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; EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing.)

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

Office of Children and Family Services

NOTICE OF ADOPTION

Child Support Requirements for Low Income Child Care Recipients

I.D. No. CFS-30-09-00007-A
Filing No. 1152
Filing Date: 2009-09-29
Effective Date: 2009-10-14

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

Action taken: Amendment of section 415.3 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 410 and title 5-C

Subject: Child Support Requirements for Low Income Child Care Recipients.

Purpose: To eliminate the requirement that recipients of low income child care subsidies pursue child support.

Text or summary was published in the July 29, 2009 issue of the Register, I.D. No. CFS-30-09-00007-P.

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

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

Assessment of Public Comment
The agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Standards for the Provision of Adolescent Services for Foster Care Youth

I.D. No. CFS-41-09-00008-P

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

Proposed Action: Amendment of sections 421.8, 430.12 and 447.2; and addition of Part 436 to Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 34-a and 398(6)(k)

Subject: Standards for the provision of adolescent services for foster care youth.

Purpose: To promote the state and federal legislative objectives of securing permanency for children in foster care.

Substance of proposed rule (Full text is posted at the following State website:www.ocfs.state.ny.us): The proposed regulations would amend 18 NYCRR sections 421.8 (Services to children) and 447.2 (Requirements for each agency boarding home) to conform the requirements in these sections regarding the training of adoptive parents and agency staff on the issues confronting adolescents.

The proposed regulations would repeal subdivision (f) of 18 NYCRR section 430.12 (Another planned living arrangement with a permanency resource) and add a new subdivision (f) that delineates between the setting of the goal and preparing youth to make a successful transition to self-sufficiency. The new subdivision (f) establishes standards for setting the goal of discharge to another planned living arrangement with a permanency resource. The standards related to service provision found in the current subdivision (f) are repealed by the proposed rule and are set forth in a new Part 436 of this Title.

The proposed regulations would add a new Part 436 to 18 NYCRR (adolescent services for foster care youth), which incorporates certain provisions currently set forth 18 NYCRR 430.12 (f) and refines the service provisions by adding a new framework of practice to strengthen services to adolescents in foster care.

The new section 436.2 expands eligibility for life skills services by including all youth in foster care age 14 and older, regardless of the youth's permanency planning goal. In addition, the proposed regulation would make life skill services outcome-focused to assist youth to achieve positive outcomes and make a successful transition to self-sufficiency.

The new section 436.3 establishes case planning requirements that include the documentation of life skills services provided; an evaluation, at regular intervals, of the youth's progress towards achieving life skill outcomes; any barriers that might exist and the youth's participation in planning activities.

The new section 436.4 strengthens opportunities for adolescents to achieve permanency by adding a new requirement for the ongoing exploration and development of permanency alternatives for all youth in foster care over the age of 14, including youth who have previously refused adoption. In addition, the new section requires documentation of the efforts made to identify adult permanency resources for youth.

The new section 436.5 maintains the minimum monthly stipend (currently called the monthly independent living stipend) for each foster child 16 years of age or older who has, or is deemed to have, a goal of discharge to another planned living arraignment with a permanency resource and who, according to the foster child's case plan, is actively participating in life skills services. The categories of foster children receiving the stipend and the rates of the stipend set forth in the new section 436.5 are the same as presently set forth in 18 NYCRR 430.12(f)(2)(i)(b).

The new section 436.6 requires a written notice of discharge 180 days prior to the planned date of discharge. The proposed regulation further provides that each youth who is discharged to another planned living arrangement or who has remained in foster care until age 18 shall, upon discharge, be placed on trial discharge status for at least six months. The proposed regulation also establishes recordkeeping requirements for assessments of a youth's safety, permanency and well being at the time of discharge planning, trial discharge and final discharge.

The new section 436.7, consistent with current regulations, requires the provision of aftercare services to youth discharged to another planned living arrangement with a permanency resource and youth formerly in foster care who remained in foster care until reaching age 18. Aftercare services in the proposed regulation include providing youth with financial, housing, counseling, employment, education and other support services as needed.

The new section 436.8 sets forth the standards for post discharge supervision of youth discharged from foster care to another planned living arrangement with a permanency resource or former foster children who remained in foster care until the age of 18.

The new section 436.9 incorporates by reference the requirements established in 18 NYCRR 430.9 (f) and clarifies when a youth in foster care having a goal of discharge to another planned living arrangement with a permanency resource is eligible for preventive housing services. In the event that a social services district elects to provide room and board payments, the proposed regulations set forth minimum criteria for such payments.

The new section 436.10 authorizes social service districts to make payments to either an individual or to the college/university on behalf of a youth in foster care attending a college/university. The proposed regulation clarifies that such payments are not subject to federal financial participation (see 18 NYCRR 628.3).

Text of proposed rule and any required statements and analyses may be obtained from: Public Information Office, NYS Office of Children and Family Services, 52 Washington Street, Rensselaer, N.Y. 12144, (518) 473-7793

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

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

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

Regulatory Impact Statement

1. Statutory authority:

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

Section 34(3)(f) of the SSL authorizes the commissioner of OCFS to establish regulations for the administration of public assistance and care within New York State, both by the State and by local government units.

Section 34-a of the SSL authorizes the commissioner of OCFS to establish regulations specifying the contents of the multi-year consolidated service plans prepared by local social service districts.

Section 398(6)(k) of the SSL requires a social services district to provide, in accordance with OCFS regulations, suitable vocational training for any minor in the district's care, provided that minor may benefit from and cannot otherwise obtain such training.

2. Legislative objectives:

The proposed regulations promote the state and federal legislative objectives of securing permanency for children in foster care and finalizing foster children's permanency plan when the discharge goal is another planned living arrangement with a permanency resource as set forth in Title IV-E of the Social Security Act and Articles 3, 7 and 10-A of the Family Court Act. The proposed regulations also address the post discharge supervision requirements imposed on social services districts pursuant to section 398(6)(h) of the SSL.

The federal Foster Care Independence Act of 1999 enacted the Chafee Foster Care Independence Program (Chafee Program). The Chafee Program offers assistance to help current and former foster children achieve self-sufficiency (see section 477 of the Social Security Act [SSA]). Grants are offered to the States that submit a compliant State plan to assist youth in a wide variety of areas designed to support a successful transition to adulthood. The activities and programs included under the Chaffee Program include, but are not limited to, help with education, employment, financial management, housing, emotional support and supported connections to caring adults for older youth in foster care, in addition to youth between the ages of 18 and 21 who have aged out o the foster care system.

In order for a State to receive Chafee Program funding, it must have in place a State Plan that incorporate federal requirements. Section 477(b)(3) of the SSA requires the State to certify to the federal government how it will administer the Chafee Program. The proposed regulations reflect the federal standards and are of assistance to New York to demonstrate to the federal government that it has a compliant State Plan and is able to satisfy federal certification requirements.

There is no minimum age requirement or youth to receive services under the Chafee Program.

3. Needs and benefits:

The proposed regulations support New York's compliance with Chafee Program State Plan and certification requirements. The proposed regulations support the State Plan requirement that assistance and services to the targeted population of foster children and youth who were discharged from foster care are available statewide. The proposed regulations support the State Plan requirement that programs serve children of various ages and at various stages of achieving independence. In addition, the proposed regulations support the federal requirement that there exist objective criteria for determining eligibility for benefits and services under this program. Included in the federal certification requirements supported by the proposed regulations is the federal requirement that the State provide assistance and services to children who have left foster care at the age of 18 and who are under the age of 21.

The proposed regulations will support the ability of social services districts to comply with federal Title IV-E eligibility requirements relating to achieving permanency for children in foster care. Section 471(a)(15)(c) of the SSA and federal regulation 45 CFR 1356.21(b)(2) require that a social services district demonstrate that reasonable effort were made to finalize a foster child's permanency plan. These federal requirements are incorporated in state statute (see Chapter 7 of the Laws of 1999 and Chapter 3 of the Laws of 2005). The assistance and services reflected in the proposed regulations will be of assistance in enabling social services district to compile more meaningful service plans and permanency plans for foster children who have a discharge goal of other than return to a parent or adoption.

The proposed regulations also support the requirement enacted by Chapter 3 of the Laws of 2005 that requires that the permanency plan for all foster children who have attained the age of fourteen and who are completely freed for adoption, were voluntarily placed or are in foster care because of abuse or neglect must include a description of the services and assistance that will be provided to enable the child to learn independent living skills (see section 1089(c)(5)(vi) of the FCA).

The proposed regulations would repeal subdivision (f) of section 430.12 and add a new subdivision (f) that provides the standards for setting the goal of discharge to another planned living arrangement with a permanency resource. The proposed regulations also add a new Part 436 to Title 18 NYCRR (Adolescent Services for Foster Care Youth) that sets forth the service requirements applicable to youth in foster care over age 14, and includes requirements applicable to youth with a goal of discharge to another planned living arrangement with a permanency resource.

The proposed regulations would strengthen services to adolescents in foster care by focusing the services provided on assisting these youth to achieve permanency and develop life skills that are outcome-focused.

The proposed changes would expand the number of youth eligible for services by requiring local social services districts to provide life skills services to all youth in foster care over age 14, regardless of their permanency planning goal.

