped at an elevation during structural fire fighting operations given the types of buildings or other structures located in the area(s) in which firefighters are expected to work. Identification of the risk in question shall include an assessment of:

(a) the extent to which standard operating procedures already in place will mitigate the risks identified;

(b) the type of escape ropes and system components that will be necessary to protect the safety of firefighters if operating procedures do not sufficiently mitigate the risk.

(2) Should the risk assessment establish that firefighters employed by the department performing interior structural firefighting are reasonably expected to be exposed to the risk of entrapment at elevations, the employer shall provide to each interior structural firefighter in its employ a properly fitted escape rope and those system components which meet the specifications for such rope and system components set forth in Part 800.7(e) and which would mitigate the danger to life and health associated with such risk.

(g) Training

(1) The employer shall ensure that each firefighter who is provided with an escape rope and system components is instructed in their proper use by a competent instructor. Instruction shall include the requirements of paragraph (h) of this Part and the user information provided by the manufacturer as required by NFPA 1983 Chapter 5.2 for each rope and system component.

(2) Instruction shall include hands-on use of the equipment in a controlled environment.

(3) A record of such instruction including the name of the individual being trained, the name of the individual delivering the training, and the date on which the training was provided shall be maintained by the employer until such time as the firefighter is no longer employed by the employer or the employer delivers a subsequent training on this topic, whichever comes first.

(h) Employer Duties. In addition to the duties set forth in Parts 800.7(f) and (g), employers covered by this Part shall have the following duties:

(1) To ensure the adequacy of the safety ropes and system components, the employer shall routinely inspect and ensure that:

(i) Existing safety ropes and system components meet the codes, standards, and recommended practices adopted by the Commissioner;

(ii) Existing safety ropes and system components still perform their function by taking precautions to identify any of their limitations through reasonable means, including, but not limited to:

(a) Checking the labels or stamps on the equipment; and

(b) Checking any documentation or equipment specifications; and

(c) contacting the supplier or approval agency.

(iii) Firefighters are informed of the limitations of any safety rope or system components;

(iv) Firefighters are not allowed or required to use any safety rope or system components beyond their limitations;

(v) Existing or new safety ropes and system components have no visible defects that limit their safe use;

(vi) Safety ropes and system components are used, cleaned and maintained according to the manufacturer's instructions;

(vii) Firefighters are instructed in identifying to the employer any defects the firefighter may find in safety ropes and system components; and

(viii) Any identified defects are corrected or immediate action is taken to eliminate the use of the equipment by:

(a) Ensuring that escape rope and system components with defects which are repairable are tagged as unsafe and stored in such a manner that they cannot be used until repairs are made;

(b) Ensuring that escape rope and system components that cannot be repaired are immediately destroyed or rendered unusable as an escape rope and system components; and

(c) Ensuring that any escape rope that has been utilized under load for the purpose of self rescue / emergency escape is immediately removed from service, destroyed, or rendered unusable as an escape rope and immediately replaced.

(2) The employer's routine inspection cycle required by this paragraph shall be based upon the volume of activity the Department undertakes but, in no case, any less frequently than once each month.

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire September 27, 2008.

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

Regulatory Impact Statement

Statutory Authority: The legislature placed the amendment in Article 2, Section 27a of the Labor Law, Public Employee Safety and Health Act. Section 4 of the Act directs the Commissioner to promulgate rules to provide for the enforcement of the amendment and require that the latest edition of the National Fire Protection Association's standard on Life Safety Ropes and System Components be adopted.

The Commissioner has broad authority to promulgate rules and regulations under New York State Labor Law Article 2, Section 27a; Article 2, Section 27; Article 7, Section 200.

Legislative Objective: The intent of the Legislature was to insure that firefighters are provided with the appropriate ropes and system components to allow self-rescue from upper stories of buildings should they become trapped. The Legislature also specified the national consensus standard to which life safety ropes and system components must conform as well as the testing criteria that must be followed by the manufacturer.

Needs and Benefits: Firefighters occasionally become trapped on upper stories during fire suppression activities. Many times the firefighter is rescued by ladders or aerial apparatus; however, there are cases where the trapped fire fighter cannot be reached or the rapid development of the emergency situation does not allow for rescue by other means and those cases could result in death or serious injury. One such case involved 6 trapped firefighters who were forced to jump from a fourth story. Four were seriously injured and two died of their injuries. Some of these injuries and deaths were attributable, in part, to either the lack of rescue ropes or the failure of the rope involved.

Costs: The ropes and system components needed to equip a firefighter for self rescue can be obtained for as little as \$60.00. New York City has provided each of its firefighters with a system that costs more than \$400.00. The proposed rule contains no minimum cost threshold. This allows the employer to take appropriate steps to reduce the cost of providing the equipment required by the rule, so long as the employer provides equipment appropriate for the risks identified in its risk assessment. Moreover, the equipment need only be provided to interior structural firefighters who work in areas where they could become trapped. Employers need not purchase or provide ropes and rescue devices to apparatus drivers and fire

policemen or other employees not expected to perform interior structural firefighting.

Additional costs would be incurred for training in instructing employees in the use of the selected equipment and self rescue techniques. These costs will vary but as an example of the potential costs associated with the rule, one manufacturer sells a system which costs \$400.00 while the training in the system use is \$250.00 per person. On the other hand, the manufacturer will offer train the trainer instruction to a Fire Department Trainer for a one time cost; this instruction will then permit the Department to train its affected employees at a much lower cost than it would incur if it purchased the manufacturer's training for each of its members. Also, as mentioned elsewhere in this rulemaking, fire departments may also consider other methods to reduce training costs such as using in-house trainers and consolidating training classes with fellow departments to maximize training resources.

Paperwork: The paperwork requirements contained in the proposed rule are minimal. The employer must certify that the hazard assessment has been completed and must maintain that document. The employer must also keep training record identifying all employees trained under the rule. Since other standards and laws already require that training records be maintained, this provision will have minimal impact on the employer.

Local Government Mandates: Fire protection is a function of local government and as such the monetary burden of providing this equipment will be borne by the local government responsible for fire protection. The legislature did not provide funding for mandate relief.

Duplication: This rule does not duplicate any state or federal regulations.

Alternatives: The legislation requiring promulgation of the rule provided little room for any alternative to be considered. The amendment specifically requires equipment that meets a defined national consensus standard for specific purposes. The alternatives provided by the Department involve the judgment of the Department with regard to the risks faced by its employees performing interior structural firefighting and the ropes and equipment needed to mitigate that risk. The agency determined that the employer would be best suited to survey the hazards in the local protection area and select the equipment based upon the hazards firefighters would be exposed to, as opposed to imposing its own stringent requirements specifying the type of equipment needed.

Federal Standards: There are no federal standards with like requirements.

Compliance Schedule: The provisions of the amendment are effective on May 18, 2008, and employers will be required to be in compliance by November 1, 2008. The effective date of the rule will be upon adoption. The compliance aspects are not difficult and under normal inspection protocols an employer would be given 30 days to comply.

Regulatory Flexibility Analysis

Effect of the Rule: There is no requirement for small businesses; the rule will apply to all governmental agencies that employ a firefighter. The rule does not apply to New York City. Virtually all local government will be affected by this rule. Impacts should be low with compliance costs at less than \$100.00 per firefighter in most areas of the state. In many smaller municipalities, minimal costs would accrue depending on the nature of the structures in the area protected.

Local Governments with hazards requiring the provision of protective equipment and training for firefighters may collaborate on the training and use quantity buying practices to reduce costs. Training requirements could also be met by utilizing free training provided by the Department of State, Office of Fire Prevention and Control. However, that agency does not have the resources to train every firefighter affected by this rule.

Compliance Requirements: The Law requires that each employer that employs firefighters must provide emergency escape rope and system components appropriate for the risk to which firefighters in their employ are exposed. To accomplish this the employer must conduct an assessment of the types of structures in the fire protection area, determine what the hazard to employees would be and then provide the appropriate harnesses, ropes and equipment so that employees may self rescue should they become trapped at an elevation expected to cause injury should the individual be required to jump. The law also requires that the employer is required to provide training in the use of the provided equipment and inspect and assure the safety of the equipment. The authorizing legislation was also specific as to the design and testing of the provided equipment citing a national consensus standard, The National Fire Protection Association Standard 1983, "Life Safety Rope and Equipment for Emergency Responders". The law requires the commissioner to adopt the latest edition which is the 2006 edition.

NFPA 1983-2006 established the design, construction and testing requirements for emergency escape and life safety ropes and system components and all such equipment must bear a label attesting to its conformance.

To meet the compliance requirements the employer must:

1. Conduct a hazard assessment to establish the risk.
2. Select the appropriate ropes and system components.
3. Provide properly fitted ropes and system components (many belts and harnesses are sized) to each Firefighter at risk.
4. Train each firefighter in the use of the selected rope and system components.
5. Inspect the ropes and system components periodically to assure they are safe for use.

Professional Services: Training on the required subject matter is provided free of charge by the Office of Fire Prevention and Control. OFPC classes are limited and would not meet the needs of all employers. There are also many experts in the field who provide rope training and smaller employers could collaborate and share the expense of training.

Under provisions of the executive law, career departments must have a Municipal Training Officer who would be capable of providing the training.

Compliance Costs: Purchase of the ropes and system components would be relatively inexpensive in suburban fire protection areas. As the height and complexity of structures increase the equipment will become more expensive and the required training more comprehensive.

Many suppliers can provide ropes and attachment devices at a price range from \$ 20.00 to \$50.00. Harnesses or escape belts can run from \$50.00 to \$100.00. On the high end of the cost spectrum, the system developed and used by FDNY costs approximately \$400.00 per firefighter and the Manufacturer (Petzil) requires that the employer participate in their training program at \$250.00 per person. They will provide train the trainer services.

Economic and Technological Feasibility: The emergency regulation does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

Minimizing Adverse Impact: The emergency regulation is necessary to implement Labor Law, Section 27-a(4)(c), as enacted by chapter 433 of the Laws of 2007 and amended by chapter 47 of the Laws of 2008, and to that extent, does not exceed any minimum State standards. Section 27-a(4)(c) requires the Commissioner to adopt the codes, standards and recommended practices promulgated by the most recent edition of the National Fire Protection Association 1983, Standard on Fire Service Life Safety Ropes and System Components, and as are appropriate to the nature of the risk to which the firefighter shall be exposed. This emergency regulation has been carefully drafted to meet these State statutory requirements and does not impose any additional costs or compliance requirements on local governments that employ firefighters beyond those inherent in the statute.

Small Business and Local Government Participation: This emergency regulation has no impact on small business. The regulation applies to all governmental agencies that employ a firefighter. The Department solicited input on this regulation by holding meetings with employer groups such as the New York State Association of Fire Chiefs and Regional Fire Administrators from around the State. The regulation was also discussed with the Counsel for the Firemen's Association of the State of New York. Additionally, input was solicited from the Office of Fire Prevention and Control and from the Department of State Counsel. Local governments that employ firefighters will also have an opportunity to comment on this regulation when it is subsequently filed as a proposed regulation and may offer comments at the public hearing that will be held regarding the proposed regulation.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The rule will apply to all public employers who employ firefighters. As many as 800 employers in rural or suburban areas will be affected by this rule.

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

The rule will require the employer to maintain training records to show that the firefighters have been trained. Employers are already required to maintain training records by other rules such as the OSHA requirements promulgated under 12 NYCRR Part 800. The proposed rule does not appear to impose an additional recordkeeping burden on the employer and will require a minimum amount of effort to comply. The training record must be maintained until the training is repeated, for a period of one year.

Compliance with the overall rule will be less and less burdensome as the size of the employer decreases. The employer must perform a hazard assessment to determine the level of risk to which its employees are exposed and use that information to select the appropriate equipment to be provided. Depending on the height and types of structures in the area where the employer provides fire protection, the equipment could be a little as a rope, belt, and attachment devices.

The employer must also train employees in the techniques of self rescue. Many Fire Departments have the expertise in-house to provide this service, particularly in rural areas where building size and configurations may limit the risks addressed by the rule. Moreover, in rural areas rope work is part of high angle rescue work which a number of fire departments in mountainous areas provide. Individuals trained in high angle rescue techniques would require little or no extra training to meet the requirements of this proposed rule.

Training provided by the State Office of Fire Prevention and Control also covers the criteria involved. However, this office does not have sufficient staff resources to provide the training on a statewide basis. Some rope and rescue system manufacturers will provide training in their equipment; there will typically be a cost associated with this service, however.

Another option open to employers is to group together and hire a professional trainer to provide a train the trainer course for individuals from a number of departments who would then train the members of their own department. This method would make the expense of hiring a contractor a shared expense.

3. Costs:

There are two primary areas of cost imposed by the rule: the cost of purchasing and maintaining the equipment and the cost of providing the required training. The cost of the equipment would fluctuate by department, depending upon the risks identified in the risk assessment conducted by the Department and the equipment needed to address the risk. Each firefighter who is at risk of entrapment at elevation must be provided with properly fitted (belts and harnesses come in different sizes) self-rescue rope and other components such as a belt and carabiners. A rural fire department employer could reasonably outfit each employee covered by the rule for as little as \$100.00; if employers were to coordinate purchases and buy these items in bulk that cost could be reduced substantially. We should note that some of the manufactured systems cost as much as \$400.00. In most rural areas such expensive systems should not be necessary.

Costs associated with the provision of training in systems are discussed above. If training is provided in-house, costs would be minimal or none at all. A professional trainer could be provided by a manufacturer "free of charge" if the employer purchases a sufficient number of units of equipment. [Note: although this is classified as a free service, it is really a service whose cost is included in the equipment purchase cost.] If the professional trainer's services are not provided along with the purchase, the charges for the trainer's time could range up to \$500.00.

4. Minimizing adverse impact:

The only adverse impact resulting from the proposed rule are the costs associated with compliance. As discussed previously, covered employers can try to minimize such costs through coordination with other fire departments to purchase equipment in bulk and through train the trainer sessions which will allow one or more members to deliver the training to their fellow firefighters.

5. Rural area participation:

The proposed rule was posted on the department web site along with a contact. Numerous emails and phone calls were taken during the 6 months it was posted.

Meetings were held with employer groups such as The New York State Association of Fire Chiefs and Regional Fire Administrators from around the state. The rule was discussed with the Counsel for The Firemen's Association of the State of New York.

Meetings were also held with representatives of the Office of Fire Prevention and Control and with Department of State Counsel.

Comments from these meetings and contacts were used to develop the rule.

Job Impact Statement

This rule concerns the provision of safety ropes and system components for public sector Fire Fighters. It is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment.

EMERGENCY RULE MAKING

The Number of Crane Board Members Needed to Conduct a Crane Operator's Examination and to Hold Administrative Hearings

I.D. No. LAB-29-08-00016-E

Filing No. 642

Filing date: July 1, 2008

Effective date: July 1, 2008

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

Action taken: Amendment of section 23-8.5 of Title 12 NYCRR.

Statutory authority: General Business Law, section 483; Labor Law, sections 21 and 27

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

Specific reasons underlying the finding of necessity: This is a very busy season for practical examinations for crane operators. This amendment will allow for more testing days to be scheduled thereby eliminating delays in getting examinations.

Subject: The number of Crane Board members needed to conduct a crane operator's examination & to hold administrative hearings.

Purpose: To modify the requirements regarding crane operator examinations and administrative hearings for crane operators.

Text of emergency rule: 12NYCRR Section 23-8.5 is amended to read as follows:

§ 23-8.5 Special provisions for crane operators

(a) Finding of fact. The board finds that the trade or occupation of operating cranes of the type described in subdivision (b) of this section, in construction, demolition and excavation work involves such elements of danger to the lives, health and safety of persons employed in such trade or occupation as to require special regulations for their protection and for the protection of other employees and the public in that such cranes may fall over, collapse, contact electric power lines, dislodge material and cause such material to fall or fail to support intended loads and convey them safely, unless such cranes are operated by persons of proper ability, judgment and diligence.