Pursuant to section 111 of the Domestic Relations Law, the consent of the adoptive child who is over 14 years of age is required, unless the court in its discretion dispenses with such consent. After refusing to consent, youth are often assigned the goal of discharge to another planned living arrangement with a permanency resource and the possibility of identifying a permanent family connection for the youth is not revisited. The proposed regulations would require social service districts to continuously explore and develop possible permanency alternatives for youth in foster care over age 14, including those youth who have previously refused to consent to adoption.

The proposed regulations would require that discharge planning for youth discharged to another planned living arrangement with a permanency resource and youth who remain in foster care until age 18 or older, begin at least 180 days prior to a planned discharge. Current regulations require that discharge planning begin at 90 days prior to a planned discharge. The expansion of the discharge planning period from 90 days to 180 days will afford both the agency and the child with more time to prepare for discharge. It will be helpful to enable the agency to assess the child's readiness and to put in place those services and assistance that will support the youth's transition from foster care. The proposed regulations would maintain the provision of aftercare services and supervision to youth discharged to another planned living arrangement with a permanency resources and to youth who remain in foster chare until 18 years of age or older. The proposed regulations are consistent with current regulations requiring a trial discharge period for a youth for at least six months unless the youth has reached age 21. Under the proposed amendments, a social service district would be required to advise a youth in writing of how he or she may obtain needed services until the age of 21.

As housing is a major issue for youth transitioning from foster care, the proposed regulations reference the preventive housing services currently available to youth formerly in foster care and the current eligibility requirements for these housing services.

The proposed regulations require that training activities for adoptive parents of older youth must help the parents understand the issues confronting adolescents. In addition, the regulatory change requires training for staff, as appropriate, on issues confronting adolescents in agency operated boarding homes.

4. Costs:

The proposed regulations would have no fiscal impact.

5. Local government mandates:

The proposed regulations would not impose any significant new mandates on local governments.

6. Paperwork:

Social services districts would be required to document in their multi-year consolidated services plans the strategies that will be employed to help youth in foster care to develop life skills to achieve positive outcomes in the transition from foster care to self-sufficiency. Strategy documentation provided by social services districts must describe the life skills services that will be provided by the district directly and through purchase of services; individual and group instruction programs; the role of foster parents and staff in teaching and providing opportunities for youth to practice learned life skills; and the role of any other individuals, such as mentors, in providing opportunities for youth to learn life skills.

The proposed regulations would also require social services districts to document the youth's responses to the exploration of permanency alternatives, the youth's potential adult permanency resources and the efforts undertaken to involve caring adults in visiting the youth and planning for his or her future.

As part of the discharge planning process, social services districts would be required to document information concerning a youth's safety, permanency and well-being 180 days prior to a planned discharge. The information would be updated both at the time of trial discharge and final discharge.

7. Duplication:

No requirements are proposed that duplicate any existing state or federal requirements.

8. Alternatives:

The proposed regulations are required to support implement the Chafee Program and to support New York's compliance with federal Title IV-E and State permanency requirements.

9. Federal standards:

The purposes of the Chafee Program are set forth in section 477(a) of the SSA:

(1) to identify children who are likely to remain in foster care until 18 years of age and to help these children make the transition to self-sufficiency by providing services such as assistance in obtaining a high school diploma, career exploration, vocational training, job placement and retention, training in daily living skills, training in budgeting and financial management skills, substance prevention, and preventive health activities (including smoking avoidance, nutrition education, and pregnancy prevention);

(2) to help children who are likely to remain in foster care until 18 years of age receive the education, training, and services necessary to obtain employment;

(3) to help children who are likely to remain in foster care until 18 years of age prepare for and enter postsecondary training and education institutions;

(4) to provide personal and emotional support to children aging out of foster care, through mentors and the promotion of interactions with dedicated adults; and

(5) to provide financial, housing, counseling, employment, education, and other appropriate support and services to former foster care recipients between 18 and 21 years of age to complement their own efforts to achieve self-sufficiency and to assure that program participants recognize and accept their personal responsibility for preparing for and then making the transition from adolescence to adulthood.

The proposed regulations satisfy the federal requirements by establishing criteria for the provision of developmentally appropriate life skills services for all foster care youth between the ages of 14 and 21. The proposed regulations address federal requirements relating to the identification of children remaining in foster care by requiring each foster child over the age of 14 and periodically thereafter in regard to the child's progress towards achieving life skills. Regarding the federal requirement to provide personal and emotional support to children again out of foster care, the proposed regulations require for the regular and continuous exploration of permanency alternative for all out in foster care over the age of 14, including re-establishing connections with family members or the identification of another adult permanency resource. The proposed regulations assist in addressing federal requirements relating to financial support, housing, education employment of former foster children through provisions dealing with the life skills stipend, housing services/room and board payments, and after care services.

The Chafee Program gives states flexibility is defining the eligible population and encourages states to serve youth younger than 16 through the provision of age-appropriate services. New York chose to have the assistance and services set forth in the proposed regulations commencing with youth 14 years of age in recognition that for youth to make a successful transition to self-sufficiency and achieve positive outcomes, adolescents need to develop a set of competencies and basic life skills. Beginning life skills development during the early adolescent years gives youth the opportunity to learn and practice self-sufficiency skills while in placement. This is benefit was recognized by the legislature in the enactment of Chapter 3 of the Laws of 2005.

10. Compliance schedule:

The proposed amendments would become effective upon adoption.

Regulatory Flexibility Analysis

1. Effect on small business and local governments:

The proposed regulations are applicable statewide to all 57 county governments and the City of New York. During FFY 2006, 4,238 youth in foster care and in after care status ages 14 to 21 received Independent Living services. Prior to the Chafee Foster Care Independence Program (Chafee Program), the Office of Children and Family Services (OCFS) had defined a broader age range of children to whom social service districts were required to offer independent living services. OCFS regulations currently require that services be provided to any child over age 14 who has a permanency planning goal of discharge to another planned living arrangement with a permanency resource. The proposed regulations would expand eligibility for life skills services for all youth in foster chare age 14 and older regardless of the youth's permanency planning goal. The Chafee Program does not establish a minimum age requirement. It gives the state broad discretion to define the population of children who are ''likely to remain in foster care until age 18''. No other small business entities would be affected by the proposed regulations.

2. Reporting, recordkeeping and compliance requirements:

The proposed regulations would require each social services district to identify in its multi-year consolidated services plan the strategies that the district will use to help youth develop life skills to achieve positive outcomes in the transition from foster care to self-sufficiency. The consolidated services plan must describe the life skills services that will be provided by the district either directly or through purchase of services; individual and group instruction programs; the role of foster parents and staff in teaching and providing opportunities for youth to practice learned life skills; and the role of any other individuals, such as mentors, in providing opportunities for youth to learn life skills.

The proposed regulations would require a social services district to document a youth's responses to the exploration of permanency alternatives, identify potential adult permanency resources and describe the efforts undertaken to involve the adults with visiting the youth and planning for his or her future.

As part of the discharge planning process, social services districts would be required to document information concerning a youth's safety, permanency and well-being 180 days prior to a planned discharge, and update the information at the time of trial discharge and final discharge.

3. Professional services:

No new or additional professional services would be required by small businesses or local governments in order to comply with the proposed regulations.

4. Compliance costs:

The proposed regulation would have no fiscal impact on local governments or small businesses.

5. Economic and technological feasibility:

Local governmental units affected by the proposed regulations would not require new economic resources or technological abilities or capacities to comply with the proposed regulations.

6. Minimizing adverse impact:

The proposed regulations would impose no adverse impact on social services districts where the local district remains within the Chafee Program allocation. Costs exceeding the Chafee Program allocation would be subject to 65% State reimbursement under section 153-k of the SSL. Since before enactment of the Chafee Program, OCFS has defined a broader age range of children to whom social service districts are required to offer independent living services. OCFS regulations currently require that services be provided to any child over age 14 who has a permanency planning goal of discharge to another planned living arrangement with a permanency resource (see 18 NYCRR 430.12(f). Social services districts have been given the option to provide independent living services to additional 14 and 15 year-old youth who do not have the goal of discharge to another planned living arrangement with a permanency resource based

upon a youth's needs. Since the enactment of Chapter 3 of the Laws of 2005, all social services districts have had to demonstrate to the court in the permanency plan for the majority of children in foster care what services and assistance has been provided to foster children 14 years of age or older to assist the child in learning independent living skills.

7. Small business and local government participation:

OCFS has widely shared the proposed regulations with social services districts and voluntary agencies. The Adolescent Services and Outcomes Workgroup (Workgroup), which was formed in response to the Federal Child and Family Services Review that took place in June 2001, assisted with the development of the proposed regulatory changes and has reviewed and commented on the proposed regulatory changes. The Workgroup continues to meet on an ongoing basis and is comprised of representatives from public and private agencies including other state agencies, educational institutions, local social services districts and Youth In Progress, a statewide team of foster care youth formed to advise OCFS on policies affecting adolescents. One Workgroup activity has been to explore possible regulatory changes to the independent living regulations. The Workgroup has also developed a policy paper, the Adolescents Services and Outcomes Practice Guidance Paper (Guidance Paper), which was transmitted to local social services districts and voluntary agencies through Informational Letter No. 04-OCFS-INF-07 on July 8, 2004. The Guidance Paper provides local districts and voluntary agencies with the new framework for practice to strengthen services to adolescents and improve their achievement of permanency. The proposed rule supports the new framework for practice developed by the Workgroup.

In 2007, OCFS solicited input from Workgroup members regarding possible modifications to the proposed regulations. Input was received and considered by OCFS in the development of the proposed regulations.

The proposed regulations were first shared with Youth In Progress in February 2004, and the organization has received updated information on the proposed regulations on a regular basis during its statewide meetings. Presentations on the proposed regulations have been made to various local districts and voluntary agencies. OCFS provided an overview of the new policy framework and the proposed regulatory changes at the New York Public Welfare Association's winter conference in 2004. In addition, at least five local social services districts and the City of New York Administration for Children's Services received training on the practice guidance paper and proposed regulatory changes in 2005. The Adolescent Services Resource Network at the Hunter College School of Social Work has collaborated with OCFS by sharing the proposed regulatory changes with various staff in local districts and voluntary agencies.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The rural areas that would be affected by the proposed regulations are the 44 social services districts that are defined as being rural counties and the seven social services districts that include significant rural areas within their borders. No small business entities in these areas would be affected by the proposed regulations.

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

The proposed regulations would require each social services district to identify in its multi-year consolidated services plan the strategies that the district will use to help youth develop life skills during the transition from foster care to self-sufficiency. The consolidated services plan must describe the life skills services that will be provided by the district either directly or through purchase of services; individual and group instruction programs provided to youth; the role of foster parents and staff in teaching and providing opportunities for youth to practice learned life skills; and the role of any other individuals, such as mentors, in providing opportunities for youth to learn life skills.

The proposed regulations would require social services districts to provide for the regular and continuous exploration and development of permanency alternatives for youth in foster care over age 14 and document the youth's responses, including potential adult permanency resources. Furthermore, a social services district must document a youth's responses to the exploration of permanency alternatives and describe efforts undertaken by the district to involve caring adults in visiting the youth and planning for his or her future.

As part of the discharge planning process in the proposed regulations, social services districts are required to document information concerning a youth's safety, permanency and well-being 180 days prior to a planned discharge, and update the information at the time of trial discharge and final discharge.

The proposed regulations would impose no other new reporting or compliance requirements and would require no additional professional services to implement.

3. Costs:

The proposed regulations would have no fiscal impact.

4. Minimizing adverse impact:

It is anticipated that there would be no adverse impacts on rural areas.

5. Rural area participation:

The Office of Children and Family Services (OCFS) has widely shared the proposed regulations with social services districts and voluntary agencies. The Adolescent Services and Outcomes Workgroup (Workgroup), which was formed in response to the Child and Family Services Federal Review that took place in June 2001, assisted with the development of the proposed regulatory changes and has reviewed and commented on the proposed regulatory changes. The Workgroup continues to meet on an ongoing basis and is comprised of representatives from public and private agencies including other state agencies, educational institutions, social services districts and Youth In Progress, a statewide team of foster care youth formed to advise OCFS on policies affecting adolescents. One Workgroup activity has been to explore possible regulatory changes to the independent living regulations. The Workgroup has also developed a policy paper, the Adolescents Services and Outcomes Practice Guidance Paper (Guidance Paper), which was transmitted to social services districts and voluntary agencies through Informational Letter No. 04-OCFS-INF-07 on July 8, 2004. The Guidance Paper provides social services districts and voluntary agencies with the new framework for practice to strengthen services to adolescents and improve their achievement of permanency. The proposed regulations support the new framework for practice developed by the Workgroup.

In 2007, OCFS solicited input from Workgroup members regarding possible modification to the proposed regulations. Input was received and considered by OCFS in the development of the proposed regulations.

The proposed regulations were first shared with Youth In Progress in February 2004, and the organization has received updated information on the proposed regulations on a regular basis during its statewide meetings. Presentations on the proposed regulations have been made to various local districts and voluntary agencies. OCFS provided an overview of the new policy framework and the proposed regulatory changes at the New York Public Welfare Association's winter conference in 2004. In addition, at least five local social services districts and the City of New York Administration for Children's Services received training on the practice guidance paper and proposed regulatory changes in 2005. The Adolescent Services Resource Network at the Hunter College School of Social Work has collaborated with OCFS by sharing the proposed regulatory changes with various staff in local districts and voluntary agencies.

Job Impact Statement

These proposed regulations address administrative procedures only and will not have an impact on jobs or employment opportunities in the State.

Department of Civil Service

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-41-09-00003-P

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

Proposed Action: Amendment of Appendix 1 of Title 4 NYCRR.

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

Subject: Jurisdictional Classification.

Purpose: To classify a position in the exempt class.

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading "Division of the Budget," by adding thereto the position of Manager Information Services.

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

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

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

Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was

previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-41-09-00004-P

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

Proposed Action: Amendment of Appendix 2 of Title 4 NYCRR.

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

Subject: Jurisdictional Classification.

Purpose: To delete a position from and classify a position in the non-competitive class.

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Health, by deleting therefrom the position of Data Processing System Auditor 3 (1) and by adding thereto the position of Information Systems Auditor 3 (1).

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

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

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

Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-41-09-00005-P

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

Proposed Action: Amendment of Appendix 2 of Title 4 NYCRR.

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

Subject: Jurisdictional Classification.

Purpose: To delete positions from the non-competitive class.

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the State Department Service under the subheading "All State Departments and Agencies," by deleting therefrom the title of Pasteurization Plant Operator; and, in the Department of Correctional Services under the subheading "Institutions," by deleting therefrom the positions of Farm Manager (9).

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

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

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

Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

Education Department

EMERGENCY
RULE MAKING

Computation of Nonresident Pupil Tuition Rate

I.D. No. EDU-18-09-00007-E

Filing No. 1137

Filing Date: 2009-09-28

Effective Date: 2009-09-28

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

Action taken: Amendment of section 174.2 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207, 2040(1) and (2), 2041(not subdivided), 2042(not subdivided), 2045(1) and 3206

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State Aid categories with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to correct the existing statutory reference and to provide for the computation of aid on an enrollment-based pupil count rather than the previous attendance-based count. The proposed amend-

ment will enable the Department to accurately reflect the actual cost to districts of educating nonresident pupils.

The proposed amendment was adopted as an emergency rule at the April 20-21, 2009 meeting of the Board of Regents, effective May 1, 2009. A Notice of Proposed Rule Making was published in the State Register on May 6, 2009. The proposed amendment was revised in response to public comment and, as so revised, adopted as an emergency rule at the July 27-28, 2009 Regents meeting. A Notice of Revised Rule Making was published in the State Register on July 29, 2009.

The proposed amendment has been adopted as a permanent rule at the September 14-15, 2009 Regents meeting. Pursuant to the State Administrative Procedure Act, the earliest the adopted rule can become effective is after its publication in the State Register on October 8, 2009. However, the emergency rule which took effect on July 30, 2009 will expire on September 27, 2009. The expiration of the emergency could cause disruptions to the preparation and administration of contracts for the reimbursement of school districts which provide instruction to nonresident pupils for the 2009-2010 school year.

Therefore, a third emergency action is necessary for the preservation of the general welfare in order to ensure that the emergency rule that was revised and adopted at the July 2009 Regents meeting, which established the methodology for computing allowable tuition rates for nonresident pupils for public reporting by school districts, remains continuously in effect until the effective date of its adoption as a permanent rule, and thereby avoid disruption to the preparation and administration of contracts for the reimbursement of school districts which provide instruction to nonresident pupils for the 2009-2010 school year.

Subject: Computation of nonresident pupil tuition rate.

Purpose: To conform section 174.2 to the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and other statutory changes.

Text of emergency rule: Section 174.2 of the Regulations of the Commissioner of Education is amended, effective September 28, 2009, as follows:

§ 174.2 Computation of tuition charges for nonresident pupils.

The provisions of this section shall apply to all contracts [entered into after January 1, 1975,] for the reimbursement of a school district which provides instruction to a nonresident pupil. The charge for the instruction of each nonresident pupil shall not exceed the actual net cost of educating such pupil. If the accounting records of the school district providing such instruction are not maintained in a manner which would indicate the net cost of educating such pupil, a board of education, board of trustees or sole trustee of each school district shall compute the tuition to be charged for the instruction of each nonresident pupil admitted to the schools of such district, or for the education of whom such district contracts with a board of cooperative educational services, in accordance with the following formulae:

(a) The tuition to be charged by a school district which provides full-day instruction for each nonresident pupil shall be computed as follows:

(1) . . .

(2) . . .

(3) The net amount of State aid received by the school district, as defined in this paragraph, shall be distributed among the categories set forth in paragraph (2) of this subdivision in the same proportion that the [aidable pupil units] *average daily membership* in each of such categories bears to the [total aidable pupil units] *average daily membership* for the school district. [Such aidable pupil units] *For the purposes of this section, such average daily membership* shall be computed in accordance with the provisions of *paragraph 1 of* subdivision [8] *1* of section 3602 of the Education Law, except that for the purpose of this computation the [additional aidable pupil units for pupils enrolled in special schools] *enrollment of pupils attending under the provisions of paragraph c of subdivision 2 of section 4401 of the Education Law and the equivalent attendance of the school district, as computed pursuant to paragraph d of subdivision 1 of section 3602 of the Education Law,* shall not be included in such computation. For the purposes of this section, net State aid shall include aid received in the general fund for operating expenses, textbooks, experimental programs, educational television, county vocational boards and boards of cooperative educational services, building aid, and other forms of State aid as approved by the department for inclusion herein, but shall not include transportation aid [or aid attributable to pupils attending special schools]. Net State aid shall also include the sum which is withheld from the school district for payment to the teacher's retirement fund.