(b) Limited application of this section. This section applies only to mobile cranes having a manufacturers' maximum rated capacity exceeding five tons or a boom exceeding forty feet in length and to all tower cranes operating in construction, demolition and excavation work. The word crane as used in this section refers to tower cranes and to such mobile cranes of the following type: a mobile, carrier-mounted, power-operated hoisting machine utilizing hoisting rope and a power-operated boom which moves laterally by rotation of the machine on the carrier.

(c) Certificate of competence required. No person, whether the owner or otherwise, shall operate a crane in the State of New York unless such person is a certified crane operator by reason of the fact that:

(1) He holds a valid certificate of competence issued by the commissioner to operate a crane; or

(2) He is at least 21 years of age and holds a valid license issued by the Federal government, a State government or by any political subdivision of this or any other State and such license has been accepted in writing by the commissioner as equivalent to a certificate of competence issued by him; or

(3) He is a person who:

(i) is at least 21 years of age and is employed by the Federal government, the State or a political subdivision, agency or authority of the State and is operating a crane owned or leased by the Federal government, the State or such political subdivision, agency or authority and his assigned duties include operation of a crane;

(ii) is at least 21 years of age and is employed only to test or repair a crane and is operating it for such purpose while under the direct supervision of a certified crane operator; or under the direct supervision of a person employed by the Federal government, the State or a political subdivision, agency or authority of the State and his assigned duties include the operation of a crane;

(iii) an apprentice or learner who is at least 18 years of age and who has the permission of the owner or lessee of a crane to take instruction in its operation and is operating such crane under the direct supervision of a certified crane operator or under the direct supervision of a person employed by the Federal government, the State or a political subdivision,

agency or authority of the State and whose assigned duties include the operation of a crane.

(d) Application forms and photographs. An application for a certificate of competence or for a renewal thereof shall be made on forms provided by the commissioner. Upon notice from the commissioner to an applicant that a certificate of competence or a renewal thereof will be issued to him, the applicant must forward photographs of himself in such numbers and sizes as the commissioner shall prescribe, and such photographs must have been taken within 30 days of the request for such photographs.

(e) Physical condition. No person suffering from a physical handicap or illness, such as epilepsy, heart disease, or an uncorrected defect in vision or hearing, that might diminish his competence, shall be certified by the commissioner.

(f) Experience required. An applicant for a certificate of competence must be at least 21 years of age and must have had practical experience in the operation of cranes for at least three years and, in addition, have a practical knowledge of crane maintenance.

(g) Examining board. The commissioner may appoint an examining board which shall consist of at least three members, at least one of whom shall be a crane operator who holds a valid certificate of competence issued by the commissioner, and at least one of whom shall be a representative of crane owners. The members of the examining board shall serve at the pleasure of the commissioner and their duties will include:

(1) The examination of applicants and their qualifications, and the making of recommendations to the commissioner with respect to the experience and competence of the applicants;

(2) The holding of hearings regarding appeals following denials of certificates;

(3) The holding of hearings prior to determinations of the commissioner to suspend or revoke certificates, or to refuse to issue renewals of certificates;

(4) The reporting of findings and recommendations to the commissioner with respect to such hearings;

(5) The acts and proceedings of the examining board shall be in accordance with regulations issued by the commissioner.

(h) General examination. Each applicant for a certificate of competence will, and each applicant for a renewal thereof may, be required by the commissioner to take an appropriate general examination.

(i) Operating examination. An applicant who passes the general examination will also be required to take a practical examination in crane operation, except that the commissioner may waive this requirement with respect to an applicant for a renewal of a certificate of competence. *The commissioner may designate one or more individual members of the examining board to conduct the practical examination. When the practical examination is conducted by a single member of the examining board, the applicant must achieve a passing score from the member to receive a certificate of competence. When the practical examination is conducted by two or more members of the examining board, the applicant must achieve a passing score, which shall be calculated as an average of all scores received from the members that conducted the practical examination. The procedures used regarding the conduct of the practical examination, the establishment of the passing score and the assignment of the board members to conduct individual examinations shall be set forth in a guidance document approved by the examining board.*

(j) Contents of certificate. Each certificate of competence issued shall include the name and address of the certified crane operator, a brief description of him for the purpose of identification and his photograph.

(k) Term of certificate. Each certificate of competence or renewal thereof shall be valid for three years from the date issued, unless its term is extended by the commissioner or unless it is sooner suspended or revoked. The commissioner may extend the term of any certificate of competence as he may find necessary to relieve a certified operator of unnecessary hardship.

(l) Carrying certificate. Each certified crane operator shall carry his certificate on his person when operating any crane and failure to produce the certificate upon request by the commissioner shall be presumptive evidence that the operator is not certified.

(m) Renewals. An application for renewal of a crane operator's certificate of competence shall be made within one year from the expiration date of the certificate sought to be renewed, except that the commissioner may extend the time to make such application to prevent any undue hardship to a certified crane operator.

(n) Suspension, revocation, refusal to renew, denials of certificates, hearings.

(1) The commissioner may, upon notice to the interested parties and after a hearing before the examining board, suspend or revoke a certificate of competence upon finding that the certified operator has failed to comply with an order of the commissioner or that the certified operator is not a person of proper competence, judgment or ability in relation to the operation of cranes, or for other good cause shown.

(2) Prior to a determination by the commissioner not to renew a certificate of competence, the commissioner shall require a hearing before the examining board upon notice to the interested parties.

(3)(i) An applicant whose application for a certificate has been denied by the commissioner may, upon his written request made to the commissioner within 30 days after the mailing or personal delivery to him of a notice of such denial, have a hearing before the examining board.

(ii) Such hearing shall be held by the examining board which](4) *The commissioner shall designate a panel of two or more members of the examining board to conduct all hearings required pursuant to this section. The commissioner may also designate a hearing officer to assist the panel in conducting the hearings. The panel shall make its recommendations to the commissioner within three days after such hearing has been concluded. A written notice of the commissioner's decision, containing the reasons therefor, shall be promptly given to the certified operator or applicant, as the case may be, and to any interested parties who appeared at the hearing. Every such hearing shall be held in accordance with such regulations as the commissioner may establish.*

This notice is intended to serve only as a notice of emergency adoption. This agency does not intend to adopt the provisions of this emergency rule as a permanent rule. The rule will expire September 28, 2008.

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

Regulatory Impact Statement

1. Statutory Authority:

Section 27(2) of the Labor Law authorizes the Commissioner of Labor to adopt, amend, or repeal safety and health standards which provide reasonable and adequate protection to the lives, safety and health of employees and of persons lawfully frequenting a place of employment. The Commissioner may also require licenses as a condition of carrying on and industry, trade, occupation or process which the Commissioner finds contains special elements of danger. Section 21 of the Labor Law also gives the Commissioner general rulemaking authority. Finally, section 483 of the General Business Law gives the Commissioner of Labor the authority to prescribe such rules and regulations as may be necessary and proper for the administration and enforcement of Article 28-D relating to Crane Operators and Blasters. Such regulations may provide for examinations, categories of certificates, licenses or registrations (Section 483(2)).

2. Legislative Objectives:

The rulemaking accords with the public policy objectives the Legislature sought to advance when it adopted Section 483 of the General Business Law. These regulatory revisions clarify administrative procedures regarding the administration of the practical examinations for crane operator's certificates and the conduct of hearings by the examining board regarding the revocation, suspension, refusal to renew or denial of a crane operator's certificate. The Department is seeking to make it easier to schedule the practical examinations by authorizing the Commissioner to designate one or more members of the examining board to conduct the exams. Currently, at least a quorum of the entire Crane Examining Board must be present to conduct the exams. Crane Board members already dedicate more than forty (40) days annually to crane testing and hearings without compensation. This is a substantial commitment of time given that Board members are responsible for operating their own businesses or are employed full-time. Finding adequate number of Board members to participate in each testing series can be difficult given limitations on availability, particularly in the construction season when demand for testing can be at its highest. The proposed rule will facilitate the conduct of examinations by allowing one or more members of the Board to be present. Additionally, the Department wants to make it easier to get administrative hearings scheduled regarding the revocation, suspension, refusal to renew or denial of a crane operator's certificate. The Board is responsible for conducting these hearings and making a report and recommendation to the Commissioner. Individuals seeking review of adverse determinations regarding their operator's certificate expect timely access to the hearing process.

It is important that crane operators not have any delays in getting their exams scheduled. It is even more important that administrative hearings not be delayed due to scheduling difficulties.

3. Needs and Benefits:

As previously mentioned, the members of the Board serve without salary or other compensation (General Business Law, Section 483(3)). The time estimated to conduct the exams and hearings is approximately 40 days per year. While Board members have been extremely generous in making themselves available for their duties, it is increasingly difficult to find testing and hearing dates when sufficient numbers of board member are available for tests or hearings given other professional and personal demands on their time. This creates many scheduling difficulties and can create delays which affect crane operator applicants and individuals who are seeking hearings to review adverse determinations regarding their operator certificates. Moreover, since General Construction Law '41 establishes a default quorum of a majority of Board members for the conduct of official business, increasing the size of the Board to make more members available to serve as examiners or hearing panelists will only exacerbate this problem. The amendments to 12 NYCRR Section 23-8.5 establishing a smaller number of Board members who need to be present at either examinations or hearings will make it easier to schedule the exams, thereby making certain that there will be no delays in the process. Additionally, the amendments will also make it easier to schedule administrative hearings. It is very important that there not be any delays in the hearing process.

4. Costs:

This amendment imposes no compliance costs upon state or local governments. There will be no additional costs to crane operators. There will also be no additional costs to the Labor Department.

5. Local Government Mandates:

The proposed amendment imposes no new programs, services, duties or responsibilities on local government.

6. Paperwork:

The proposed amendment imposes no new paperwork requirements.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other State or federal requirements.

8. Alternatives:

The primary alternative is to leave the regulation unchanged. Another alternative would be to add new Board members, thereby increasing the pool of available members for testing and/or hearing panelists. However, as described above, the quorum language of General Construction Law '41 would then require a larger number of Board members to make up the statutory quorum of a majority of members required by that section.

9. Federal Standards:

There are no federal standards regulating the testing and licensing of crane operators, or administrative hearings relating thereto.

10. Compliance Schedule:

The provisions of this amendment will take effect immediately.

Regulatory Flexibility Analysis

These emergency regulations make revisions regarding the number of Crane Examining Board members required to be in attendance in order to conduct a practical examination for a crane operator's certificate and how passing scores will be calculated when the exam is conducted by two or more members of the Board. The emergency regulations also permit the Commissioner to designate a panel of two or more members of the Board together with an administrative hearing officer to conduct hearings regarding the suspension, revocation, refusal to renew, and the denials of a certificate to operate a crane. The practical examination was already required in regulation and does not impose any new requirement on crane operators. The regulations also currently provide for hearings for crane operators who have their certificate of competence to operate a crane suspended, revoked, refused to renew or denied. This amendment merely clarifies that the hearings need not be conducted by the entire examining board, but rather may be conducted by a panel of two or more members of the board.

The emergency regulations do not impose any additional obligations on any local government or business entity. Nor do they impose any adverse economic impact, reporting or recordkeeping, or other compliance requirements on small businesses and/or local governments. Rather, they are intended to facilitate the testing of individuals seeking crane operator certificates, some of whom are employees of local governments or businesses. 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 emergency rule will not impose any additional reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. On the contrary, the rule is intended to facilitate the timely conduct

of crane operator examinations and hearings. Therefore, the emergency regulations will not have a substantial adverse economic impact on rural areas or reporting, recordkeeping 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 administration of a crane operator's practical examination and the conduct of hearings regarding a suspension, revocation, refusal to renew, or denial of a crane operator's certificate. Currently, regulations already require that a crane operator pass a practical examination before being given a certificate to operate a crane. Additionally, where a certificate is suspended, revoked, refused a renewal or denied, the individual is given an opportunity for a hearing before the Crane Examining Board. The emergency regulations merely clarify that the practical examination may be administered by one or more members of the Board and that the hearings may be conducted by a panel of two or more members of the Board. Accordingly, the emergency regulation will not have a substantial adverse impact on jobs and employment opportunities. Rather, the rule will encourage and support employment opportunities for qualified crane operators because it will facilitate the testing of individuals seeking crane operator licenses. Because it is evident from the nature of the emergency regulation that it will have a beneficial impact on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Therefore, a job impact statement is not required and one has not been prepared.

Office of Mental Health

EMERGENCY RULE MAKING

Comprehensive Outpatient Programs

I.D. No. OMH-29-08-00015-E

Filing No. 641

Filing date: July 1, 2008

Effective date: July 1, 2008

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

Action taken: Amendment of Part 592 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 31.04 and 43.02; and Social Services Law, sections 364 and 364-a

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

Specific reasons underlying the finding of necessity: The amendments are a result of the enacted State budget and are effective July 1, 2008.

Subject: Comprehensive outpatient programs.

Purpose: To increase the Medicaid reimbursement associated with certain outpatient treatment programs regulated by the Office of Mental Health.

Text of emergency rule: 1. Subdivisions (c), (d), and (k) are amended and a new subdivision (l) is added to section 592.8 of Title 14 NYCRR as follows:

(c) The supplemental rate, for providers with at least one Level I comprehensive outpatient program, shall be calculated as follows:

(1) For outpatient mental health programs *other than clinics* which are designated Level I providers pursuant to this Part, grants received for the local fiscal year ended in 2001 for upstate and Long Island based providers, and for the local fiscal year ended in 2001 for New York City based providers, *as well as grants received for subsequent fiscal years which have been identified for inclusion by the Office of Mental Health* shall be added, if applicable, to the annualized eligible deficit approved in the calculation of the previous supplemental rate.

(2) For clinic treatment programs which are designated Level I programs pursuant to this Part, grants received for the local fiscal year ended in 2001 for upstate and Long Island based providers, and for the local fiscal year ended in 2001 for New York City based providers, *as well as grants received for subsequent fiscal years which have been identified for inclusion by the Office of Mental Health* shall be added, if applicable,

to the annualized eligible deficit approved in the calculation of the previous supplemental rate.

[(2)] (3) The sum of grants received by the provider, as recalculated under paragraph (1) or (2) of this subdivision as applicable, shall be divided by the projected number of annual visits to the provider's designated programs. The projected number of annual visits shall be calculated as follows:

(i) For outpatient programs other than clinic treatment programs, the [The] combined total of outpatient mental health program visits reimbursed by medical assistance for each provider shall be calculated by using the average number of visits provided in the most recent three fiscal years multiplied by 90.9 percent. These visits shall include all visits reimbursed by Medicaid, including visits partially reimbursed by Medicare. Providers, who in the three most recent fiscal years earned less than the full Medicaid supplemental rate on visits partially reimbursed by Medicare, shall have the projected number of annual visits adjusted to reflect the lower supplemental revenue earned on Medicare/Medicaid dually eligible visits. The calculation of the Medicare/Medicaid adjusted visits shall be based on the percentage of Medicaid supplemental payments earned on Medicare/Medicaid dually eligible visits provided during the three most recent fiscal years and the number of dually eligible visits provided in the three most recent fiscal years. The Medicare/Medicaid adjusted visits are calculated by multiplying the projected annual volume of dually eligible visits by the average percentage of Medicaid supplemental revenue earned on these visits during the three most recent fiscal years.

(ii) For clinic treatment programs, the combined total of outpatient mental health program visits reimbursed by medical assistance for each provider shall be calculated by using the average number of visits provided in the most recent three fiscal years multiplied by 90.9 percent, for rates effective prior to July 1, 2008. For rates effective July 1, 2008, the higher of the number of paid visits from calendar year 2007 or the average number of paid visits provided in the calendar years 2005 - 2007, multiplied by 90.9 percent, shall be used. These visits shall include all visits reimbursed by Medicaid, including visits partially reimbursed by Medicare, and those for which payment has been made or approved by a Medicaid managed care organization. Providers, who in the three most recent fiscal years earned less than the full Medicaid supplemental rate on visits partially reimbursed by Medicare, shall have the projected number of annual visits adjusted to reflect the lower supplemental revenue earned on Medicare/Medicaid dually eligible visits. The calculation of the Medicare/Medicaid adjusted visits shall be based on the percentage of Medicaid supplemental payments earned on Medicare/Medicaid dually eligible visits provided during the three most recent fiscal years and the number of dually eligible visits provided in the three most recent fiscal years. The Medicare/Medicaid adjusted visits are calculated by multiplying the projected annual volume of dually eligible visits by the average percentage of Medicaid supplemental revenue earned on these visits during the three most recent fiscal years.

[(ii)] (iii) Rates calculated pursuant to [subparagraph] subparagraphs (i) or (ii) of this paragraph are subject to appeal by the local governmental unit, or by the provider with the approval of the local governmental unit. Appeals pursuant to this paragraph shall be made within [one year] 120 days after receipt of initial notification of the most recent supplemental reimbursement rate calculation. However, under no circumstances may the recalculated rate be higher than the rate cap set forth in paragraph [(3)] (4) of this subdivision.

[(3)] (4) The supplemental rate for a provider operating a licensed outpatient mental health program shall be the lesser of the rate calculated in paragraph [(2)] (3) of this subdivision or a rate cap as established by the Commissioner of Mental Health and approved by the Director of the Division of the Budget.

(d) [In order to recoup supplemental payments for those visits in excess of 110 percent of the number of visits used to calculate the supplemental rate for a Level I provider, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year.] Excess supplemental payments shall be recouped as follows:

[(d)] (1) For outpatient programs other than clinic treatment programs, in [In] order to recoup supplemental payments for those visits in excess of 110 percent of the number of visits used to calculate the supplemental rate for a Level I provider, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year. The Office of Mental Health may recover such funds by request-

ing that the Department of Health withhold such funds from future Medicaid payments to the provider.

(2) For clinic treatment programs, in order to recoup supplemental payments for those visits provided prior to July 1, 2008 in excess of 110 percent of the number of visits used to calculate the supplemental rate for a Level I program, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year. The Office of Mental Health may recover such funds by requesting that the Department of Health withhold such funds from future Medicaid payments to the provider. For services provided July 1, 2008, and thereafter, the Office of Mental Health will no longer recover supplemental payments in excess of 110 percent of the number of visits used to calculate the supplemental rate of a Level I provider.

(k) When a clinic treatment provider opens a new clinic program location, the supplemental rate shall be re-calculated to include the volume of Medicaid visits projected for the location in the provider's approved Application for Prior Approval Review. The funding used in calculation of the supplemental rate shall be increased by the amount calculated by multiplying the increased volume of Medicaid visits from the approved Application for Prior Approval Review by the Level II COPS supplement for the applicable program/region.

[(k)](l) Each general hospital, as defined by article 28 of the Public Health Law, which is operated by the New York City Health and Hospitals Corporation, which received a grant pursuant to section 41.47 of the Mental Hygiene Law for the local fiscal year ending in 1989, shall be designated as a Level I comprehensive outpatient program for all outpatient programs licensed pursuant to Part 587 of this Title. For purposes of calculating supplemental Medicaid rates pursuant to this Part, all such programs in the New York City Health and Hospitals Corporation are combined for a uniform supplemental Medical Assistance program rate.

2. Subdivision (b) of section 592.10 of Title 14 NYCRR is amended to read as follows:

(b) [in] In order to recoup supplemental payments for those visits in excess of the number of visits used to calculate the supplemental rate under this section, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year. Effective with all services rendered July 1, 2008 and thereafter, no recoupment of supplemental payments to clinic treatment programs shall be made.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 28, 2008.

Text of emergency rule and any required statements and analyses may be obtained from: Joyce Donohue, Office of Mental Health, 44 Holland Ave., 8th Fl., Albany, NY 12229, (518) 474-1331, e-mail: cocabjdd@omh.state.ny.us

Regulatory Impact Statement

1. Statutory Authority:

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

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

Subdivision (a) of Section 43.02 of the Mental Hygiene Law grants the Commissioner the power to set rates for facilities licensed under Article 31 of the Mental Hygiene Law.

Sections 364 and 364-a of the Social Services Law give the Office of Mental Health responsibility for establishing and maintaining standards for care and services eligible for Medicaid reimbursement in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health.

Chapter 54 of the Laws of 2008 provides increased funding appropriations in support of amendments to Part 592. (Section 1, State Agencies, Office of Mental Health, lines 18-29 on page 393, lines 46-50 on page 403, and lines 1-7 on page 404.)

2. Legislative Objectives:

Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. The amendments to Part 592 increase the Medicaid reimbursement associated with certain outpatient treatment programs regulated by the Office of Mental Health (OMH) consistent with the enacted 2008-2009

state budget. These changes will be targeted in such a way as to provide general fiscal relief to providers, as well as improve the quality and availability of services. They will also equalize reimbursement fees for clinic treatment within geographic areas, as approved by the Division of Budget.

3. Needs and Benefits:

The enacted state budget for State Fiscal Year 2008-2009 provided for an approximately \$5 million increase for clinic treatment programs in State share of Medicaid (\$10 million gross Medicaid funds) through adjustments to the Medicaid fee supplements calculated in accordance with Part 592. This funding will have a full annual value of \$10 million in State share of Medicaid (\$20 million in gross Medicaid funds). Clinic treatment programs provide outpatient treatment designed to reduce symptoms, improve functioning and provide ongoing support to adults and children admitted to the program with a diagnosis of a designated mental illness. This rulemaking includes provisions to increase certain programs to a minimum payment level and removes the requirement to recover monies generated by paid visits in excess of 110 percent of the visits used to calculate the rate supplement.

4. Costs:

a) Costs of regulated parties:

There are no costs to providers associated with these amendments.

b) Costs to State and Local government and the agency:

Medicaid services typically involve both a state and county share in matching the federal portion. The state share of this \$20 million outpatient initiative is \$10 million, with no impact to local governments. The increase is being implemented after the local share Medicaid cap is already in place. (The local share Medicaid cap was an initiative included in the enacted State budget for 2005-2006, under which the state pays for increases in the local share of Medicaid after January 1, 2006.) The proposed changes will be implemented effective July 1, 2008.

5. Local Government Mandates:

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

6. Paperwork:

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

7. Duplication:

These regulatory amendments do not duplicate existing State or federal requirements.

8. Alternatives:

The application of the increased funding for certain outpatient programs consistent with the 2008-2009 enacted state budget resulted in increases for certain clinic treatment programs, and allows clinic treatment programs to retain additional Medicaid rate supplement payments, should they increase the number of services they provide. Determination of the methodology to implement the supplement changes, and the decision to allow clinic treatment programs to retain additional Medicaid rate supplement payments was made in consultation with the New York State Division of Budget, to be consistent with the enacted state budget. This would allow for the continued strengthening and expansion of the ambulatory mental health system and support a movement away from more expensive modalities of treatment. Therefore, no alternative was considered.

9. Federal Standards:

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

10. Compliance Schedule:

The changes are effective July 1, 2008. This rulemaking is effective upon adoption.

Regulatory Flexibility Analysis

The proposed rule will increase the Medicaid reimbursement associated with certain outpatient treatment programs regulated by the Office of Mental Health. This increase is consistent with the 2008-09 enacted State budget. Because it is evident from the nature of the proposed rule that there will be no adverse economic impact on small businesses or local governments, a regulatory flexibility analysis is not submitted with this notice.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this notice because the proposed rule, which serves to increase the Medicaid reimbursement associated with certain outpatient treatment providers, will not impose any adverse economic impact on rural areas.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because the proposed regulation merely increases the Medicaid reimbursement associ-

ated with certain outpatient treatment programs regulated by the Office of Mental Health. Therefore, it is evident that there will be no adverse impact on jobs and employment opportunities.

Office of Mental Retardation and Developmental Disabilities

EMERGENCY RULE MAKING

Notification of Incidents and Access to Records

I.D. No. MRD-29-08-00001-E

Filing No. 627

Filing date: June 25, 2008

Effective date: June 25, 2008

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

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

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

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

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

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

Subject: Notification of incidents and access to records.

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

Substance of emergency rule: • Effective June 25, 2008. Replaces similar emergency regulations that were effective October 1, December 30, 2007 and March 27, 2008.

• No substantive changes were made in the June 25, 2008 regulations compared to the March 27 regulations. Minor non-substantive changes were made for clarity.

• A provision was also added that, if authorized by law and in accordance with the provisions of the law, agencies are required to provide records and documents pertaining to allegations of abuse which occurred or were discovered prior to May 5, 2007 (the effective date of Jonathan's Law).

General:

• The regulations amend existing OMRDD regulations on incidents and abuse (Part 624).

• The regulations apply to all facilities and services operated, certified, authorized or funded through contract by OMRDD. This includes residen-

tial facilities, day programs, HCBS waiver services, and Medicaid Service Coordination.

- New notification and disclosure requirements do not apply to events or situations which are not under the auspices of the agency, such as allegations of abuse by family members in private residences. Requirements that agencies intervene and take appropriate action in these events or situations are unchanged.

- The OMR 147(I) and OMR 147(A) are removed from the regulation. OMRDD is replacing these forms with a single revised form.

- The OMR 147 must be used for all reportable incidents, serious reportable incidents and allegations of abuse.

- Full documentation of compliance is required.

- Existing requirements are unchanged for notification to CQCAPD, law enforcement officials, Statewide Central Register of Child Abuse and Maltreatment, etc.

- For the Willowbrook class, agencies must continue to comply with the incident reporting requirements of the Willowbrook Permanent Injunction.

- An old requirement for a “written preliminary finding” within 24 hours of the occurrence or discovery has been eliminated. The OMR 148 or equivalent report on actions taken takes the place of the written preliminary finding.

- The use of a diagnostic procedure (e.g. x-ray) when the results are negative (nothing broken) is no longer considered a reportable injury.

- Service coordinators must be notified of all reportable incidents, serious reportable incidents and allegations of abuse whether or not the event or situation is “under the auspices” of the agency or sponsoring agency.

Regulations to implement Section 33.23 MHL:

- The regulations build on notification requirements in pre-existing OMRDD regulations, which required notification of serious reportable incidents and allegations of abuse to guardians, parents and advocates/correspondents.

- The following types of events/situations are subject to the new requirements:

- Reportable incidents in the categories of injury, medication error and death.

- Serious reportable incidents in the categories of injury, missing person, medication error and death.

- All allegations of abuse.

- Current notification requirements are maintained for serious reportable incidents which are in the other categories (restraint, possible criminal act, and sensitive situation). Notification must occur within 24 hours of completion of the OMR 147.

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

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

- Exceptions:

- The guardian, parent, spouse or adult child objects to notification to himself or herself.

- The person receiving services is a capable adult who objects to the notification being made to someone else.

- The person who would otherwise be notified is the alleged abuser.

- If there is no guardian, parent, spouse or adult child (or they are unavailable), but the person has an advocate or correspondent, notification should be made to that individual in the same manner. Advocates/correspondents must also be offered a meeting and must be sent the report on actions taken. Upon request, advocates/correspondents must be sent the redacted OMR 147. (Note: the advocate or correspondent is not eligible to request disclosure of the investigation report and other investigation documents).

- If there is no guardian, parent, spouse or adult child (or they are unavailable), and the person receiving services is a “capable adult” as defined in the regulations, the person receiving services must be notified. In addition, the person receiving services must be offered a meeting and must receive the report on actions taken.

- The notification must be by telephone or in person, or by other methods at the request of the recipient of the notice.

- The notification must be made within 24 hours of the completion of the OMR 147.

- The notice must include:

- A description of the event or situation and a description of initial actions taken to address the incident or alleged abuse, if any,

- An offer to meet with the chief executive officer or designee, and
 - For allegations of abuse, an offer to provide information on the status and resolution of the allegation (this is a pre-existing requirement).

- Upon request, a copy of the OMR 147 reporting form must be provided to the person receiving services, guardian, parent, spouse, adult child, or advocate/correspondent. Records must be redacted.

- The agency must provide a written report on actions taken to address the incident or alleged abuse for every incident and allegation subject to the new notification process.

- The report must be provided to the individual that was notified.

- The report must include: any immediate steps taken in response to the incident or alleged abuse to safeguard the health or safety of the person receiving services, and a general description of any initial medical or dental treatment or counseling provided to the person in response to the incident or alleged abuse.

- The report must be on a form developed by OMRDD or a similar agency form.

- The report must be provided within 10 days of the completion of the OMR 147.

- The report on actions taken cannot include names of others involved in the incident/allegation or investigation or information tending to identify them.

Regulations to implement Section 33.25 MHL:

- The regulations require the release of records and documents pertaining to allegations and investigations into abuse under the auspices of the agency.

- Only guardians, parents, spouses and adult children who are considered to be a “qualified person” according to the definition in the Mental Hygiene Law, are eligible to receive records.

- If the otherwise eligible requestor is the alleged abuser he or she is not eligible to receive records.

- If the consumer is a capable adult and objects to the release of records, the otherwise eligible requestor is not eligible to receive records.

- Requests must be in writing.

- Documents and records must be released 21 days after the closure of the alleged abuse case or 21 days after the request, if the request is made after closure.

- For purposes of determining when the 21 day clock begins, closure is considered the time when the standing committee has ascertained that no further investigation is necessary and a conclusion is reached whether the allegation is substantiated, disconfirmed or inconclusive.

- Records must be redacted.

- Agencies are only required to release records pertaining to allegations of abuse which occurred or were discovered on or after May 5, 2007.

- Records may not be disseminated by recipients.

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

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

- Names or other information tending to identify anyone who made a report to the Statewide Central Register of Child Abuse and Maltreatment (SCR), contacted the SCR, or otherwise cooperated in a child abuse/maltreatment investigation.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 22, 2008.

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

Additional matter required by statute:

Pursuant to the requirements of the State Environmental Quality Review Act (SEQRA) and in accordance with 14 NYCRR Part 622, OMRDD has on file a Negative Declaration with respect to this Action. Thus, consistent

with the requirements of 6 NYCRR Part 617, OMRDD, as lead agency, has determined that the action described herein will not have a significant effect on the environment, and an Environmental Impact Statement will not be prepared.

Regulatory Impact Statement

1. Statutory authority:

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

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

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

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

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

3. Needs and Benefits: Chapter 24 of the Laws of 2007 (MHL Sections 33.23 and 33.25), otherwise known as "Jonathan's Law," was signed by the Governor on May 5, 2007 and was effective immediately.

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

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

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

4. Costs:

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

offer to hold a meeting. Lastly, documents and records must be provided upon request and must be redacted in accordance with the law.

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

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

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

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

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

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

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

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

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

8. Alternatives: The law only requires the notification requirements to be made to a qualified person as defined in MHL 33.16. "Qualified persons" include only guardians, parents, spouse or adult child. OMRDD had considered limiting the applicability of the notification requirements to "qualified persons." However, OMRDD recognizes the valuable role played by siblings, family members, friends and others who are advocates and correspondents but who are not "qualified persons." OMRDD considers that individuals without a "qualified person" who have an advocate or correspondent should also be able to benefit from the additional notification process requirements. OMRDD consequently extended the new notification process requirements to include advocates/correspondents.

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

10. Compliance schedule: OMRDD filed similar emergency regulations effective on October 1, December 30, 2007 and March 27, 2008.

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

Regulatory Flexibility Analysis

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

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

The amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has

determined that these amendments will not cause undue hardship to small business providers due to increased costs for additional services or increased compliance requirements.