(4) . . .

(5) The maximum nonresident pupil tuition which may be charged shall be determined by dividing the net cost of instruction of pupils in each category by the estimated average daily [attendance] *membership* of pupils in each category.

(6) Refunds or additional charges shall be made at the conclusion of the school year based upon actual revenues, expenditures and average daily [attendance] *membership*.

(b) . . .

(c) . . .

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 submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-18-09-00007-P, Issue of May 6, 2009. The emergency rule will expire November 26, 2009.

Text of rule and any required statements and analyses may be obtained from: Chris Moore, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234, (518) 473-8296, email: legal@mail.nysed.gov

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

Education Law section 2040(1) authorizes a school district by majority vote of the qualified voters to contract for the education of its pupils by one or more other school districts in the State. Education Law section 2040(2) provides that the designation of the school districts with which such contracts may be made shall be made pursuant to the Commissioner's regulations.

Education Law section 2041 authorizes school districts to enter into contracts to receive and educate the children of any district which authorizes its board of education or trustees to contract for the education of its children pursuant to Education Law section 2040.

Education Law section 2042 pertains to the form and validity of contracts for the education of nonresident pupils.

Education Law section 2045(1) provides that the tuition charged for the instruction of nonresident pupils in excess of the difference between the cost of educating such pupils and the apportionment of public moneys on account of the attendance of such pupils shall be a charge upon the district from which such nonresident pupil attends, subject to the right of such district to designate the school where instruction shall be given at the district's expense, and provided that no tuition shall be payable by the district of residence for the education by another district of an elementary pupil unless a contract has been entered into between such districts.

Education Law section 3602 provides for the apportionment of State monies to school districts, and the process therefore. Chapter 57 of the Laws of 2007 amended section 3602 to change the school funding system by replacing approximately 30 State aid items with a single Foundation Aid.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statute and is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes.

NEEDS AND BENEFITS:

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State Aid categories with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to correct the existing statutory reference and to provide for the computation of aid on an enrollment-based pupil count rather than the previous attendance-based count. The proposed amendment will enable the Department to accurately reflect the actual cost to districts of educating nonresident pupils.

COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

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

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any costs beyond those inherent in Chapter 57 of the Laws of 2007 and other applicable statutes.

LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to revise the Commissioner's

Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional program, service, duty or responsibility upon local governments beyond those inherent in Chapter 57 of the Laws of 2007 and other applicable statutes.

PAPERWORK:

The proposed amendment conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional reporting or other paperwork requirements on school districts.

DUPLICATION:

The proposed amendment is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other State statutory changes, and to eliminate obsolete provisions, and does not duplicate, overlap or conflict with State and federal legal requirements.

ALTERNATIVES:

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. There are no significant alternatives and none were considered.

FEDERAL STANDARDS:

The proposed amendment relates to the computation of nonresident tuition by school districts, and is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other State statutory changes. There are no related federal standards.

COMPLIANCE SCHEDULE:

The proposed amendment is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements, mandates or costs on school districts beyond those inherent in Chapter 57 and other applicable statutes. It is anticipated that regulated parties can achieve compliance with the proposed rule making upon its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment relates to the computation of nonresident tuition by school districts, and is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule making that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Government:

EFFECT OF RULE:

The proposed amendment applies to each of the 698 public school districts in the State.

COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements or local government mandates on school districts. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State aid items with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to correct the existing statutory reference and to provide for the computation of aid on an enrollment-based pupil count rather than the previous attendance-based count. These amendments will enable the department to accurately reflect the actual cost to districts of educating nonresident pupils.

PROFESSIONAL SERVICES:

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

COMPLIANCE COSTS:

The proposed amendment is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any costs beyond those inherent in Chapter 57 and other applicable statutes.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements or local government mandates on school districts. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State aid items with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to reflect the fact that the existing statutory reference is now incorrect and that aid is now computed based on an enrollment-based pupil count rather than the previous, attendance-based count. These amendments will enable the department to accurately reflect the actual cost to districts of educating nonresident pupils.

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State, and from the chief school officers of the five big city school districts.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

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

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

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements or local government mandates on school districts in rural areas. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State aid items with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to reflect the fact that the existing statutory reference is now incorrect and that aid is now computed based on an enrollment-based pupil count rather than the previous, attendance-based count. These amendments will enable the department to accurately reflect the actual cost to districts of educating nonresident pupils. The proposed amendment will impose no additional professional services requirements on rural school districts.

COMPLIANCE COSTS:

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any costs on rural school districts beyond those inherent in Chapter 57 and other applicable statutes.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements, local government mandates or costs on school districts in rural areas. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State aid items with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to correct the existing statutory reference and to provide for the computation of aid on an enrollment-based pupil count rather than the

previous attendance-based count. These amendments will enable the department to accurately reflect the actual cost to districts of educating nonresident pupils.

RURAL AREA PARTICIPATION:

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

Job Impact Statement

The proposed amendment relates to the payment of State aid to school districts, and is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes to the law. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements, mandates or costs on school districts, and will not have an adverse impact on job or employment opportunities. Because it is evident from the nature and purpose of the proposed amendment that it will have no impact on jobs or employment opportunities, no further measures were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

A Notice of Proposed Rule Making was published in the State Register on May 6, 2009, and a Notice of Revised Rule Making was published on July 29, 2009. The State Education Department received the following comments in addition to those included in the Assessment of Public Comment published on July 29, 2009 with the revised rule making.

1. COMMENT:

A comment asked whether the tuition formula change in the proposed rule only applies prospectively.

DEPARMENT RESPONSE:

The proposed rule became effective, as an emergency adoption, on May 1, 2009, and will take effect as a permanent rule on October 8, 2009. However, it is the Department's position that the tuition formula change included in the proposed rule is required by the Foundation Aid statutory provisions enacted by Chapter 57 of the Laws of 2007, and that the proposed rule is merely a conforming change to reflect the statutory requirements. Accordingly, the tuition formula change became effective on July 1, 2007, the effective date of the applicable provisions of Chapter 57 of the Laws of 2007, and applies to the 2007-2008 school year and afterwards. The tuition formula change was used to determine the final nonresident tuition charge for the 2007-2008 school year and to determine the estimated nonresident tuition calculation for the 2008-09 school year.

2. COMMENT:

The proposed rule should be amended to allow the receiving district to charge the Average Daily Membership (ADM) rate on an enrollment-based pupil count rather than on actual student attendance.

DEPARTMENT RESPONSE:

The Department believes an amendment is unnecessary because districts are allowed to use an enrollment-based pupil count under section 174.2. The regulation sets forth the methodology used to arrive at a per-pupil charge, but does not prescribe the pupil count used to charge a sending district. In the Department's experience, most districts agree to use a count based on enrollment as the comment suggests, and under the proposed regulation districts would be able to continue that practice.

EMERGENCY RULE MAKING

No Child Left Behind Act of 2001(NCLB) - School Accountability

I.D. No. EDU-26-09-00004-E

Filing No. 1150

Filing Date: 2009-09-29

Effective Date: 2009-09-29

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

Action taken: Amendment of sections 100.2(p), 120.2, 120.3 and 120.4 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 210(not subdivided), 215(not subdivided), 305(1), (2) and (20), 309(not subdivided) and 3713(1) and (2)

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 conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program, as granted by the United States Department of Education (USED) on January 8, 2009, in order to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress for two consecutive years and be returned to Good Standing. The State and local educational agencies, including school districts, BOCES and charter schools, are required to comply with NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965 (ESEA), as amended.

On January 8, 2009, former Education Secretary Spellings informed Commissioner Mills of New York's approval to participate in the United States Department of Education's (USED) Differentiated Accountability Pilot Program as a part of its system of interventions under section 1116 of the ESEA. The purpose of the proposed amendment is to conform the Commissioner's Regulations with the approved plan and to support the implementation of Differentiated Accountability. The proposed amendment will:

(1) reduce the current number of school accountability categories by eliminating dual Title I and non-Title I streams of improvement, integrating federal and State accountability systems and collapsing identifications for improvement into three simplified phases, each of which provides schools with diagnostic tools, planning strategies, and supports and interventions specific to that phase in the improvement process and the school's category of need;

(2) allow for differentiation in the improvement process, permitting schools and districts to prepare and implement school improvement plans that best match a school's designation;

(3) better align the SURR and NCLB processes and ensure that schools with systemic and persistent failure fundamentally restructure or close; (4) maximize SED's limited resources and utilize the resources of USNY while implementing School Quality Review Teams, Joint Intervention Teams, and Distinguished Educators to schools in improvement;

(4) strengthen the capacity of districts to assist schools to improve; and

(5) empower parents by increasing combined participation in Public School Choice (PSC) and Supplemental Educational Services (SES) by offering SES in the first year of a school's identification for improvement and school choice only after an identified school has failed to make AYP.

The proposed amendment was adopted as an emergency rule at the May 18, 20-21, 2009 meeting of the Board of Regents, effective July 1, 2009. A Notice of Proposed Rule Making was published in the State Register on July 1, 2009.