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

OMRDD has carefully considered the desirability of a small business regulation guide to assist provider agencies with this rule, as provided for by new section 102-a of the State Administrative Procedure Act. However, OMRDD has already developed a regulatory handbook on the implementation of 14 NYCRR Part 624. This handbook will be updated to reflect the new requirements outlined in these amendments.

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

4. Compliance costs: There are no costs to local governments.

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

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

6. Minimizing adverse economic impact: As stated in the Regulatory Impact Statement, the proposed regulation will have no fiscal effect on State or local governments, and minimal fiscal impact on regulated parties (including the state as a provider). Modest additional costs are necessary to the extent regulatory requirements exceed statutory requirements. OMRDD has reviewed and considered the approaches for minimizing economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. In order to minimize adverse economic impact, OMRDD has developed a standardized form for the report on actions taken. The use of this form will minimize staff resources devoted to completing the form, instead of each agency developing its own form or not using a form for this purpose.

7. Small business and local government participation: OMRDD convened a Jonathan’s Law implementation workgroup which included representatives from provider associations. The group met on June 1, June 20 and November 7, 2007. Presentations were made to various groups including committees of the Cerebral Palsy Associations of New York State and the New York State Association of Residential and Community Agencies (NYSACRA). OMRDD staff presented at training sessions with hundreds of provider representatives hosted by NYSACRA on June 28 and July 20. OMRDD staff also presented at a training session hosted by the Long Island Alliance on August 23. In addition, OMRDD staff made a presentation at a meeting of the Conference of Local Mental Hygiene Directors on August 17. OMRDD also conducted a series of internal training sessions on October 3, October 11, October 18 and October 29. Informational mailings were sent to affected providers regarding the implementation of the new law on May 11 and May 15. A detailed informational mailing specifically discussing the emergency regulations was sent to providers and other interested parties on August 31. OMRDD also solicited comments from the Self-Advocacy Association, the Statewide Family Support Services Committee and the NYSARC Adult Services Committee. OMRDD informed all provider agencies, provider associations, and other interested parties (including parents, family members and individuals receiving services) of the October 1, December 30, 2007 and March 27, 2008 emergency regulations by mail. In addition, numerous questions and comments were received from voluntary providers, local government repre-

sentatives and others at the events noted above and through individual contact.

Rural Area Flexibility Analysis

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

Job Impact Statement

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

Commission on Public Integrity

EMERGENCY RULE MAKING

Adjudicatory Proceedings and Appeals Procedure

I.D. No. CPI-29-08-00003-E
Filing No. 629
Filing date: June 26, 2008
Effective date: June 26, 2008

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

Action taken: Amendment of Part 941 to Title 19 NYCRR.

Statutory authority: Executive Law, section 94(9)(c) and (13)

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

Specific reasons underlying the finding of necessity: In order that the regulations governing adjudicatory proceedings and appeals procedure conform with changes effectuated by the recently-enacted governing statute, the Public Employee Ethics Reform Act of 2007.

Subject: Adjudicatory proceedings and appeals procedure.

Purpose: To afford all parties due process protection and fair and just resolution of all matters that may come before the commission.

Substance of emergency rule: The rules governing adjudicatory proceedings and appeals procedures are amended to comport with the Public Employee Ethics Reform Act of 2007 (PEERA). Therefore, these amendments provide that the adjudicatory proceeding rules apply to violations of all laws within the jurisdiction of the Commission on Public Integrity, specifically, sections 73, 73-a and 74 of the Public Officers Law, section 107 of the Civil Service Law and Article 1-A of the Legislative Law. As PEERA repealed the Public Advisory Council, these amendments also set forth the amended appeals procedure for applications for deletion and exemption from Financial Disclosure Statements pursuant to section 73-a of the Public Officers Law. These amendments also provide the amended

list of documents that are publicly available from the Commission on Public Integrity.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 23, 2008.

Text of emergency rule and any required statements and analyses may be obtained from: Shari Calnero, Associate Counsel, Commission on Public Integrity, 540 Broadway, Albany, NY 12207, (518) 408-3976, e-mail: scalnero@nyintegrity.org

Regulatory Impact Statement

1. Statutory authority: Section 94 (9)(c) of the Executive Law generally directs the Commission on Public Integrity ("CPI") to adopt, amend, and rescind rules and regulations to govern the procedures of the CPI; and section 94 (13) specifically directs the CPI to adopt rules governing the conduct of adjudicatory hearings for violations of all laws within its jurisdiction, as well as to adopt rules governing appeals taken pursuant to denials of requests for certain deletions or exemptions from Financial Disclosure Statements pursuant to section 73-a of the Public Officers Law.

2. Legislative objectives: The Public Employee Ethics Reform Act of 2007 ("PEERA") established the CPI, thus merging the former New York State Ethics Commission ("Ethics Commission") and the former New York Temporary State Commission on Lobbying ("Lobbying Commission"). PEERA intended that the CPI's consolidated jurisdiction would strengthen integrity, public trust and confidence in New York State government. PEERA authorizes the CPI to conduct adjudicatory proceedings to enforce the laws within its jurisdiction and to ensure that all parties receive due process protection and a fair and just resolution of applicable enforcement actions and of the aforementioned appeals.

3. Needs and benefits: The proposed rule-making is necessary to fulfill the statutory mandate of the CPI. PEERA became law on March 26, 2007. Pursuant to PEERA, effective September 22, 2007, all powers, duties and functions conferred upon the former Ethics Commission and the former Lobbying Commission were transferred to and assumed by the CPI. Pursuant to Resolution CPI 07-03, the CPI adopted the rules codified at Title 19 NYCRR Part 941, which were previously adopted by the former Ethics Commission, to govern the conduct of adjudicatory proceedings for violations of all laws within the CPI's jurisdiction, specifically violations of sections 73, 73-a and 74 of the Public Officers Law, section 107 of the Civil Service Law and Article 1-A of the Legislative Law.

However, the existing text of Title 19 NYCRR Part 941 does not comport with PEERA and Resolution CPI 07-03. Given the ongoing nature of CPI's adjudicatory proceedings and the appeal process for denials on requests for deletion and exemption from Financial Disclosure Statements, time is of the essence in regard to the adoption and publication of the amendments to this rule as an emergency measure.

For example, pursuant to PEERA, the CPI's jurisdiction is expanded in that it may now adjudicate Public Officers Law section 74 violations. The existing text of Title 19 Part 941 does not state that these rules apply to such violations. By adopting this emergency rule, Title 19 NYCRR Part 941 will be amended to reflect that these rules also apply to Public Officers Law section 74 violations, thus providing the general public and those who would be affected by this change in the law, including statewide elected officials and state officers and employees, with adequate notice, comment and due process of law.

PEERA also repealed the Public Advisory Council, which previously served as the body authorized to review requests for deletions and exemptions of certain information from Financial Disclosure Statements, as provided in paragraphs (h) and (i) of subdivision 9 of section 94 of the Executive Law. While PEERA retains an appeal process for these requests for deletion and exemption, the existing text of the applicable section Part 941.19 is obsolete, as it describes the now-dissolved Public Advisory Council's role in the appeal process. By adopting this emergency rule, section 941.19 will be amended to reflect that the Public Advisory Council no longer exists, and to also set forth the statutorily-authorized appeal process, thus providing statewide elected officials and state officers and employees who are required to submit Financial Disclosure Statements with adequate notice should they seek deletions or exemptions or appeal such denials.

In addition, PEERA authorized the CPI to enforce and adjudicate violations of section 107 of the Civil Service Law, commonly referred to as the "Little Hatch Act." The existing text of Title 19 NYCRR Part 941 does not state that the rules apply to such violations. By adopting this emergency rule, Title 19 NYCRR Part 941 will be amended to reflect that these rules also apply to Civil Service Law section 107 violations, thus providing

the general public and those who would be affected by this change in the law, including statewide elected officials and state officers and employees, with adequate notice, comment and due process of law.

Furthermore, PEERA authorized the CPI to enforce and adjudicate violations of Article 1-A of the Legislative Law, which was within the jurisdiction of the former Lobbying Commission prior to September 22, 2007. The former Lobbying Commission's adjudicatory proceeding rules codified at Title 21 NYCRR Part 250 are obsolete and do not comport with PEERA. Pursuant to Resolution CPI 07-03, the CPI duly rescinded Title 21 NYCRR Part 250 and adopted the rules set forth in Title 19 NYCRR Part 941 to also cover violations of Article 1-A of the Legislative Law, subject to PEERA's requirement that adjudicatory proceedings for such violations shall be open to the public in accordance with Article 7 of the Public Officers Law. While the rules codified at Title 19 NYCRR Part 941 now govern violations of Article 1-A of the Legislative Law, the existing text of Title 19 NYCRR Part 941 does not state that the rules also apply to violations of Article 1-A of the Legislative Law. By adopting this emergency rule, Title 19 NYCRR Part 941 will be amended to reflect that these rules also apply to violations of Article 1-A of the Legislative Law, thus providing the general public and those affected by this change in the law, including registered lobbyists and clients in New York State, with adequate notice, comment and due process of law.

4. Costs:

- a. costs to regulated parties for implementation and compliance: None
- b. costs to the agency, state and local government: None
- c. cost information is based on the fact that there are no costs associated with these amendments to the rules.
- d. not applicable

5. Local government mandate: None

6. Paperwork: This amendment will not require the preparation of any additional forms or paperwork.

7. Duplication: None

8. Alternatives: On December 11, 2007, the CPI approved Resolution CPI 07-03, which adopted the rules codified at Title 19 NYCRR Part 941 to govern adjudicatory proceedings for all laws within its jurisdiction. While this resolution provides the requisite authority to adopt such rules, the text of the existing rules remains inaccurate and misleading to the general public and those directly affected by the changes in the law effectuated by PEERA. Therefore, the CPI seeks to publish notice of such amendment in the State Register and the revised text of the rules in the Official Compilation of Codes, Rules and Regulations of the State of New York in order to afford the public with the most notice and maximum due process practicable.

9. Federal standards: The proposed rule-making pertains to adjudicatory proceedings and appeals taken from denials for exemption or deletion from Financial Disclosure Statements pursuant to PEERA. These amendments do not exceed any federal minimum standard with regard to a similar subject area.

10. Compliance schedule: Compliance is required on the part of the CPI only and will take effect upon emergency adoption.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not submitted with this Notice of Emergency Adoption since the proposed rule-making will not impose any adverse economic impact on small businesses or local governments, nor will it require or impose any reporting, record-keeping or other affirmative acts on the part of these entities for compliance purposes. The Commission notes that while it is authorized by the Public Employee Ethics Reform Act of 2007 ("2007") to enforce the reporting requirements of the Article 1-A of the Legislative Law, which requires those public corporations that conduct lobbying activity to register and report expenses in accordance with the law, these amendments to the adjudicatory proceeding and appeal procedure rules does not impose any adverse economic impact on those public corporations for compliance purposes. The New York State Commission on Public Integrity makes these findings based on the fact that the adjudicatory proceedings and appeals procedure affect only certain State officers and employees and lobbyists and their clients, including certain public corporations registered for lobbying activity in New York State. Small businesses and local governments are not affected in any way by these amendments.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this Notice of Emergency Adoption since the proposed rule-making will not impose any adverse economic impact on rural areas, nor will compliance require or impose any reporting, record-keeping or other affirmative acts on the part

of rural areas. The Commission on Public Integrity makes these findings based on the fact that the adjudicatory proceedings and appeals procedure affect only certain State officers and employees and registered lobbyists and clients in New York State. Rural areas are not affected in any way.

Job Impact Statement

Job Impact Statement is not submitted with this Notice of Emergency Adoption since the proposed rule-making will have no impact on jobs or employment opportunities. The Commission on Public Integrity makes this finding based on the fact that the proposed rule-making is technical in nature and applies to internal adjudicatory proceedings and appeal procedures only. In addition, the regulation applies to certain State officers and employees subject to the provisions of Public Officers Law sections 73, 73-a and 74 and Civil Service Law section 107 and lobbyists and clients subject to Article one-A of the Legislative law. This regulation does not apply, nor relate to small businesses, economic development or employment opportunities.

Public Service Commission

NOTICE OF WITHDRAWAL

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

The following rule makings have been withdrawn from consideration:

I.D. No.	Publication Date of Proposal
PSC-33-01-00009-P	August 15, 2001
PSC-50-01-00008-P	December 12, 2001
PSC-05-02-00004-P	January 30, 2002
PSC-12-02-00008-P	March 20, 2002
PSC-20-02-00005-P	May 15, 2002
PSC-31-02-00010-P	July 31, 2002
PSC-06-03-00015-P	February 12, 2003
PSC-16-03-00031-P	April 23, 2003
PSC-16-03-00032-P	April 23, 2003
PSC-17-03-00006-P	April 30, 2003
PSC-19-03-00015-P	May 14, 2003
PSC-22-03-00015-P	June 4, 2003
PSC-29-03-00002-P	July 23, 2003
PSC-29-03-00003-P	July 23, 2003
PSC-29-03-00004-P	July 23, 2003
PSC-29-03-00005-P	July 23, 2003
PSC-39-03-00010-P	October 1, 2003
PSC-46-03-00009-P	November 19, 2003
PSC-10-04-00006-P	March 10, 2004
PSC-10-04-00007-P	March 10, 2004
PSC-12-04-00004-P	March 24, 2004
PSC-15-04-00011-P	April 14, 2004
PSC-27-04-00010-P	July 7, 2004
PSC-34-04-00015-P	August 25, 2004
PSC-37-04-00010-P	September 15, 2004
PSC-45-04-00009-P	November 10, 2004
PSC-45-04-00010-P	November 10, 2004
PSC-28-05-00016-P	July 13, 2005
PSC-33-05-00004-P	August 17, 2005
PSC-36-05-00014-P	September 7, 2005
PSC-41-05-00017-P	October 12, 2005
PSC-41-05-00023-P	October 12, 2005
PSC-41-05-00024-P	October 12, 2005
PSC-43-05-00011-P	October 26, 2005
PSC-44-05-00022-P	November 2, 2005
PSC-44-05-00023-P	November 2, 2005
PSC-44-05-00024-P	November 2, 2005
PSC-51-05-00011-P	December 21, 2005
PSC-02-06-00006-P	January 11, 2006
PSC-02-06-00007-P	January 11, 2006

PSC-02-06-00008-P	January 11, 2006
PSC-02-06-00009-P	January 11, 2006
PSC-04-06-00011-P	January 25, 2006
PSC-04-06-00012-P	January 25, 2006
PSC-04-06-00013-P	January 25, 2006
PSC-04-06-00014-P	January 25, 2006
PSC-04-06-00015-P	January 25, 2006
PSC-04-06-00016-P	January 25, 2006
PSC-04-06-00017-P	January 25, 2006
PSC-11-06-00010-P	March 15, 2006
PSC-37-06-00012-P	September 13, 2006
PSC-01-07-00013-P	January 3, 2007
PSC-01-07-00014-P	January 3, 2007
PSC-01-07-00015-P	January 3, 2007
PSC-01-07-00016-P	January 3, 2007
PSC-01-07-00017-P	January 3, 2007
PSC-01-07-00018-P	January 3, 2007
PSC-03-07-00007-P	January 17, 2007
PSC-04-07-00008-P	January 24, 2007
PSC-05-07-00004-P	January 31, 2007
PSC-16-07-00018-P	April 18, 2007
PSC-16-07-00019-P	April 18, 2007
PSC-16-07-00020-P	April 18, 2007
PSC-17-07-00007-P	April 25, 2007
PSC-17-07-00009-P	April 25, 2007
PSC-20-07-00014-P	May 16, 2007
PSC-20-07-00015-P	May 16, 2007
PSC-22-07-00012-P	May 30, 2007
PSC-22-07-00014-P	May 30, 2007
PSC-32-07-00004-P	August 8, 2007
PSC-34-07-00020-P	August 22, 2007
PSC-34-07-00021-P	August 22, 2007
PSC-39-07-00011-P	September 26, 2007
PSC-39-07-00012-P	September 26, 2007
PSC-39-07-00013-P	September 26, 2007
PSC-39-07-00014-P	September 26, 2007
PSC-45-07-00003-P	November 7, 2007
PSC-48-07-00009-P	November 28, 2007

NOTICE OF ADOPTION

Merger by Gaz De France SA (GDF) and Suez SA (Suez)

I.D. No. PSC-51-07-00007-A
Filing date: June 25, 2008
Effective date: June 25, 2008

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

Action taken: On June 18, 2008, the Public Service Commission adopted an order approving the merger of Gaz de France SA and Suez SA with GDF Suez being the surviving entity, and an initial public offering of shares of Suez Environment.

Statutory authority: Public Service Law, section 89(h)

Subject: Merger of Gaz de France SA and Suez SA with GDF Suez being the surviving entity and initial public offering of shares.

Purpose: To approve the merger of Gaz de France SA and Suez SA with GDF Suez being the surviving entity, and initial public offering of shares.

Substance of final rule: The Commission, on June 18, 2008, adopted an order approving the merger of Gaz De France and Suez SA, with GDF Suez being the surviving entity, an Initial Public Offering of shares of Suez Environment, 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: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, NY 12223, (518) 486-2655, e-mail: leann_ayer@dps.state.ny.us

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-W-1367SA2)

NOTICE OF ADOPTION

New Types of Electricity Meters, Transformers and Auxiliary Devices by General Electric**I.D. No.** PSC-12-08-00022-A**Filing date:** June 26, 2008**Effective date:** June 26, 2008

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

Action taken: On June 18, 2008, the Public Service Commission adopted an order approving the petition of General Electric Company for the use of electric meters I-210+, I-210+c and I-210+n for use in New York State.

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

Subject: Approval of new types of electricity meters.

Purpose: To approve the General Electric Company's electric meters I-210+, I-210+c and I-210+n for use in New York State.

Substance of final rule: The Commission, on June 18, 2008, adopted an order approving the petition of General Electric Company to permit the use of the General Electric I-210+, I-210+c and I-210+n electric meter lines for revenue metering and billing applications for residential and commercial installations in New York State.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, NY 12223, (518) 486-2655, e-mail: leann_ayer@dps.state.ny.us

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-1503SA1)

NOTICE OF ADOPTION

Uniform System of Accounts by City of Jamestown Board of Public Utilities**I.D. No.** PSC-13-08-00010-A**Filing date:** June 25, 2008**Effective date:** June 25, 2008

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

Action taken: On June 18, 2008, the Public Service Commission adopted an order approving the petition of the Jamestown Board of Public Utilities to defer expenses related to a steam turbine major maintenance overhaul and to recover the expenses from the dismantling fund.

Statutory authority: Public Service Law, sections 5(1)(b), 65(1), 66(1), (5), (9) and (12)

Subject: Uniform system of accounts.

Purpose: To approve the City of Jamestown Board of Public Utilities to defer expenses beyond the end of the current fiscal year.

Substance of final rule: The Commission, on June 18, 2008, adopted an order approving the petition of the Jamestown Board of Public Utilities to defer and amortize \$960,742 of expenses related to a steam turbine major maintenance overhaul over a seven year period beginning December 31, 2007, and to recover the first year's amortization of \$137,249 from the Dismantling Fund established in the Commission order approving the Joint Proposal in Case 04-E-1485, 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: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, NY 12223, (518) 486-2655, e-mail: leann_ayer@dps.state.ny.us

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.

(08-E-0210SA1)

NOTICE OF ADOPTION

Request for Recovery of Deferral Amortization by City of Jamestown Board of Public Utilities**I.D. No.** PSC-13-08-00013-A**Filing date:** June 25, 2008**Effective date:** June 25, 2008

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

Action taken: On June 18, 2008, the Public Service Commission adopted an order approving the petition of the Jamestown Board of Public Utilities to use a portion of dismantling fund to offset the second year amortization of maintenance costs regarding overhaul of gas fired generator #7.

Statutory authority: Public Service Law, sections 5(1)(b), 65(1), 66(1), (5), (9) and (12)

Subject: Uniform system of accounts.

Purpose: To approve the City of Jamestown Board of Public Utilities to recover the second year of a deferral amortization.

Substance of final rule: The Commission, on June 18, 2008, adopted an order approving the petition of the Jamestown Board of Public Utilities to recover the second year of the five year gas turbine maintenance overhaul amortization amount of \$153,989, approved in Case 06-E-0577, from the Dismantling Fund, 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: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, NY 12223, (518) 486-2655, e-mail: leann_ayer@dps.state.ny.us

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.

(08-E-0212SA1)

NOTICE OF ADOPTION

Petition for the Submetering of Electricity**I.D. No.** PSC-18-08-00008-A**Filing date:** June 26, 2008**Effective date:** June 26, 2008

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

Action taken: On June 18, 2008, the Public Service Commission adopted an order approving the petition filed by United Development Corporation, to submeter electricity at 3111 Saunders Settlement Rd., Sandborn, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To grant the petition of United Development Corp., to submeter electricity at 3111 Saunders Settlement Rd., Sandborn, NY.

Substance of final rule: The Commission, on June 18, 2008, adopted an order in Case 08-E-0390 approving a petition by United Development Corporation, to submeter electricity at 3111 Saunders Settlement Road, Sandborn, New York, located in the territory of Niagara Mohawk Power Corporation d/b/a National Grid.

Final rule compared with proposed rule: No changes.

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, NY 12223, (518) 486-2655, e-mail: leann_ayer@dps.state.ny.us

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.

(08-E-0390SA1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED****Petition for Submetering of Electricity****I.D. No.** PSC-29-08-00006-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 Living Opportunities of DePaul, to submeter electricity at 67-113 Lindwood St., Warsaw, 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 of Living Opportunities of DePaul, to submeter electricity at 67-113 Lindwood St., Warsaw, 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 Living Opportunities of DePaul, to submeter electricity at 67-113 Linwood Street a/k/a DePaul Warsaw Community Residence in Warsaw, New York, located in the territory of New York State Electric and Gas Corporation.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (08-E-0554SA1)

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

Approval of an Amendment to an Electric Service Agreement

I.D. No. PSC-29-08-00007-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 a joint petition from New York State Electric and Gas Corporation and Nucor Steel Auburn, Inc. requesting approval of an amendment to an electric service agreement.

Statutory authority: Public Service Law, sections 5(1)(b), 64, 65(1), 66(1), (5), (9), (10), (12) and (12-b)

Subject: Approval of an amendment to an electric service agreement.

Purpose: Consideration of the approval an amendment to an electric service agreement.

Substance of proposed rule: The Public Service Commission is considering a joint petition from New York State Electric and Gas Corporation and Nucor Steel Auburn, Inc. requesting approval of an amendment to an electric service agreement, and recovery in regulated electric rates of certain costs related to the agreement. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

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-0713SA1)

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

Petition for the Submetering of Electricity

I.D. No. PSC-29-08-00008-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 Park Hill Housing, LLC f/k/a College Hill Apartments, to submeter electricity at 63-34 South St., Middletown, 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 of Park Hill Housing, LLC, to submeter electricity at 63-34 South St., Middletown, 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 Park Hill Housing, LLC, f/k/a College Hill Apartments, to submeter electricity at 63-34 South Street, Middletown, New York, located in the territory of Orange and Rockland Utilities, 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-0676SA1)

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

Issuance of Long-Term Indebtedness in the Principal Amount of \$6,000,000

I.D. No. PSC-29-08-00009-P

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

Proposed action: A petition filed by Corning Natural Gas Corporation (Corning) for authority, pursuant to Public Service Law 69, to issue long-term indebtedness in the principal amount of \$6,000,000 for the purpose of refunding existing obligations and financing new construction.

Statutory authority: Public Service Law, section 69

Subject: Issuance of long-term indebtedness in the principal amount of \$6,000,000.

Purpose: Issuance of long-term indebtedness.

Substance of proposed rule: The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, a petition by Corning Natural Gas Corporation for authority, pursuant to PSL 69, to issue long-term indebtedness in the principal amount of \$6,000,000 for the purpose of refunding existing obligations and financing new construction. The Commission may approve, reject or modify, in whole or in part, the relief requested by Corning.

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-G-0708SA1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED****Waiver of 16 NYCRR sections 894.1 through 894.4**

I.D. No. PSC-29-08-00010-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject in whole or in part, a petition by the Town of Butler (Wayne County), for a waiver of 16 NYCRR Part 894.1, 894.2, 894.3 and 894.4 pertaining to the franchising process.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 16 NYCRR sections 894.1, 894.2, 894.3 and 894.4.

Purpose: To allow the Town of Butler (Wayne County) and Time Warner Cable to expedite the cable television franchising process.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Town of Butler (Wayne County) for a waiver of Section 894.1 (cable television advisory committee), 894.2 (final report of advisory committee), 894.3 (requests for proposals) and 894.4 (invitation of applications; public notice of request for proposals) in order to expedite the cable television franchising process with Time Warner Cable.

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-V-0720SA1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED****Waiver of 16 NYCRR sections 894.1, 894.2, 894.3 and 894.4**

I.D. No. PSC-29-08-00011-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject in whole or in part, a petition by the Town of Torrey (Yates County), for a waiver of 16 NYCRR Part 894.1, 894.2, 894.3 and 894.4 pertaining to the franchising process.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 16 NYCRR sections 894.1, 894.2, 894.3 and 894.4.

Purpose: To allow the Town of Torrey (Yates County) and Time Warner Cable to expedite the cable television franchising process.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Town of Torrey (Yates County) for a waiver of Section 894.1 (cable television advisory committee), 894.2 (final report of advisory committee), 894.3 (requests for proposals) and 894.4 (invitation of applications; public notice of request for proposals) in order to expedite the cable television franchising process with Time Warner Cable.

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-V-0718SA1)

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED****Petition for Submetering of Electricity**

I.D. No. PSC-29-08-00012-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 in part, the petition filed by The Mark Hotel LLC, to submeter electricity at 25 E. 77th 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 of The Mark Hotel LLC, to submeter electricity at 25 E. 77th St., New York, NY.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or in part, the petition filed by The Mark Hotel, LLC, to submeter electricity at 25 East 77th 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-0656SA1)

Department of State

**EMERGENCY
RULE MAKING****Thirty Hour Remedial Course for Real Estate Brokers and Salespeople**

I.D. No. DOS-29-08-00002-E

Filing No. 628

Filing date: June 25, 2008

Effective date: June 25, 2008

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

Action taken: Addition of section 176.26 and amendment of section 177.18 of Title 19 NYCRR.

Statutory authority: Real Property Law, section 442-k

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

Specific reasons underlying the finding of necessity: Real Property Law (RPL) Article 12-A, prescribes requirements for individuals and business entities to act as a real estate salesperson and/or real estate broker. RPL § 440-a, among other provisions, requires that an individual or entity possess a license from the Department to operate as a real estate salesman or broker. RPL § 441(1)(b), as amended by Chapter 183 of the Laws of 2006, effective July 1, 2008, increased from 90 to 120 the required minimum number of hours of course work to obtain a real estate broker's license; RPL § 441(1-A)(d) as amended by Chapter 183 of the Laws of 2006, effective July 1, 2008, increased from 45 to 75 the required minimum number of hours of course work to obtain a real estate salesperson's license.

Effective July 1, 2008, no license may be issued to a real estate broker or salesperson who does not possess the increased number of course work. Prior to this effective date, however, some prospective licensees completed the old 45 hour qualifying course. This rule will afford these licensees with the option of taking a 30 hour remedial course which will result in them obtaining the 75 hours of education required by the recent statutory amendments, rather than requiring these licensees to complete the entire 75 hour educational course. This will protect consumers to ensuring that real estate licensees have adequate education.

Subject: Thirty hour remedial course for real estate brokers and salespeople.

Purpose: To amend current regulations in order to conform said regulations with recent statutory amendments to article 12-A of the Real Property Law.

Text of emergency rule: Section 176.26 is added to 19 NYCRR to read as follows:

176.26 30 Hour Remedial Course

(a) *Applicants for licensure as a real estate broker who successfully completed the 45 hour salesperson qualifying course prior to July 1, 2008 may take a 30 hour remedial course which, if successfully completed, may be used by said applicant in conjunction with the 45 hour salesperson qualifying course towards satisfying the educational requirements for licensure as a real estate broker.*

(b) *The following are the required subjects to be included in the 30 hour remedial course and the required number of hours to be devoted to each such subject:*

*Contract Preparation 1 hour
 Predatory Lending 1 hour
 Pricing Properties 1 hour
 Municipal Agencies 2 hours
 Property Insurance 2 hours
 Taxes and Assessments 3 hours
 Condominiums and Cooperatives 4 hours
 Commercial and Investments Properties 10 hours
 Income Tax Issues in Real Estate Transactions 3 hours
 Mortgage Brokerage 1 hour
 Property Management 2 hours
 Total 30 hours
 Final Exam 2 hours
 TOTAL 32 HOURS*

Section 177.18 of Title 19 NYCRR is amended to read as follows:

177.18 Continuing education credit.

(a) A salesperson may receive continuing education credit for completing any approved broker's course covering the subjects listed in '176.4 of this Title 19.

(b) A salesperson may receive continuing education credit for successfully completing an approved 30 hour qualifying course as described in section 176.26 of this Part.

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 22, 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) 473-6728, e-mail: whitney.clark@dos.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

Real Property Law (RPL) Article 12-A, Real Estate Brokers and Salesmen, prescribes requirements for individuals and business entities to act as a real estate salesperson and/or real estate broker. RPL '440-a, among other provisions, requires that an individual or entity possess a license from the Department to operate as a real estate salesman or broker. RPL '441, Application for license, prescribes the qualifications to be licensed as a real estate broker or real estate salesperson, including satisfactory completion of a real estate course program that has been approved by the Department. RPL '441(1)(b), as amended by Chapter 183 of the Laws of 2006, effective July 1, 2008, increased from 90 to 120 the required minimum number of hours of course work to obtain a real estate broker's license; RPL '441(1-A)(d) as amended by Chapter 183 of the Laws of 2006, effective July 1, 2008, increased from 45 to 75 the required minimum number of hours of course work to obtain a real estate salesperson's license. RPL '442-k(1) authorizes the New York State Real Estate Board to promulgate regulations to administer and effectuate the purposes of Article 12-A of the Real Property Law. RPL '442-k(1) provides that the Secretary of State shall adopt rules to administer the provisions of RPL '441. To fulfill these purposes, the Department of State, in conjunction with the New York State Real Estate Board, has issued rules and regulations which are found at Part 176 of Title 19 NYCRR and is proposing the rule making.

2. Legislative objectives:

Real Property Law, Article 12-A, requires the Department of State to license and regulate real estate brokers and salespeople ("real estate licensees"). One of the purposes of Article 12-A is to ensure that real estate licensees are properly educated and trained. The rule making advances this legislative intent by providing real estate licensees who have taken the old 45-hour salesperson qualifying course with an option of taking a 30-hour remedial course which will result in them obtaining the 75 hours of education required by the recent statutory amendments.

3. Needs and benefits:

The proposed rule making will protect consumers and meet the legislative intent in enacting the amendments to Article 12-A. As a result of the statutory amendments to Article 12-A, the hours of qualifying education required for licensure were increased for real estate brokers (from 90 to 120 hours) and salespersons (from 45 to 75 hours). The Department of State is permitted by Real Property Law section 441(1)(c) to credit the 75 hours of real estate salesperson qualifying education against the 120 hours required for licensure as a real estate broker.