The proposed rule has been revised in response to public comment. Pursuant to the State Administrative Procedure Act, a revised rule cannot be permanently adopted until after publication of a Notice of Revised Rule Making and expiration of a 30-day public comment period. Because the Board of Regents meets at fixed intervals, the earliest the proposed revised rule could be presented for permanent adoption, after publication of the Notice and expiration of the 30-day public comment period, would be the November 16-17, 2009 Regents meeting. However, the emergency rule which took effect on July 1, 2009 will expire on September 28, 2009. The expiration of the emergency rule could cause disruptions to the administration of the Differentiated Accountability Pilot Program for the 2009-2010 school year. In addition, the revised rule makes clarifies certain provisions in the rule in response to public comment, and updates statutory citations.

Therefore, a second emergency action is necessary for the preservation of the general welfare in order to immediately adopt clarifying and corrective revisions to the rule in response to public comment and to otherwise ensure that the emergency rule adopted at the May 2009 Regents meeting remains continuously in effect until such time as it can be adopted as a permanent rule, in order to avoid disruption to the administration of the Differentiated Accountability Pilot Program for the 2009-2010 school year.

It is anticipated that the proposed revised rule will be presented for permanent adoption at the November 16-17, 2009 Regents meeting, after publication of a Notice of Revised Rule Making in the State Register and expiration of the 30-day public comment period prescribed for revised rule makings in the State Administrative Procedure Act.

Subject: No Child Left Behind Act of 2001(NCLB) - school accountability.

Purpose: To implement the NCLB Differentiated Accountability Pilot Program.

Substance of emergency rule: The Board of Regents has amended subdivision (p) of section 100.2 of the Regulations of the Commissioner of Education, subdivisions (g)-(i) of section 120.2; subdivisions (a) and (g) of section 120.3; and subdivisions (b) and (f) of section 120.4 of the Regulations of the Commissioner of Education, as an emergency action, effective September 29, 2009, to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program as granted by the United States Department of Education, particularly in terms of revising school accountability to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress (AYP) for two consecutive years and be returned to Good Standing.

The substantive amendments to the regulations are as follows:

Section 100.2(p)(2)(ii)(a) is amended to replace the term ''identified'' with ''designated'' and to replace the phrase ''school requiring academic progress'' with ''school in Improvement, Corrective Action or Restructuring.''

Section 100.2(p)(5)(vii) is amended to replace the term ''identified'' with ''designated'' and to replace the phrase '' a school requiring academic progress'' with ''a school in Improvement (year 1).''

The current paragraph 100.2(p)(6), School Requiring Academic Progress, is repealed and a new paragraph 100.2(p)(6), Differentiated Accountability for Schools, is added, beginning with the 2009-2010 school year. More specifically, the new paragraph 100.2(p)(6) will:

(1) integrate federal and State accountability systems;

(2) reduce the current number of school accountability categories by eliminating dual Title I and non-Title I streams of improvement;

(3) collapse identifications for improvement into three simplified accountability phases; Improvement, Corrective Action and Restructuring, based upon the number of years that a school failed to make adequate yearly progress on an accountability performance criterion and/or accountability indicator;

(4) further differentiate each phase into three categories of intervention: Basic, Focused and Comprehensive, based upon the number of accountability groups that failed to make adequate yearly progress in an accountability performance criterion and/or accountability indicator for which a school has been identified;

(5) determine a school's accountability designation for the 2009-2010 school year based upon the school's accountability status for the 2008-2009 school year and the school's AYP for the 2007-2008 and 2008-2009 school years;

(6) provide schools with diagnostic tools, planning strategies, and supports and interventions specific to that phase in the improvement process and the school's category of need;

(7) allow for differentiation in the accountability process, permitting schools and districts to prepare and implement two-year school improvement/corrective action/restructuring plans that best match a school's designation;

(8) better align the School Under Registration Review (SURR) and NCLB processes and ensure that schools with systemic and persistent failure fundamentally restructure or close;

(9) maximize SED's limited resources and utilize the resources of the University of the State of New York (USNY) to assign School Quality Review Teams, Joint Intervention Teams, and Distinguished Educators to schools in improvement; strengthen the capacity of districts to assist schools to improve; and

(10) empower parents by increasing combined participation in Public School Choice (PSC) and Supplemental Educational Services (SES) by providing for SES in the first year of a school's identification for improvement and PSC only after an identified school has failed to make AYP.

Section 100.2p(9) is amended to reference subparagraph 100.2(p)(5)(vi) rather than 100.2(p)(5)(vii) due to general reorganization of the section.

Section 100.2p(10) is amended to set forth the action that is to be taken when a school has been designated as Improvement, Corrective Action, or Restructuring and has been placed on registration review. More specifically, under the amended regulations, a school designated as Improvement (year 1) or Corrective Action (year 1) shall modify its plan to meet the requirements of a restructuring plan for implementation no later than the beginning of the next school year following the year identified for registration review. The amended regulations also provide that a school designated as Restructuring (advanced) may be warned of revocation of registration unless an acceptable plan for closure or phase out has been submitted. In addition, a school identified for registration review may be identified for phase out or closure if after two full academic years of implementing a restructuring plan progress has not been demonstrated.

Section 100.2p(11) is amended to eliminate the provision allowing a board of education to replace a school under registration review with a redesigned school, and to provide for the phase out or closure of such.

Conforming amendments are also made to section 120.2(g), (h) and (i), section 120.3 (a) and (g) and section 120.4(b) and (f), for purposes of ensuring consistency with the above amendments to section 100.2(p).

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 submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-26-09-00004-P, Issue of July 1, 2009. The emergency rule will expire November 27, 2009.

Text of rule and any required statements and analyses may be obtained from: Chris Moore, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave, Albany, NY 12234, (518) 486-1713, email: legal@mail.nysed.gov

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Regents to appoint the Commissioner of Education as the Department's Chief Administrative Officer, which is charged with the general management and supervision of all public schools and the educational work of the State.

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

Education Law section 210 authorizes the Regents to register domestic and foreign institutions in terms of State standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries and presented for entrance to schools, colleges and the professions in the State.

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

Education Law section 305(1) and (2) provide the Commissioner, as chief executive officer of the State's education system, with general supervision over all schools and institutions subject to the Education Law, or any statute relating to education, and responsibility for executing all educational policies of the Regents. Section 305(20) provides the Commissioner shall have such further powers and duties as charged by the Regents.

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

Education Law section 3713(1) and (2) authorize the State and school districts to accept federal law making appropriations for educational purposes and authorize the Commissioner to cooperate with federal agencies to implement such law.

LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above authority and is necessary to establish criteria and procedures ensuring State and local educational agency (LEA) compliance with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program, as granted by the U.S. Department of Education (USDE).

NEEDS AND BENEFITS:

Section 100.2(p) is amended to establish criteria and procedures ensuring State and LEA compliance with the NCLB school accountability provisions. The State and LEAs are required to comply with the NCLB as a condition to their receipt of federal funds under Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA).

The Differentiated Accountability Pilot Program requires the State to implement a new method of categorizing schools identified for improvement; to use differentiated diagnostic tools to assist schools and districts to develop and implement appropriate plans to address the needs of students; to vary the intensity and interventions to match the academic reasons that led to a school's identification; to compress the length of time a school is supported through improvement; to merge elements of the State and NCLB accountability systems; and to reverse the order of Supplemental Educational Services and Public School Choice.

On January 8, 2009, former USDE Secretary Margaret Spellings approved New York's request to participate in the Differentiated Accountability Pilot Program. The proposed rule will conform the Commissioner's Regulations with the approved Pilot Program to:

(1) integrate federal and State accountability systems;

(2) reduce the current number of school accountability categories by eliminating dual Title I and non-Title I streams of improvement;

(3) collapse identifications for improvement into three simplified phases: Improvement, Corrective Action and Restructuring, based upon the number of years that a school failed to make adequate yearly progress (AYP) on an accountability performance criterion and/or accountability indicator for which it has been identified;

(4) further differentiate each phase into three categories of intervention: Basic, Focused and Comprehensive, based upon the number of accountability groups that failed to make AYP;

(5) determine a school's accountability designation for the 2009-2010 school year on the school's accountability status for the 2008-2009 school year and the school's AYP status for the 2007-2008 and 2008-2009 school years;

(6) provide schools with diagnostic tools, planning strategies, and supports and interventions specific to that phase in the improvement process and the school's category of need;

(7) allow for differentiation in the accountability process, permitting schools and districts to prepare and implement school improvement plans that best match a school's designation;

(8) better align the SURR and NCLB processes and ensure that schools with systemic and persistent failure fundamentally restructure or close;

(9) maximize SED's limited resources and utilize the resources of USNY to assign School Quality Review Teams, Joint Intervention Teams, and Distinguished Educators to schools in improvement; strengthen the capacity of districts to assist schools to improve; and

(10) empower parents by increasing combined participation in Public School Choice (PSC) and Supplemental Educational Services (SES) by offering SES in the first year of a school's identification for improvement and PSC only after an identified school has failed to make AYP.

COSTS:

Cost to the State: None.

Costs to local government: The rule is necessary to conform the Commissioner's Regulations with the State's approval to participate in the NCLB Differentiated Accountability Pilot Program, as granted by the United States Department of Education. The State and LEAs, including school districts and charter schools, are required to comply with the NCLB as a condition for their receipt of federal funding under Title I of the ESEA.