The proposed rule making will create a 30-hour remedial course for those real estate broker applicants who completed the 45 hours of qualifying education prior to July 1, 2008. By successfully completing the 30-hour remedial course, these applicants will possess the full 75 hours of salesperson qualifying education and will be entitled to credit those hours against the 120 hours of qualifying education required for licensure as a real estate broker. This will benefit those applicants seeking to upgrade their license to that of a real estate broker and will protect consumers by ensuring that real estate licensees have adequate education.

4. Costs:

a. Costs to regulated parties:

The rule making will not impose any new costs on real estate licensees other than the cost of taking the 30-hour remedial course. It is anticipated that the 30-hour course will cost licensees approximately \$200.00. This course will not be mandatory and, rather, will be an option for real estate salespeople.

b. Costs to the Department of State:

The rule does not impose any costs to the agency, the state or local government for the implementation and continuation of the rule.

5. Local government mandates:

The rule does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or other special district.

6. Paperwork:

The rule does not impose any new paperwork requirements insofar as prospective licensees are already required to satisfactorily complete qualifying education.

7. Duplication:

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

8. Alternatives:

The Department of State recently proposed a rule making - published in the May 7, 2008 edition of the *State Register*, I.D. No. DOS-19-08-00017-P - to change the qualifying curriculum for real estate salespeople. This proposed rule making is an extension of that proposed rule insofar as the

proposed 30-hour remedial course represents the additional 30 hours that were added to the old 45-hour salesperson qualifying course. In developing the new 75-hour curriculum, which includes the 30-hour course proposed in this rule making, the New York State Real Estate Board formed a subcommittee to prepare the allocation of course hours within that curriculum. The subcommittee met with representatives of the New York State Association of Realtors (NYSAR) and the Real Estate Board of New York (REBNY) to discuss and consider alternative allocations. NYSAR, specifically, recommended a different allocation of course hours within the new syllabus. After due consideration of this, and other alternatives, the subcommittee determined that the proposed course allocation was the superior option and recommended said proposal to the New York State Real Estate Board. After deliberation, the New York State Real Estate Board approved the course allocation reflected in the rule making proposed in the May 7, 2008 *State Register*, which includes the 30-hour remedial course proposed by this rule making. During the public comment period, the Department of State and the New York State Real Estate Board will receive and consider all recommended alternatives. The New York State Real Estate Board is a regulatory board established by Article 12-A of the Real Property Law. The Board is composed of real estate licensees and members of the public. It shares regulatory authority with the Department of State and is authorized to promulgate regulations including those pertaining to the education of real estate licensees.

9. Federal standards:

There are no federal standards regulating the registration of real estate licensees. Consequently, this rule does not exceed any existing federal standard.

10. Compliance schedule:

The 30-hour remedial course will be available on July 1, 2008, the effective date of the statutory amendments. Prospective licensees opting to take this course will therefore be able to take this course as of that date.

Regulatory Flexibility Analysis

1. Effect of rule:

The rule will apply to prospective real estate brokers and salespeople ("real estate licensees") who are applying for licensure pursuant to Article 12-A of the Real Property Law. Chapter 183 of the Laws of 2006, which takes effect on July 1, 2008, increased the education requirement for brokers from 90 to 120 hours and increased the education requirement for salespersons from 45 to 75 hours. The proposed rule making merely creates a 30-hour remedial course for those real estate broker applicants who completed the required 45 hours of qualifying education prior to July 1, 2008, so that these applicants can possess the full 75 hours of salesperson qualifying education. The rule making will not have any foreseeable impact on jobs or employment opportunities for real estate licensees.

The rule does not apply to local governments.

2. Compliance requirements:

Insofar as the existing statute and regulations already require qualifying education for licensure, the proposed rule making will not add any new reporting, record-keeping or other compliance requirements.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

Real estate licensees will not need to rely on any new professional services in order to comply with the rule. Licensees are already required to complete qualifying education pursuant to Article 12-A of the Real Property Law. Insofar as licensees must already attend and complete approved education courses, creating a 30-hour remedial course for real estate salespersons who successfully completed the old 45-hour course will not result in the need to rely on any new professional services. The Department expects existing education providers to begin offering the proposed 30-hour remedial course in accordance with the amended statute and the proposed rule making.

The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

The rule making will result in compliance costs only for those prospective licensees who elect to take the 30-hour remedial course. It is anticipated that the course will cost licensees approximately \$200.00.

The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

Since the rule does not impose any new record keeping requirements on prospective licensees, it will be technologically feasible for these persons to comply with the rule.

6. Minimizing adverse economic impact:

The Department of State has not identified any adverse economic impact of this rule. The rule does not impose any additional reporting or record keeping requirements on real estate licensees and does not require prospective licensees to take any affirmative acts to comply with the rule other than those acts that are already required pursuant to Real Property Law, Article 12-A.

7. Small business and local government participation:

Prior to proposing the rule, the Department discussed the proposal at a public meeting of the New York State Real Estate Board, the minutes of which were posted on the Department's website. The public was given an opportunity to issue comments during the public comment period of the meeting. In addition, the Notice of Proposed Rule Making will be published by the Department of State in the *State Register*. The publication of the rule in the *State Register* will provide notice to local governments and additional notice to small businesses of the proposed rule making. Additional comments will be received and entertained by the Department.

Rural Area Flexibility Analysis

A rural flexibility analysis is not required because this rule does not impose any adverse impact on rural areas, and the rule does not impose any new reporting, record keeping or other compliance requirements on public or private entities in rural areas.

During the 2006 legislative session, a bill was passed to amend sections 440 and 441 of the Real Property Law to, in relevant part, increase the hours of qualifying education required for licensure as a real estate broker (from 90 to 120 hours) and salesperson (from 45 to 75 hours). The Department of State is permitted by Real Property Law section 441(1)(c) to credit the 75 hours of real estate salesperson qualifying education against the 120 hours required for licensure as a real estate broker.

The proposed rule making merely creates a 30 hour remedial course for those real estate broker applicants who completed the 45 hours of qualifying education that was required prior to the statutory amendment. By successfully completing the 30 hour remedial course, these applicants will possess the full 75 hours of salesperson qualifying education and will be entitled to credit those hours against the 120 hours of qualifying education required for licensure as a real estate broker.

Insofar as the existing statute already requires the successful completion of qualifying education for licensure as a real estate broker or salesperson, the proposed rule making will not add any new reporting, record-keeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

A job impact statement is not required insofar as the proposed rule will not have a substantial adverse effect on jobs and employment opportunities for licensed real estate salespersons and brokers.

During the 2006 legislative session, a bill was passed to amend sections 440 and 441 of the Real Property Law to, in relevant part, increase the hours of qualifying education required for licensure as a real estate broker (from 90 to 120 hours) and salesperson (from 45 to 75 hours). The Department of State is permitted by Real Property Law section 441(1)(c) to credit the 75 hours of real estate salesperson qualifying education against the 120 hours required for licensure as a real estate broker.

The proposed rule making merely creates a 30 hour remedial course for those real estate broker applicants who completed the 45 hours of qualifying education that was required prior to the statutory amendment. By successfully completing the 30 hour remedial course, these applicants will possess the full 75 hours of salesperson qualifying education and will be entitled to credit those hours against the 120 hours of qualifying education required for licensure as a real estate broker.

NOTICE OF ADOPTION

Installation of Pool Alarms in Residential and Commercial Swimming Pools

I.D. No. DOS-02-08-00001-A

Filing No. 630

Filing date: June 27, 2008

Effective date: July 16, 2008

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

Action taken: Addition of Part 1228 to Title 19 NYCRR.

Statutory authority: Executive Law, sections 377 and 378

Subject: Installation of pool alarms in residential and commercial swimming pools.

Purpose: To implement Executive Law section 378(14)(b)-(c).

Text of final rule: Title 19 NYCRR is amended by adding a new Part 1228 to read as follows:

Part 1228. Additional Uniform Code Provisions.

Section 1228.1. Additional Uniform Code Provisions.

The provisions set forth in this Part 1228 are part of the New York State Fire Prevention and Building Code (the Uniform Code). The provisions set forth in this Part 1228 are in addition to, and not in limitation of, the provisions set forth in Parts 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, and 1227 of this Title and in the publications referred to in Parts 1220, 1221, 1222, 1223, 1224, 1225, 1226, and 1227 of this Title.

Section 1228.2. Swimming pool alarms.

(a) Purpose. This section is intended to implement the provisions of Executive Law section 378(14)(b), as added by Chapter 450 of the Laws of 2006, and Executive Law section 378(14)(c), as added by Chapter 75 of the Laws of 2007.

(b) Definitions. For the purposes of this section, the following words and terms shall have the following meanings:

(1) The word approved means approved by the code enforcement official responsible for enforcement and administration of the Uniform Code as complying with and satisfying the purposes of this section.

(2) The term commercial swimming pool means any swimming pool (as defined in paragraph (4) of this subdivision) that is not a residential swimming pool (as defined in paragraph (3) of this subdivision).

(3) The term residential swimming pool means a swimming pool (as defined in paragraph (4) of this subdivision) which is situated on the premises of a detached one- or two-family dwelling not more than three stories in height with separate means of egress; a multiple single-family dwelling (townhouse) not more than three stories in height with separate means of egress; a one-family dwelling converted to a bed and breakfast; a community residence for 14 or fewer mentally disabled persons, operated by or subject to licensure by the Office of Mental Health or the Office of Mental Retardation and Developmental Disabilities; a one- or two-family dwelling operated for the purpose of providing care to more than two but not more than eight hospice patients, created pursuant to Article 40 of the Public Health Law, and defined as a hospice residence in section 4002 of said Law; a manufactured home; a mobile home; or a factory manufactured dwelling unit.

(4) The term swimming pool means any structure, basin, chamber or tank which is intended for swimming, diving, recreational bathing or wading and which contains, is designed to contain, or is capable of containing water more 24 inches (610 mm) deep at any point. This includes in-ground, above-ground and on-ground pools; indoor pools; hot tubs; spas; and fixed-in-place wading pools.

(5) The term substantial damage means damage of any origin sustained by a swimming pool whereby the cost of restoring the swimming pool to its before damaged condition would equal or exceed 50 percent of the market value of the swimming pool before the damage occurred.

(6) The term substantial modification means any repair reconstruction, rehabilitation, addition, or improvement of a swimming pool, the cost of which equals or exceeds 50 percent of the market value of the swimming pool before the repair, rehabilitation, addition, or improvement is started. If a swimming pool has sustained substantial damage, any repairs are considered to be a substantial modification regardless of the actual repair work performed.

(c) Pool alarms. Except as otherwise provided in subdivision (e) of this section, each residential swimming pool installed, constructed or substantially modified after December 14, 2006 and each commercial swimming pool installed, constructed or substantially modified after December 14, 2006 shall be equipped with an approved pool alarm which:

(1) is capable of detecting a child entering the water and giving an audible alarm when it detects a child entering the water;

(2) is audible poolside and at another location on the premises where the swimming pool is located;

(3) is installed, used and maintained in accordance with the manufacturer's instructions;

(4) is classified by Underwriters Laboratory, Inc. (or other approved independent testing laboratory) to:

(i) reference standard ASTM F2208, entitled Standard Specification for Pool Alarms, as adopted in 2002 and editorially corrected in June 2005, published by ASTM International, 100 Barr Harbor Drive, West Conshohocken, PA 19428, or

(ii) reference standard ASTM F2208, entitled Standard Specification for Pool Alarms, as adopted in 2007, published by ASTM International, 100 Barr Harbor Drive, West Conshohocken, PA 19428; and

(5) is not an alarm device which is located on person(s) or which is dependent on device(s) located on person(s) for its proper operation.

(d) Multiple pool alarms. A pool alarm installed pursuant to subdivision (c) of this section must be capable of detecting entry into the water at any point on the surface of the swimming pool. If necessary to provide detection capability at every point on the surface of the swimming pool, more than one pool alarm shall be installed.

(e) Exemptions.

(1) A hot tub or spa equipped with a safety cover classified by Underwriters Laboratory, Inc. (or other approved independent testing laboratory) to reference standard ASTM F1346 (2003), entitled Standard Performance Specification for Safety Covers and Labeling Requirements for All Covers for Swimming Pools, Spas and Hot Tubs, published by ASTM International, 100 Barr Harbor Drive, West Conshohocken, PA 19428, shall be exempt from the requirements of subdivisions (c) and (d) of this section.

(2) Any swimming pool (other than a hot tub or spa) equipped with an automatic power safety cover classified by Underwriters Laboratory, Inc. (or other approved independent testing laboratory) to reference standard ASTM F1346 (2003), entitled Standard Performance Specification for Safety Covers and Labeling Requirements for All Covers for Swimming Pools, Spas and Hot Tubs, published by ASTM International, 100 Barr Harbor Drive, West Conshohocken, PA 19428, shall be exempt from the requirements of subdivisions (c) and (d) of this section.

Section 1228.3. Carbon monoxide alarms.

Section 1228.3. Carbon monoxide alarms.

Former section 1228.3 was repealed by its own terms on January 1, 2008. The provisions relating to carbon monoxide alarms contained in Parts 1220 to 1227, and in the publications incorporated by reference in Parts 1220 to 1227, are effective on and after January 1, 2008.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 1228.1, 1228.2(a) and 1228.3.

Text of rule and any required statements and analyses may be obtained from: Joseph Ball, Department of State, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-6740, e-mail: joseph.ball@dos.state.ny.us

Revised Regulatory Impact Statement

1. STATUTORY AUTHORITY.

Subdivision 1 of Executive Law section 377 authorizes the State Fire Prevention and Building Code Council to periodically amend the provisions of the New York State Uniform Fire Prevention and Building Code ("Uniform Code").

Subdivision 1 of Executive Law section 378 directs that the Uniform Code shall address standards for safety and sanitary conditions.

Paragraph (b) of subdivision (14) of Executive Law section 378 directs that the Uniform Code shall provide that residential and commercial swimming pools constructed or substantially modified after December 14, 2006 shall be equipped with an acceptable pool alarm capable of detecting a child entering the water and of giving an audible alarm. This rule making adds provisions that require the installation of pool alarms.

Paragraph (c) of subdivision (14) of Executive Law section 378 provides that hot tubs and spas equipped with safety covers and other pools equipped with automatic power safety covers shall not be required to be equipped with pool alarms. This rule provides for this exception.

NOTE: This rule was originally proposed by Notice of Emergency Adoption and Proposed Rule Making filed on December 19, 2007, and published in the State Register on January 9, 2008. Since the date of filing of that Notice, (1) a separate rule making which amended the State Uniform Fire Prevention and Building Code (the Uniform Code) in its entirety became effective, and (2) provisions in this proposed rule making relating to carbon monoxide alarms expired by their own terms, and were replaced by corresponding provisions in the separate rule making which amended the Uniform Code in its entirety. As a result, the following non-substantial changes were made to this proposed rule making: (1) transitional provisions which related to the period that expired when the separate rule making that amended the Uniform Code in its entirety were removed from this proposed rule making, because the transition period had expired and the transitional provisions were no longer necessary, and (2) the provisions relating to carbon monoxide alarms were removed from this proposed rule making, because they had expired by their own terms and had been replaced by the corresponding provisions in the separate rule making that amended the Uniform Code in its entirety.

2. LEGISLATIVE OBJECTIVES.

The memorandum accompanying the bill which added paragraph (b) to subdivision (14) of Executive Law section 378 included the following justification:

“According to the National Center for Injury and Control (NCIPC), drowning is the second leading cause of unintentional injury-related deaths in children between the ages of one and fourteen nationwide, and the third leading cause of injury-related deaths of children in New York. NCIPC data also shows [sic] that twenty-six infants and children under fourteen drowned in New York State, in 2002 alone. Local laws often require barriers for residential pools, but technological advances have produced several different types of pool alarms designed to sound a warning if a child falls into the water. When used in conjunction with access barriers, these alarms provide greater protection against accidental pool drownings.”