The proposed amendment may impose costs on LEAs with schools that are in Improvement, Corrective Action, or Restructuring status. These costs would consist of the reasonable and necessary costs associated with the activities required under Differentiated Accountability of SQR teams and curriculum auditors, Joint Intervention Teams and Distinguished Educators. However, the State Education Department anticipates mitigating these costs to schools districts by using State Education Department staff or staff contracted by the Department to serve on SQR and Joint Intervention Teams or as Distinguished Educators. In addition, we anticipate that LEAs that receive Contract for Excellence funding will be able to consider the costs of SQR, curriculum auditors, Joint Intervention Teams and Distinguished Educators to be an allowable program and activity. No additional costs have been identified with respect to the implementation of improvement plans, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

Because of the number of schools involved, and the fact that the services and activities required to be provided will vary greatly from school to school, depending on the academic circumstances and needs presented in each school, a complete cost statement cannot be provided. In the event that persons serving as members of an SQR or Joint Intervention team or as a Distinguished Educator are not State Education Department staff or staff contracted for by the State Education Department, the estimated reasonable and necessary annual expenses will range from approximately $900 to $40,000 per school. These estimates are based on the number of anticipated hours that a school district will be required to engage the services of a consultant multiplied by the consulting fees that shall be paid in accordance with Commissioner's Regulations 100.16(c)(1). More specifically: For a school designated as Improvement/Basic, it is anticipated that two days (16 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of $57/hour, resulting in costs totaling $912. For a school designated as Corrective Action, it is anticipated that thirteen days (104 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of $72/hour, resulting in costs totaling $7,488. For a school designated as Restructuring/Advanced, it is anticipated that thirty days (240 hours) will be required to engage the services of a consultant multiplied by consulting fees in the amount of $102, as well as 20 days (160 hours) will be required to engage the services of a Distinguished Educator, multiplied by consulting fees in the amount of $112/hour, resulting in costs totaling $42,400. These estimates presume, to the extent appropriate, that the Commissioner appoints qualified employees of the district of location to serve as consultants, that there will be no replacement costs incurred by the district for these employees, and that, in general, the consultants will incur no overnight and minimal travel expenses.

Cost to private regulated parties: None.

Cost to regulating agency for implementation and continued administration of this rule: None.

LOCAL GOVERNMENT MANDATES:

The proposed rule is necessary to conform the Commissioner's Regulations to the Differentiated Accountability Pilot Program. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended. The rule will not impose any additional program, service, duty or responsibility beyond those imposed by State and federal statutes.

PAPERWORK:

A public school or charter school subject to the provisions of 100.2(p)(6) that has been newly designated as Improvement shall participate in a school quality review. All Improvement schools shall develop an improvement plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Corrective Action shall participate in a curriculum audit. All Corrective Action schools shall develop a corrective action plan no later than three months following designation; implement the plan no later than the beginning of the next school year following designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Restructuring shall participate in an

assessment of the educational program. All Restructuring schools shall develop a restructuring plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school in receipt of Title I funds that has been designated as a school in the Improvement, Corrective Action, or Restructuring phase shall arrange for the provision of supplemental education services (SES) and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to SES.

A school in receipt of Title I funds that has been designated as a school in the Improvement (year 2), Corrective Action, or Restructuring phase shall provide public school choice to eligible students and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to public school choice.

DUPLICATION:

The rule does not duplicate, overlap or conflict with State and federal requirements, and is necessary to conform the Commissioner's Regulations to the Differentiated Accountability Pilot Program.

ALTERNATIVES:

There were no significant alternatives and none were considered. The rule is necessary to conform the Commissioner's Regulations to the Differentiated Accountability Pilot Program.

FEDERAL STANDARDS:

The rule does not exceed any minimum standards of the federal government for the same or similar subject areas, and is necessary to conform the Commissioner's Regulations to the Differentiated Accountability Pilot Program.

COMPLIANCE SCHEDULE:

The rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program. The State and LEAs are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA.

It is anticipated that regulated parties may achieve compliance with the rule by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program as granted by the United States Department of Education, particularly in terms of revising school accountability to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress for two consecutive years and be returned to Good Standing. The proposed rule applies to school districts, boards of cooperative educational services (BOCES) and charter schools. Local educational agencies, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965, as amended.

The proposed rule does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Government:

EFFECT OF RULE:

The proposed rule generally applies to school districts, boards of cooperative educational services and charter schools that receive funding as local educational agencies (LEAs) pursuant to the federal Elementary and Secondary Education Act of 1965 (ESEA), as amended.

COMPLIANCE REQUIREMENTS:

The proposed rule is necessary to establish criteria and procedures, relating to school accountability, to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program, as granted by the United States Department of Education. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended.

A public school or charter school subject to the provisions of 100.2(p)(6), beginning with the 2009-2010 school year, shall implement the requirements set forth [by] in the Differentiated Accountability Pilot Program.

A public school or charter school subject to the provisions of 100.2(p)(6) that has been newly designated as Improvement shall participate in a school quality review. All Improvement schools shall develop an improvement plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Corrective Action shall participate in a curriculum audit. All Corrective Action schools shall develop a corrective action plan no later than three months following designation; implement the plan no later than the beginning of the next school year following designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Restructuring shall participate in an assessment of the educational program. All Restructuring schools shall develop a restructuring plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school in receipt of Title I funds that has been designated as a school in the Improvement, Corrective Action, or Restructuring phase shall arrange for the provision of supplemental education services (SES) and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to SES.

A school in receipt of Title I funds that has been designated as a school in the Improvement (year 2), Corrective Action, or Restructuring phase shall provide public school choice to eligible students and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to public school choice.

PROFESSIONAL SERVICES:

The proposed rule does not impose any additional professional services requirements on school districts, BOCES or charter schools.

COMPLIANCE COSTS:

The rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program, as granted by the United States Department of Education, relating to school accountability. The State and LEAs, including school districts and charter schools, are required to comply with the NCLB as a condition for their receipt of federal funding under Title I of the ESEA, as amended.

The rule may impose costs on LEAs with schools that are in Improvement, Corrective Action, or Restructuring status. These costs would consist of the reasonable and necessary costs associated with the activities required under Differentiated Accountability of SQR teams and curriculum auditors, Joint Intervention Teams and Distinguished Educators. However, the State Education Department anticipates mitigating these costs to schools districts by using State Education Department staff or staff contracted by the Department to serve on SQR and Joint Intervention Teams or as Distinguished Educators. In addition, we anticipate that LEAs that receive Contract for Excellence funding will be able to consider the costs of SQR, curriculum

auditors, Joint Intervention Teams and Distinguished Educators to be an allowable program and activity. No additional costs have been identified with respect to the implementation of improvement plans, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

Because of the number of schools involved, and the fact that the services and activities required to be provided will vary greatly from school to school, depending on the academic circumstances and needs presented in each school, a complete cost statement cannot be provided. In the event that persons serving as members of an SQR or Joint Intervention team or as a Distinguished Educator are not State Education Department staff or staff contracted for by the State Education Department, the estimated reasonable and necessary annual expenses will range from approximately $900 to $40,000 per school. These estimates are based on the number of anticipated hours that a school district will be required to engage the services of a consultant multiplied by the consulting fees that shall be paid in accordance with Commissioner's Regulations 100.16 (c)(1). More specifically: For a school designated as Improvement/Basic, it is anticipated that two days (16 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of $57/hour, resulting in costs totaling $912. For a school designated as Corrective Action, it is anticipated that thirteen days (104 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of $72/hour, resulting in costs totaling $7,488. For a school designated as Restructuring/Advanced, it is anticipated that thirty days (240 hours) will be required to engage the services of a consultant multiplied by consulting fees in the amount of $102, as well as 20 days (160 hours) will be required to engage the services of a Distinguished Educator, multiplied by consulting fees in the amount of $112/hour, resulting in costs totaling $42,400. These estimates presume, to the extent appropriate, that the Commissioner appoints qualified employees of the district of location to serve as consultants, that there will be no replacement costs incurred by the district for these employees, and that, in general, the consultants will incur no overnight and minimal travel expenses.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule does not impose any new technological requirements on school districts, BOCES and charter schools. Economic feasibility is addressed under the Compliance Costs section above.

MINIMIZING ADVERSE IMPACT:

The proposed rule is in response to recent guidance provided by the U.S. Department of Education and is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program as granted by the United States Department of Education, relating to school accountability. LEAs, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed rule has been carefully drafted to meet specific federal and State requirements.

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from school districts through the offices of the district superintendents of each supervisory district in the State, and from the chief school officers of the five big city school districts. In addition, copies of the proposed rule will be provided to each charter school to give them an opportunity to participate in this proposed rule making. Copies of the proposed rule were also provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and paraprofessionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators representing the New York City Board of Education, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed rule applies to school districts, boards of cooperative educational services (BOCES) and charter schools that receive funding as local educational agencies (LEAs) pursuant to the federal Elementary and Secondary Education Act of 1965 (ESEA), as amended, 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 establish criteria and procedures, relating to school accountability, to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program as granted by the United States Department of Education, particularly in terms of revising school accountability to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress for two consecutive years and be returned to Good Standing. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended.

A public school or charter school subject to the provisions of 100.2(p)(6), beginning with the 2009-2010 school year, shall implement the requirements set forth in the Differentiated Accountability Pilot Program.