The Legislative objective sought to be achieved by pool alarm provisions added by this rule is a reduction in the number of accidental drownings in swimming pools in this State.

3. NEEDS AND BENEFITS.

This rule making amends the Uniform Code by adding new provisions that require residential and commercial swimming pools installed, constructed or substantially modified after December 14, 2006 be equipped with approved pool alarms. By requiring the use of a device that provides rapid and automatic detection of an unintentional, unsupervised or accidental entry of a child into a pool, this rule should provide the benefit intended by the Legislature: a reduction in the number of accidental drownings. This rule provides that the required pool alarms must be capable of detecting a child entering the water; must be capable of giving an audible alarm; must be audible poolside and at another location on the premises where the swimming pool is located; must be installed, used and maintained in accordance with the manufacturer's instructions; and must be classified by Underwriter's Laboratory, Inc. (or other approved independent testing laboratory) to reference standard ASTM F2208, entitled "Standard Specification for Pool Alarms."

A hot tub or spa that is equipped with a safety cover that complies with ASTM F1346 (2003), entitled "Standard Performance Specification for Safety Covers and Labeling Requirements for All Covers for Swimming Pools, Spas and Hot Tubs," published by ASTM International, will not be required to be equipped with a pool alarm. A swimming pool (other than a hot tub or spa) equipped with an automatic power safety cover that complies with ASTM F1346 will not be required to be equipped with a pool alarm. Section 1.1 of ASTM F1346 (2003) provides that "This specification establishes requirements for safety covers for swimming pools, spas, hot tubs, and wading pools (hereinafter referred to as pools, unless otherwise specified). When correctly installed and used in accordance with the manufacturer's instructions, this specification is intended to reduce the risk of drowning by inhibiting the access of children under five years of age to the water." Therefore, these exceptions to the pool alarm requirement, which reflect the provisions of new paragraph (c) of Executive Law section 378(14), allow, in the stated applications, the use of a cover designed to inhibit access to the water in lieu of an alarm designed to detect actual entry into the water.

4. COSTS.

The initial capital costs of complying with the pool alarm provisions added by this rule will include the cost of purchasing and installing the pool alarm. The cost of a typical surface wave sensor or subsurface disturbance sensor pool alarm suitable for most swimming pools (i.e., for regularly shaped pools up to 16' x 32') is estimated to be \$150 to \$200. Larger pools or irregularly shaped pools may require more than one such alarm. In the case of a large, complex shaped pool, a more sophisticated system may be required. A member of a hospitality and tourism association has reported that it cost \$4,000 to install a pool alarm in a 20' x 40' rectangular pool. It is estimated that a self-setting pool alarm system using invisible sonar technology and capable of protecting a large, complex shaped swimming pool would cost between \$5,000 and \$8,000. A pool alarm system for an Olympic-size pool may cost between \$35,000 and \$40,000. The annual costs of complying with the rule will include the costs of operating and maintaining the alarm, which are anticipated to be modest.

In the case of a hot tub or spa, the initial capital costs of complying with the rule will include the cost of purchasing and installing the safety cover. The Department of State estimates that the cost of a safety cover for a typical hot tub or spa is approximately \$450. The annual costs of complying with the rule will include the costs of operating and maintaining the safety cover, which are anticipated to be modest.

While this rule provides that a pool (other than a hot tub or spa) equipped with an automatic power safety cover need not be equipped with

a pool alarm, this rule does not require the installation of an automatic power safety cover: the owner of a pool (other than a hot tub or spa) may comply with this rule by installing either a pool alarm or an automatic power safety cover. There are no costs to the Department of State for the implementation of this rule. The Department is not required to develop any additional regulations or develop any programs to implement this rule.

There are no costs to the State of New York or to local governments for the implementation of this rule, except as follows:

First, if the State or any local government constructs, installs or substantially modifies a swimming pool, the State or such local government, as the case may be, will be required to install a pool alarm.

Second, since this rule adds provisions to the Uniform Code, the authorities responsible for administering and enforcing the Uniform Code will have additional items to verify in the process of reviewing building permit applications, conducting construction inspections, and (where applicable) conducting periodic fire safety and property maintenance inspections. However, the need to verify the installation of required pool alarms will not have a significant impact on the permitting process or inspection process.

5. PAPERWORK.

This rule will not impose any new reporting requirements. No new forms or other paperwork will be required as a result of this rule.

6. LOCAL GOVERNMENT MANDATES.

This rule will not impose any new program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district, except as follows:

First, any county, city, town, village, school district, fire district or other special district that owns or operates a swimming pool that is installed, constructed or substantially modified after December 14, 2006 will be required to comply with the pool alarm provisions added by this rule.

Second, cities, towns and villages (and sometimes counties) are charged by Executive Law section 381 with the responsibility of administering and enforcing the Uniform Code; since this rule adds provisions to the Uniform Code, the aforementioned local governments will be responsible for administering and enforcing the requirements of the rule along with all other provisions of the Uniform Code.

The rule does not otherwise impose any new program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district.

7. DUPLICATION.

The rule does not duplicate any existing Federal or State requirement.

8. ALTERNATIVES.

New paragraph (b) of subdivision (14) of section 378 of the Executive Law requires that the Uniform Code provide that any residential or commercial swimming pool constructed or substantially modified after December 14, 2006 (the effective date of said paragraph) shall be equipped with an acceptable pool alarm capable of detecting a child entering the water and of giving an audible alarm.

While the use of personal immersion alarms may provide supplemental protection in certain situations, such devices would not protect a child who was not wearing the device when he or she entered the water. Therefore, this rule provides that an alarm device which is located on person(s) or which is dependent on device(s) located on person(s) for its proper operation will not satisfy the requirements of the new provisions.

No other significant alternatives to the pool alarm provisions to be added by this rule were considered, since it appears that no such alternative would satisfy the specific directive of the Legislature as set forth in Executive Law section 378(14)(b)-(c).

9. FEDERAL STANDARDS.

There are no standards of the Federal Government which address the subject matter of the rule.

10. COMPLIANCE SCHEDULE.

Regulated persons will be able to achieve compliance with the pool alarm provisions added by this rule in the normal course of operations, either as part of the installation or construction of a new swimming pool or the substantial modification of an existing swimming pool.

Revised Regulatory Flexibility Analysis

1. EFFECT OF RULE:

This rule was originally proposed by Notice of Emergency Adoption and Proposed Rule Making filed on December 19, 2007, and published in the State Register on January 9, 2008. Since the date of filing of that Notice, (1) a separate rule making which amended the State Uniform Fire Prevention and Building Code (the Uniform Code) in its entirety became effective, and (2) provisions in this proposed rule making relating to carbon monoxide alarms expired by their own terms, and were replaced by

corresponding provisions in the separate rule making which amended the Uniform Code in its entirety. As a result, the following non-substantial changes were made to this proposed rule making: (1) transitional provisions which related to the period that expired when the separate rule making that amended the Uniform Code in its entirety were removed from this proposed rule making, because the transition period had expired and the transitional provisions were no longer necessary, and (2) the provisions relating to carbon monoxide alarms were removed from this proposed rule making, because they had expired by their own terms and had been replaced by the corresponding provisions in the separate rule making that amended the Uniform Code in its entirety.

The new section 1228.2 which is added to Title 19 NYCRR by this rule will apply to any small business and any local government that owns or operates a swimming pool that is installed, constructed or substantially modified after December 14, 2006. The Department of State has not been able to estimate the number of small businesses and local governments that own or operate swimming pools, but it is believed that a majority of the non-residential swimming pools in this State are owned or operated by small businesses or local governments. Small businesses that install construct or modify swimming pools and small businesses that sell swimming pool alarms will also be affected by this rule.

Since this rule adds provisions to the Uniform Fire Prevention and Building Code (the "Uniform Code"), each local government that is responsible for administering and enforcing the Uniform Code will be affected by this rule. The Department of State estimate that approximately 1,604 local governments (mostly cities, towns and villages, as well as several counties) are responsible for administering and enforcing the Uniform Code.

2. COMPLIANCE REQUIREMENTS:

No reporting or recordkeeping requirements are imposed upon regulated parties by the rule. Small businesses and local governments subject to the rule will be required to install, use and maintain swimming pool alarms and carbon monoxide alarms in accordance with the rule's provisions. In cases where the installation, construction or substantial modification of a swimming pool involves the issuance of a building permit, the local government responsible for administering and enforcing the Uniform Code will be required to consider the pool alarm requirements of this rule when reviewing plans and inspecting work.

3. PROFESSIONAL SERVICES:

No professional services will be required to comply with the rule.

4. COMPLIANCE COSTS:

The initial capital costs of complying with the rule will include the cost of purchasing and installing the pool alarm. The cost of a typical surface wave sensor or subsurface disturbance sensor pool alarm suitable for most swimming pools (i.e., for regularly shaped pools up to 16' x 32') is estimated to be \$150 to \$200.

Larger pools or irregularly shaped pools may require more than one such alarm. In the case of large, complex shaped pools, a more sophisticated system may be required. A member of a hospitality and tourism association has reported that it cost \$4,000 to install a pool alarm in a 20' x 40' rectangular pool. It is estimated that a self-setting pool alarm system using invisible sonar technology and capable of protecting a large, complex shaped swimming pool would cost between \$5,000 and \$8,000. A pool alarm system for an Olympic-size pool may cost between \$35,000 and \$40,000. The annual costs of complying with the rule will include the costs of operating and maintaining the alarm, which are anticipated to be modest.

In the case of a hot tub or spa, the initial capital costs of complying with the rule will include the cost of purchasing and installing the safety cover. The Department of State estimates the cost of a safety cover for a typical hot tub or spa is approximately \$450. The annual costs of complying with the rule will include the costs of maintaining the safety cover, which are anticipated to be modest.

Any variations in the initial capital cost of complying with the rule or in the annual cost of complying with the rule are likely to be attributable to variations in the size and configuration of the swimming pools to be protected, and not to the type or size of the small businesses and local governments that own the pools. To the extent that larger businesses and larger local governments may tend to own larger swimming pools, or more than one swimming pool, the total costs of compliance would be higher for larger entities and larger local governments.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

It is economically and technologically feasible for regulated parties to comply with the rule. Except in the case of very large or complex shaped swimming pools, which may require a more sophisticated alarm system,

this rule imposes no substantial capital expenditures. No new technology need be developed for compliance with this rule.

6. MINIMIZING ADVERSE IMPACT:

The rule minimizes any potential adverse economic impact on regulated parties (including small businesses or local governments) by allowing several types of pool alarms on the market to be used. In the case of hot tubs and spas that fall within the Uniform Code's definition of "swimming pool," the rule minimizes any potential adverse impact by providing that a hot tub or spa that is equipped with a safety cover need not be equipped with a pool alarm. Further, the rule provides that other swimming pools equipped with automatic power safety covers need not be equipped with a pool alarm.

The applicable statute (Executive Law section 378(14)(b)-(c)) requires that this rule apply to all swimming pools constructed or substantially modified after December 14, 2006 (except for hot tubs and spas equipped with safety covers and other pools equipped with automatic power safety covers). The statute does not authorize the establishment of differing compliance requirements or timetables with respect to swimming pools owned or operated by small businesses or local governments. Hot tubs and spas equipped with safety covers and other pools equipped with automatic power safety covers are exempt from this rule, as required by Executive Law section 378(14)(c); providing other exemptions from coverage by the rule was not considered because such exemptions are not authorized by Executive Law section 378(14)(b)-(c) and would endanger public safety.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

The Department of State notified interested parties throughout the State of the adoption of the previous emergency rules that were similar to this rule by means of notices posted on the Department's website and notices published in Building New York, a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and which is currently distributed to approximately 5,500 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry. The Department of State will publish a notice of the adoption of this rule in a future edition of Building New York. In addition, the Department of State will post a notice of the adoption of this rule, and the full text of this rule, on the Department's website.

Revised Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

This rule was originally proposed by Notice of Emergency Adoption and Proposed Rule Making filed on December 19, 2007, and published in the State Register on January 9, 2008. Since the date of filing of that Notice, (1) a separate rule making which amended the State Uniform Fire Prevention and Building Code (the Uniform Code) in its entirety became effective, and (2) provisions in this proposed rule making relating to carbon monoxide alarms expired by their own terms, and were replaced by corresponding provisions in the separate rule making which amended the Uniform Code in its entirety. As a result, the following non-substantial changes were made to this proposed rule making: (1) transitional provisions which related to the period that expired when the separate rule making that amended the Uniform Code in its entirety were removed from this proposed rule making, because the transition period had expired and the transitional provisions were no longer necessary, and (2) the provisions relating to carbon monoxide alarms were removed from this proposed rule making, because they had expired by their own terms and had been replaced by the corresponding provisions in the separate rule making that amended the Uniform Code in its entirety.

This rule implements the provisions of paragraphs (b) and (c) of subdivision (14) of section 378 of the Executive Law, as added by Chapter 450 of the Laws of 2006 and Chapter 75 of the Laws of 2007, respectively, by adding provisions to the Uniform Fire Prevention and Building Code ("Uniform Code") requiring that a pool alarm be installed in any residential or commercial swimming pool (other than a hot tub or spa equipped with a safety cover or other pool equipped with an automatic power safety cover) that is installed, constructed or substantially modified after December 14, 2006. Since the Uniform Code applies in all areas of the State (other than New York City), this rule will apply in all rural areas of the State.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS.

The rule will not impose any reporting or recordkeeping requirements. The rule will impose the following compliance requirements:

All residential and all commercial swimming pools that are installed, constructed or substantially modified after December 14, 2006 will be

required to be equipped with an acceptable pool alarm that is capable of detecting a child entering the water and of giving an audible alarm, and such alarms will be required to be installed, used and maintained in accordance with the manufacturer's instructions. (Hot tubs and spas equipped with safety covers and other pools equipped with automatic power safety covers will not be required to be equipped with pool alarms.) No professional services are likely to be needed in a rural area in order to comply with such requirements.

3. COMPLIANCE COSTS.

The initial capital costs of complying with the rule will include the cost of purchasing and installing the pool alarm. The cost of a typical surface wave sensor or subsurface disturbance sensor pool alarm suitable for most swimming pools (i.e., for regularly shaped pools up to 16' x 32') is estimated to be \$150 to \$200.

Larger pools or irregularly shaped pools may require more than one such alarm. In the case of a large, complex shaped pool, a more sophisticated system may be required. A member of a hospitality and tourism association has reported that it cost \$4,000 to install a pool alarm in a 20' x 40' rectangular pool. It is estimated that a self-setting pool alarm system using invisible sonar technology and capable of protecting a large, complex shaped swimming pool would cost between \$5,000 and \$8,000. A pool alarm system for an Olympic-size pool may cost between \$35,000 and \$40,000. The annual costs of complying with the rule will include the costs of operating and maintaining the alarm, which are anticipated to be modest.

A swimming pool (other than a hot tub or spa) equipped with an automatic power safety cover will not be required to be equipped with a pool alarm. However, this rule does not require the installation of an automatic power safety cover.

In the case of a hot tub or spa, the initial capital costs of complying with the rule will include the cost of purchasing and installing a safety cover. The Department of State estimates that the cost of a safety cover for a typical hot tub or spa is approximately \$450. The annual costs of complying with the rule will include the costs of maintaining the safety cover, which are anticipated to be modest.

Any variation in initial capital costs of complying and/or annual costs of complying with this rule for different types of public and private entities in rural areas will be attributable to the size and configuration of the swimming pools owned or operated by such entities, and not to nature or type of such entities or to the location of such entities in rural areas.

4. MINIMIZING ADVERSE IMPACT.

Executive Law section 378(14)(b) makes no distinction between swimming pools located in rural areas and swimming pools located in non-rural areas. However, the economic impact of this rule in rural areas will be no greater than the economic impact of this rule in non rural areas, and the ability of individuals or public or private entities located in rural areas to comply with the requirements of this rule should be no less than the ability of individuals or public or private entities located in non-rural areas. Executive Law section 378(14)(b)-(c) requires that this rule apply to all swimming pools (other than hot tubs and spas equipped with safety covers and other pools equipped with automatic power safety covers) constructed or substantially modified after the effective date of section 378(14)(b), which is December 14, 2006. The statute does not authorize the establishment of differing compliance requirements or timetables in rural areas. Providing exemptions from coverage by the rule was not considered because such exemptions are not authorized by Executive Law section 378(14)(b)-(c) and would endanger public safety.

5. RURAL AREA PARTICIPATION.

The Department of State notified interested parties throughout the State of the adoption of the previous emergency rules that were similar to this rule by means of notices posted on the Department's website and notices published in *Building New York*, a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and which is currently distributed to approximately 5,500 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry. The Department of State will publish a notice of the adoption of this rule in a future edition of *Building New York*. In addition, the Department of State will post a notice of the adoption of this rule, and the full text of this rule, on the Department's website.

Job Impact Statement

The Department of State has concluded after reviewing the nature and purpose of the rule that it will not have a "substantial adverse impact on jobs and employment opportunities" (as that term is defined in section 201-a of the State Administrative Procedures Act) in New York.

This rule was originally proposed by Notice of Emergency Adoption and Proposed Rule Making filed on December 19, 2007, and published in the State Register on January 9, 2008. Since the date of filing of that Notice, (1) a separate rule making which amended the State Uniform Fire Prevention and Building Code (the Uniform Code) in its entirety became effective, and (2) provisions in this proposed rule making relating to carbon monoxide alarms expired by their own terms, and were replaced by corresponding provisions in the separate rule making which amended the Uniform Code in its entirety. As a result, the following non-substantial changes were made to this proposed rule making: (1) transitional provisions which related to the period that expired when the separate rule making that amended the Uniform Code in its entirety were removed from this proposed rule making, because the transition period had expired and the transitional provisions were no longer necessary, and (2) the provisions relating to carbon monoxide alarms were removed from this proposed rule making, because they had expired by their own terms and had been replaced by the corresponding provisions in the separate rule making that amended the Uniform Code in its entirety.

The rule adds a new Part 1228 to Title 19 NYCRR. Part 1228 adds provisions to the Uniform Fire Prevention and Building Code ("Uniform Code") which require that residential and commercial swimming pools installed, constructed or substantially modified after December 14, 2006 be equipped with a pool alarm that is capable of detecting a child entering the water and giving an audible alarm. The pool alarms must be installed, used and maintained in conformance with the manufacturer's instructions. These provisions are added to satisfy the requirements of paragraphs (b) and (c) of subdivision (14) of section 378 of the Executive Law.

Pool alarms that satisfy the requirements of this rule are currently available. The cost of a typical surface wave sensor or subsurface disturbance sensor pool alarm suitable for most swimming pools (i.e., for regularly shaped pools up to 16' x 32') is estimated to be \$150 to \$200. Larger pools or irregularly shaped pools may require more than one such alarm. The cost of providing the appropriate surface wave sensor or subsurface disturbance sensor pool alarm(s) is considered to be modest, particularly when considered in relation to the cost of the typical swimming pool. It is anticipated that requiring pool alarms will have no significant adverse impact on jobs or employment opportunities in businesses that manufacture, install or construct the types of swimming pools that can be protected by such surface wave sensor or subsurface disturbance sensor pool alarm(s). It is also anticipated that requiring pool alarms may have a positive impact on employment opportunities in businesses that sell, install and service pool alarms.

In the case of a large, complex shaped swimming pool, a more sophisticated system may be required. A member of a hospitality and tourism association has reported that it cost \$4,000 to install a pool alarm in a 20' x 40' rectangular pool. At least one manufacturer produces a pool alarm system, using sonar technology, which is claimed to be suitable for pools of virtually any size or shape. The cost of such a system is estimated to be between \$5,000 and \$8,000. A sonar-based pool alarm system for an Olympic-size pool may cost between \$35,000 and \$40,000. In these cases, the cost of providing the appropriate pool alarm system may add between 5% and 10% to the cost of the pool to be protected. This may have some negative impact on the segment of the swimming pool industry that constructs large, complex shaped swimming pools that require the more expensive sonar pool alarm systems. However, based on information provided on the International Aquatic Foundation website (http://www.iafh2o.org/IAF_Statistics.asp), of the estimated 8,349,000 swimming pools in the United States, only 270,000, or less than 3.25%, are "commercial" swimming pools. Based on this information, it is estimated that less than 3.25% of swimming pools that will be installed, constructed or substantially modified after December 14, 2006 will be "commercial" swimming pools. It is also anticipated that many such "commercial" swimming pools will be of a size and shape that can be protected by the less expensive surface wave sensor or subsurface disturbance sensor pool alarms mentioned above and, accordingly, it is estimated that the percentage of new swimming pools that will require the more expensive sonar pool alarm systems will be much less than 3.25%. Therefore, it is anticipated that this rule will not have a substantial adverse impact on jobs and employment opportunities.

Hot tubs and spas equipped with safety covers and other pools equipped with automatic power safety covers are exempted from the pool alarm requirement by this rule.

Assessment of Public Comment

The period for submission of comments regarding this proposed rule making expired on March 18, 2008. The Department of State received

three written submissions, which contained a total of seven comments. A public hearing was held on February 26, 2008. The representative of one party that made a written submission appeared at the public hearing, and summarized that written submission. No other comments were received at the public hearing.

Comment 1: "Confusion arises regarding situations for many of the pools around the state when an owner of a pool attempts to comply with the regulation as currently written. For example, in many hotels the pool is in its own room with a locked door. The door may be unlocked only by the key cards issued to guests of the hotel. These pools are often closed to guests for certain hours. Therefore, is a pool alarm required when other circumstances are such that the pool access is restricted in this way?"

Response to Comment 1: No change was made in response to this comment. Executive Law section 378(14)(b) provides that the Uniform Code must include provisions requiring pool alarms in all residential and commercial swimming pools installed or substantially modified after December 14, 2006. The statute does not provide for exceptions for pools with restricted access. Indeed, the Legislative history indicates that the pool alarms are intended to provide a level of protection in addition to that provided by pool barriers. See, for example, the memorandum accompanying the bill which added paragraph (b) to subdivision (14) of Executive Law section 378, which included the following justification: "According to the National Center for Injury and Control (NCIPC), drowning is the second leading cause of unintentional injury-related deaths in children between the ages of one and fourteen nation wide, and the third leading cause of injury-related deaths of children in New York. NCIPC data also shows [sic] that twenty-six infants and children under fourteen drowned in New York State, in 2002 alone. Local laws often require barriers for residential pools, but technological advances have produced several different types of pool alarms designed to sound a warning if a child falls into the water. When used in conjunction with access barriers, these alarms provide greater protection against accidental pool drownings."

Comment 2: "The pool alarms go off when someone enters a pool. Normal use of a pool involves people entering the pool. Therefore, when people are using the pool, is the alarm meant to be turned off?"

Response to Comment 2: No change was made in response to this comment. The rule provides that pools alarms are to be "installed, used and maintained in accordance with the manufacturer's instructions." Manufacturer's instructions will typically indicate that the alarm is to be turned off, or switched to a "standby" mode, or otherwise set not to sound an alarm, when the pool is actually in use.

Comment 3: "The regulations cite outside standards for the alarms. However, the average pool owner, even the sophisticated pool owner, is not necessarily fully attentive to the nuances of the standards of the organization that the State has relied upon. Code enforcement officers are versed in construction guidelines and fire codes, yet pools are a new jurisdiction for them. Pool installers are in a position to have expertise, yet may also benefit from lack of expertise in their customers. We are left with uncertainty as to the appropriate expert to rely upon in these matters."

Response to Comment 3: No change was made in response to this comment. The rule requires use of a pool alarm which is classified by Underwriters Laboratory, Inc. (or other approved independent testing laboratory) to reference standard ASTM F2208, entitled "Standard Specification for Pool Alarms" (either the 2002 edition or the 2007 edition). A pool owner, pool installer, or code enforcement officer is not required to know the details of the ASTM F2208 reference standard, or to test the pool alarm for compliance with ASTM F2208. A pool owner, pool installer or code enforcement officer may rely upon the certification of Underwriters Laboratory, Inc., or of any other approved independent testing laboratory, that the alarm complies with ASTM F2208.

Comment 4: "(P)ool owners are accustomed to working with the Department of Health on the regulation of their pools. It is the Department of Health that has promulgated numerous regulations affecting swimming pools such as safety requirements and chemical regimens. Therefore, the Department of Health has developed an expertise in this area over the years. As such, it is confusing to . . . have a new agency regulating one aspect of pool safety."

Response to Comment 4: No change was made in response to this comment. Executive Law section 378(14) provides that the Uniform Code must include a number of provisions relating to swimming pools, including, but not limited to, the provisions requiring the use of pool alarms. The Uniform Code is promulgated by the State Fire Prevention and Building Code Council, and not by the Department of Health. The Department of State has taken steps to inform the public about the pool-related provisions in the Uniform Code. See, for example, the publication entitled "New York

State Department of State Swimming Pool Rules and Regulations found in the Uniform Fire Prevention and Building Code" which is posted on the Department of State's website at <http://www.dos.state.ny.us/code/pools.htm>.

Comment 5: Comment was received indicating that the expected costs of installing a pool alarm, as published in the Regulatory Impact Statement and other documents filed with the emergency rule makings, "have proven inaccurate for our membership." The comment referred to the materials in the New York State Register which quote the cost of pool alarms to be an estimated \$150 to \$200 for "regularly shaped pools up to 16 feet by 32 feet." The comment indicates that "(o)ne of our members in particular owns a pool that is 20 feet by 40 feet, rectangular. This pool is just 25% larger than the pool cited as having a pool alarm cost of \$150 to \$200. However, the pool alarm for this pool cost 2000% more than the Department's estimation; the pool alarm cost \$4000. This is an increase of \$100 for every single square foot a pool is larger than the Department's 'regular size pool', and this is when the pool is a regular rectangle. This vast increase is not one that would be predicted from review of the published materials provided with the emergency regulation in the Register. . . Therefore, it is of our opinion that the Department may want to consider additional research for either average pool sizes throughout the state, or of actual pool alarm costs throughout the state."

Response to Comment 5: No change to the rule was made in response to this comment. The Regulatory Impact Statement and other documents filed in connection with prior emergency rule makings and with this proposed rule making indicate that the estimated cost of pool alarms "for regularly shaped pools up to 16 feet by 32 feet" is \$150 to \$200; however, those documents also included the following information: "Larger pools or irregularly shaped pools may require more than one such alarm. In the case of a large, complex shaped pool, a more sophisticated system may be required. It is estimated that a self-setting pool alarm system using invisible sonar technology and capable of protecting a large, complex shaped swimming pool would cost between \$5,000 and \$8,000. A pool alarm system for an Olympic-size pool may cost between \$35,000 and \$40,000." The Department of State has been advised that the pool alarm referred to in this comment uses the sonar technology, and includes a number of optional features. In addition, a review of manufacturers' and retailers' websites accessed by the Department of State on April 10, 2008 confirms that at least three manufacturers of pool alarms in the \$150 to \$200 price range state that their products work in pools up to 16' x 32', and at least one of those manufacturers states that its product works in pools up to 20' x 40'.

While no change to the rule is made in response to this comment, the Regulatory Impact Statement and other documents to be filed in connection with this rule making will be revised to reflect the information provided in this comment.

Comment 6: Comment was received expressing concern with the requirement, in section 1228.2(c)(2), that the pool alarm be audible poolside and at another location on the premises where the swimming pool is located, indicating that ". . . on commercial pools larger than 800 square feet, we are aware of only one alarm that meets the regulatory standard for remote audible sound capability, appearing to make this section of the regulation proprietary."

Response to Comment 6: No change was made in response to this comment. Based on a follow up telephone call to the party submitting this comment, it appears that only one manufacturer produces an alarm suitable for use on pools 800 square feet and larger. This was confirmed in a telephone conversation with that manufacturer. Therefore, it does not appear that there are multiple manufacturers that make alarms suitable for use in the larger pools, and that only one of those manufacturers produces an alarm that is audible at a remote location; rather, it appears that the alarm produced by the one and only manufacturer that produces an alarm suitable for use in larger pools is audible poolside and at a remote location. Further, the performance standards set forth in the reference standard cited in the rule (ASTM F2208, "Standard Specification for Pool Alarms") provide that a pool alarm must sound both at poolside and inside any adjacent residence or building of occupancy via a remote receiver. It is likely that any manufacturer that begins to produce alarms suitable for use in larger pools in the future will include a remote sounding capability, and it is unlikely that adding such capability to any new alarm model will add significantly to the price of such a model (which, as noted above, is likely to be on the order of several thousand dollars).

Comment 7: Comment was received indicating that in the case of a commercial swimming pool, the only time a pool alarm can be used is "when the pool is NOT in operation, and usually closed." The comment also indicated that typically, when a commercial swimming pool is closed,

especially during non-business hours, there may not be anyone on the premises to hear the alarm. The party submitting this comment suggests that the requirement that the alarm be audible at another location on the premises where the swimming pool is located be limited to residential pools only.

Response to Comment 7: No change was made in response to this comment. While it is true that an intruder may enter a pool at a time when the property where a pool is located is otherwise vacant, it is also true that an intruder could enter a pool at a time when no one else is located at or near the pool, but someone is present elsewhere on the property. Requiring the alarm to be audible poolside and at another location increases the chance that someone will hear the alarm, and is consistent with the provisions of ASTM F2208 ("Standard Specification for Pool Alarms").

NOTICE OF ADOPTION

Qualifying Experience and Education for Real Estate Brokers and Salespeople

I.D. No. DOS-19-08-00017-A

Filing No. 626

Filing date: June 25, 2008

Effective date: July 16, 2008

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

Action taken: Amendment of sections 176.3, 176.4, 176.11, 176.15, 176.16, 176.20, 177.1 and 177.14 and addition of sections 176.22-176.25 to Title 19 NYCRR.

Statutory authority: Real Property Law, section 442-k

Subject: Qualifying experience and education for real estate brokers and salespeople.

Purpose: To amend current regulations in order to conform said regulations with recent statutory amendments to article 12-A of the Real Property Law.

Text or summary was published in the notice of proposed rule making, I.D. No. DOS-19-08-00017-P, Issue of May 7, 2008.

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

Text of rule and any required statements and analyses may be obtained from: Whitney A. Clark, Department of State, Division of Licensing Services, Alfred E. Smith State Office Bldg., 80 S. Swan St., P.O. Box 22001, Albany, NY 12231, (518) 473-2728, e-mail: whitney.clark@dos.state.ny.us

Assessment of Public Comment

The overwhelming majority of all comments received support the rule as proposed. Comments received indicate that the proposed rule is seen as an improvement over the existing curriculum and will add necessary topics and hours to the qualifying education for real estate salespeople. Only three comments expressed concern about the rule. One was non-substantive and expressed a general frustration with the lengthy rule-making process. Another suggested that the distance learning regulations be amended so as to remove the requirement that providers of distance learning utilize >time-out= mechanisms so as to monitor when students are not actively viewing the course material. No suggested alternatives were provided. After discussion, the Board determined that the >time-out= mechanism requirement is necessary for security purposes and that if alternative technologies and/or procedures are presented to the Board in the future, said options will be considered at that point in time. The final comment expressed concern over the requirement that distance learning examinations be administered at a physical location in New York State. The concern was expressed that this would disadvantage education providers and students by depriving them of flexibility to offer an examination at a location other than the State of New York. It was suggested that this requirement be replaced with detailed requirements on appropriate proctors for the examinations. After discussion, it was decided that the need to ensure that students utilizing distance learning courses are provided with a physical location within the State of New York to take the examination outweighed the concerns expressed in the comment.