A public school or charter school subject to the provisions of 100.2(p)(6) that has been newly designated as Improvement shall participate in a school quality review. All Improvement schools shall develop an improvement plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Corrective Action shall participate in a curriculum audit. All Corrective Action schools shall develop a corrective action plan no later than three months following designation; implement the plan no later than the beginning of the next school year following designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Restructuring shall participate in an assessment of the educational program. All Restructuring schools shall develop a restructuring plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school in receipt of Title I funds that has been designated as a school in the Improvement, Corrective Action, or Restructuring phase shall arrange for the provision of supplemental education services (SES) and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to SES.

A school in receipt of Title I funds that has been designated as a school in the Improvement (year 2), Corrective Action, or Restructuring phase shall provide public school choice to eligible students and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to public school choice.

The proposed rule does not impose any additional professional services requirements on school districts, BOCES or charter schools.

COSTS:

The rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program, as granted by the United States Department of Education, relating to school accountability. The State and LEAs, including school districts and charter schools, are required to comply with the NCLB as a condition for their receipt of federal funding under Title I of the ESEA, as amended.

The rule may impose costs on LEAs with schools that are in

Improvement, Corrective Action, or Restructuring status. These costs would consist of the reasonable and necessary costs associated with the activities required under Differentiated Accountability of SQR teams and curriculum auditors, Joint Intervention Teams and Distinguished Educators. However, the State Education Department anticipates mitigating these costs to schools districts by using State Education Department staff or staff contracted by the Department to serve on SQR and Joint Intervention Teams or as Distinguished Educators. In addition, we anticipate that LEAs that receive Contract for Excellence funding will be able to consider the costs of SQR, curriculum auditors, Joint Intervention Teams and Distinguished Educators to be an allowable program and activity. No additional costs have been identified with respect to the implementation of improvement plans, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

Because of the number of schools involved, and the fact that the services and activities required to be provided will vary greatly from school to school, depending on the academic circumstances and needs presented in each school, a complete cost statement cannot be provided. In the event that persons serving as members of an SQR or Joint Intervention team or as a Distinguished Educator are not State Education Department staff or staff contracted for by the State Education Department, the estimated reasonable and necessary annual expenses will range from approximately $900 to $40,000 per school. These estimates are based on the number of anticipated hours that a school district will be required to engage the services of a consultant multiplied by the consulting fees that shall be paid in accordance with Commissioner's Regulations 100.16(c)(1). More specifically: For a school designated as Improvement/Basic, it is anticipated that two days (16 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of $57/hour, resulting in costs totaling $912. For a school designated as Corrective Action, it is anticipated that thirteen days (104 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of $72/hour, resulting in costs totaling $7,488. For a school designated as Restructuring/Advanced, it is anticipated that thirty days (240 hours) will be required to engage the services of a consultant multiplied by consulting fees in the amount of $102, as well as 20 days (160 hours) will be required to engage the services of a Distinguished Educator, multiplied by consulting fees in the amount of $112/hour, resulting in costs totaling $42,400. These estimates presume, to the extent appropriate, that the Commissioner appoints qualified employees of the district of location to serve as consultants, that there will be no replacement costs incurred by the district for these employees, and that, in general, the consultants will incur no overnight and minimal travel expenses.

MINIMIZING ADVERSE IMPACT:

The proposed rule is in response to recent approval granted by the U.S. Department of Education and is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program, relating to school accountability. LEAs, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed rule has been carefully drafted to meet specific federal and State requirements. Because these requirements are uniformly applicable State-wide to school districts, BOCES and charter schools, it was not possible to prescribe lesser requirements for rural areas or to exempt them from such requirements.

RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from the Department's Rural Advisory Committee, whose membership includes schools located in rural areas. In addition, copies of the proposed rule will be provided to each charter school. Copies of the proposed rule were also provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and paraprofessionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators representing the New York City Board of Education, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

Job Impact Statement

The proposed rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program as granted by the United States Department of Education. The proposed amendment applies to school districts, boards of cooperative educational services (BOCES) and charter schools, and implements the NCLB Differentiated Accountability Pilot Program in order to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress for two consecutive years and be returned to Good Standing. Local educational agencies, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965, as amended.

The proposed rule 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.

Department of Health

EMERGENCY RULE MAKING

Ocean Surf Bathing Beaches and Automated External Defibrillators (AEDs)

I.D. No. HLT-41-09-00001-E
Filing No. 1130
Filing Date: 2009-09-23
Effective Date: 2009-09-23

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

Action taken: Amendment of Subpart 6-2 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 225

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

Specific reasons underlying the finding of necessity: Chapter 500 of the Laws of 2008 was signed on September 4, 2008. This law requires amendments to the State Sanitary Code (SSC) to mandate automated external defibrillator (AED) equipment and at least one lifeguard trained in AED use, and for all HOA ocean surf beaches to be supervised by qualified surf lifeguards. The Public Health Law (PHL) amendments became effective January 2, 2009 and the chapter law mandates the Department of Health amend the SSC on or before the effective date to provide for implementation of the new requirements. Enacting this regulation as an emergency pending routine rulemaking will protect swimmers during the spring and early summer bathing seasons.

Requiring AED equipment and at least one lifeguard trained in the use of an AED at surf beaches during all hours of operation enable better emergency response for sudden cardiac arrest. Sudden cardiac arrest is one of the leading causes of death in the United States and the administration of a defibrillator within the first few minutes has been shown to be highly successful in preventing death. The presence of an AED and lifeguard trained in its use at a surf beach can decrease delays in AED administration, which was previously dependent on off-site Emergency Medical Services response.

The PHL specifies that the SSC must be amended to require all ocean surf beaches operated by a HOA to have qualified surf lifeguards on duty, including HOAs in Suffolk County and New York City (NYC), which are currently exempt from Subpart 6-2. Although this PHL amendment only specifies that surf lifeguards be provided, the SSC is being changed to require all ocean surf beaches owned or operated by HOAs to comply with

Subpart 6-2 in its entirety. Compliance with Subpart 6-2 of the SSC is essential to protect the public, protect lifeguards while performing their job duties, and to ensure consistency with requirements for operation for other surf beaches. Subpart 6-2 of the SSC requires rescue and first aid equipment, elevated lifeguard stands, and safety plans, and specifies the number and positioning of lifeguards. These requirements are necessary to ensure lifeguards are able to protect swimmers and not place their own safety at risk during rescue activities.

Subject: Ocean Surf Bathing Beaches and Automated External Defibrillators (AEDs).

Purpose: Mandate required ocean surf beaches to be supervised by a surf lifeguard trained in AED operation & provide & maintain onsite AED.

Text of emergency rule: Subdivision (i) of Section 6-2.2 is added as follows:

(i) Public Access Defibrillation (PAD) program shall mean a program that complies with Section 3000-b of the Public Health Law, including the availability of an automated external defibrillator, the identification of an emergency health care provider, the development of a collaborative agreement and successful staff completion of training in the operation of an automated external defibrillator.

* * *

Paragraph (2) of Section 6-2.3(a) is amended as follows:

(2) those, excluding ocean beaches in Nassau County*, Suffolk County, and New York City*, that are owned and operated by a condominium (i.e., property subject to the Article 9-B of the Real Property Law, also known as the Condominium Act), a property commonly known as a cooperative, in which the property is owned or leased by a corporation, the stockholders of which are entitled, solely by reason of their ownership of stock in the corporation, and occupy apartments for dwelling purposes, provided an ''offering statement'' or ''prospectus'' has been filed with the Department of Law, or an incorporated or unincorporated property association, all of whose members own residential property in a fixed or defined geographical area with deeded rights to use, with similarly situated owners, a defined bathing beach, provided such bathing beach is used exclusively by members of the condominium, cooperative apartment project or corporation or association and their family and friends.

* * *

Subparagraph (i) is added to Section 6-2.17(a)(4) as follows:

(i) At ocean surf beaches, at least one Supervision Level I aquatic supervisory staff possessing a current certificate of training in the operation and use of an automated external defibrillator approved by a nationally-recognized organization or the state emergency medical services council shall be present at all hours of beach operation. Records of the training shall be maintained available for review during inspections.

* * *

Clause (*a*) is added to Section 6-2.17(b)(1)(ii) as follows:

(a) At ocean surf beaches, at least one automated external defibrillator shall be provided by the operator and maintained on-site. The beach operator shall implement a PAD program as defined in Section 6 2.2(i) of this Subpart and maintain the following records on-site for inspection:

- *A copy of the collaborative agreement between an emergency health care provider and the ocean surf beach operator;*
- *A copy of the notification to the regional emergency medical services council of the existence, location, and type of automated external defibrillator; and*
- *The records of automated external defibrillator maintenance and testing specified by the manufacturer's standards.*

* * *

Subdivision (c) of Section 6-2.17 is amended as follows:

(c) Safety plan. Operators of bathing beaches must develop, update and implement a written beach safety plan, consisting of: procedures for daily bather supervision, injury prevention, reacting to emergencies, injuries and other incidents, providing first-aid and summoning help. *At ocean surf beaches, the safety plan shall be developed in consultation with an individual having adequate ocean surf lifeguarding experience.* The safety plan shall be approved by the permit-issuing official and kept on file at the beach. Approval will be granted when all the components of this section are addressed so as to protect the health and safety of the bathers, and the plan sets forth procedures to insure compliance with this Subpart.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 21, 2009.

Text of rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

The Public Health Council is authorized by Section 225(4) of the Public Health Law (PHL) to establish, amend and repeal sanitary regulations to be known as the State Sanitary Code (SSC) subject to the approval of the Commissioner of Health. PHL Section 225(5)(a) provides that the SSC may deal with any matter affecting the security of life and health of the people of the State of New York. In 2008, two amendments (Chapter 500 of the Laws of 2008) were made to PHL Section 225. The first added new Section 225 (5-c), requiring any public or private surf beach or swimming facility be supervised by a surf lifeguard and provide and maintain on-site automated external defibrillator (AED) equipment. Further, at least one lifeguard who has been trained in the operation and use of an AED must be present during all periods of required supervision. The second amendment added a new Section 225 (5-a) requiring surf lifeguards to supervise surf beaches used for swimming or bathing which are owned or operated by a homeowners association (HOA). HOA facilities, with the exception of those located in Nassau County, are currently exempt from Subpart 6 2 of the SSC. The PHL amendments became effective January 2, 2009 and the chapter law mandates the Department of Health amend the SSC to provide for implementation of the new requirements.

Legislative Objectives:

The legislative objective of Chapter 500 of the Laws of 2008 was to enhance the protection of public health and safety. The proposed amendments to the SSC, Subpart 6-2 Bathing Beaches will further this legislative objective and are required by statute.

Needs and Benefits:

Relating to AED Requirements:

The benefit of AED equipment and at least one lifeguard trained in the use of an AED at surf beaches during all hours of operation improves emergency response for sudden cardiac arrest. Sudden cardiac arrest is one of the leading causes of death in the United States and the administration of a defibrillator within the first few minutes has been shown to be highly successful in preventing death. The presence of an AED and of a lifeguard trained in its use at a surf beach will decrease delays in AED administration, which was previously dependent on a response from a generally off-site emergency medical services provider.

Related to Surf Lifeguard:

New PHL requirements specify that the SSC must be amended to require all ocean surf beaches operated by a HOA to have qualified surf lifeguards on duty, including HOAs in Suffolk County and New York City (NYC), which are currently exempt from Subpart 6-2. Although this PHL amendment only specifies that surf lifeguards be provided, the SSC is being changed to require all ocean surf beaches owned or operated by HOAs to comply with Subpart 6-2 in its entirety. Compliance with Subpart 6 2 of the SSC is essential to protect the public and protect lifeguards while performing their job duties. Subpart 6 2 of the SSC requires rescue and first aid equipment, elevated lifeguard stands, and safety plans, and specifies the number and positioning of lifeguards. These requirements are necessary to ensure lifeguards are able to protect swimmers and not place their own safety at risk. A requirement for ocean surf beach safety plans to be developed in consultation with an individual with ocean surf beach lifeguarding experience is added to ensure staff who are knowledgeable in lifeguarding practices and emergency procedures have input in establishing the safety plan.

Costs to Regulated Parties:

The proposed amendments affect approximately 95 surf beach operations: 60 municipal, 6 HOAs, 3 temporary residences, 25 beach clubs, and 1 community college, in NYC and Nassau and Suffolk Counties. Each of the 95 ocean surf beaches may incur costs associated with purchasing and maintaining AED equipment and establishing a Public Access Defibrillation (PAD) Program at the facility. Some may already have and maintain AEDs but the number, if any, is unknown. The cost of an AED device ranges from $1,100 to $3,000. There will be additional expenses related to maintenance and service of the AED. Periodic battery replacement is required (every 3 to 7 years, depending on the AED); replacement batteries average between $50 and $400. Some AED units have the option of using rechargeable batteries; costs range from $415 to $680 for batteries, including chargers. Replacement of pediatric or adult defibrillation pads is necessary after use, and unused pads must be replaced every 2-5 years depending on the unit. Pad replacement is estimated to be between $30 and $100 per set. Alternatively, AEDs can be leased for approximately $70 to $130 per month. Although the law only requires one AED per facility, some beaches may choose to provide more than one AED to facilitate a timely response.

In addition to the cost for purchasing an AED, surf beach operators must develop and implement a PAD program for their facility, which includes obtaining medical direction and program management. Costs for a PAD program, medical direction, and program management are estimated to be between $500 and $1500 a year. Municipalities that have physicians serving as health officers may have no additional expenses associated with medical direction. A single PAD program can be utilized for multiple beaches that have the same owner/operator, such as municipally operated beaches, the NYC Parks Department, and Nassau County Parks.

Training and certification in the use of the AED are incorporated in most cardiopulmonary resuscitation (CPR) certification programs and are not expected to add any additional expenses to beaches that are already supervised by lifeguards. CPR/AED training courses range from $75 to $110, but may be also included as part of lifeguard training courses. Lifeguards must renew their CPR/AED certification annually; re-certification courses range from $40 to $75.

There are two HOA ocean surf beaches in Suffolk County and one HOA ocean surf beach in NYC previously exempt that will now be regulated under Subpart 6-2. Although previously exempt from Subpart 6-2 of the SSC, the NYC HOA ocean surf beach has been regulated under Article 167 of the NYC Health Code and will have no additional expenses to comply with Subpart 6-2 of the SSC. Costs associated with Subpart 6-2 compliance for the two HOA surf beaches in Suffolk County are as follows:

Surf Lifeguard Training and Salary - Surf lifeguard training is estimated to cost between $200 and $500. Certifications are valid for up to three years from the date of issuance. CPR training courses range from $75 to $110; however, CPR training may be included in lifeguard training courses. Annual CPR re-certification is required, and is estimated to be between $40 and $75. Lifeguard salaries range from $11 to $21 dollars per hour. One of the HOA in Suffolk County is known to already supply lifeguards. One lifeguard must be provided for each 50 yards of beach open for swimming. At this time, the length of beach that is used for swimming is unknown; however, beach operators may restrict the area open for swimming to minimize expenses.

Initial Equipment Cost - The cost of equipment, including lifeguard chairs and rescue and first aid equipment, ranges from $1,470 to $3,970, for each required lifeguard. It is likely that beaches have some or all of the required equipment already.

Permit fee - There is an annual permit fee of $230 to operate a bathing beach in Suffolk County.

Drinking fountains and bathhouse facilities - No additional expense is anticipated for these facilities since beach use is restricted to residents, and their living quarters are expected fulfill these needs.

Costs to the Department of Health:

The cost for routine printing and distribution of the amended code will be the only cost to the State. There will be no cost to State Health Department District Offices as there are no ocean surf beaches within the jurisdiction of any District Office.

Costs to State and Local Government:

The proposed amendments affect approximately 95 beach operations in three local health department jurisdictions: 34 in Nassau County, 52 in Suffolk County, and 9 in NYC. The estimated burden to local health departments is minimal, as the inspection frequency would not change for NYC and Nassau County, and the number of permitted ocean surf beaches in Suffolk County would increase by 2 to a total of 52 regulated ocean surf beaches. Local governments that operate surf beaches will have the same costs described in the section entitled ''Costs to Regulated Parties.''

Paperwork/Reporting:

The proposed amendments require the beach operator to have available on-site records of AED program management and use, and copies of certifications in AED training for lifeguards. In addition, operators will need to amend their facility safety plan to reflect the deployment and use of AEDs, and must develop a PAD program. Initiation of the PAD program includes development of a collaborative agreement that is submitted to the appropriate Regional Emergency Medical Services Council (REMSCO). The PAD program specifies requirements for notifying REMSCO of the existence, location, and type of AED; and reporting every AED use.

The two HOA surf beaches in Suffolk County will have additional paperwork and recordkeeping associated with Subpart 6-2 compliance. Annually, each beach operator must apply for and obtain a permit to operate from the Suffolk County Department of Health. Daily logs indicating the number of bathers using the beach, number of lifeguards on duty, weather conditions, water clarity, and reported rescues, injuries, or illnesses must be maintained. In addition, owners/operators are required to report certain injury or illness incidents to the permit-issuing official within 24 hours, and must maintain records of lifeguard certifications and a written safety plan.

Local Government Mandates:

The proposed revisions impose a new responsibility of establishing a PAD program upon 60 municipalities that operate surf beaches. Local health department staff are responsible for enforcing the amendments to the bathing beach regulations as part of their existing program responsibilities.

Duplication:

This regulation does not duplicate any existing federal, state or local regulation.

Alternatives:

Because the PHL amendment required that surf lifeguards be provided at all ocean surf beaches, but did not mandate compliance with Subpart 6-2 of the SSC in its entirety, one alternative considered was to limit the SSC modifications to only mandating that surf lifeguards be provided. This option was rejected to ensure that lifeguards are provided with the necessary safety equipment and safety plans to protect the public and themselves and to maintain consistency with requirements for operation for other surf beaches.

Federal Standards:

At this time, there are no Federal standards pertaining to AEDs or public safety (lifeguards, safety equipment, etc.) at surf beaches.

Compliance Schedule:

These regulations will be effective upon filing with the Secretary of State.

Regulatory Flexibility Analysis

Effect of Rule:

There are 95 ocean surf bathing beaches in New York City (NYC) and Nassau and Suffolk Counties, all of which will be affected by the proposed rule that will require ocean surf beaches to provide and maintain automated external defibrillator (AED) equipment and a lifeguard trained in its use. Thirty-five (35) of these ocean surf beaches are considered small businesses, and include 25 beach clubs, 3 temporary residences (e.g., hotels and motels), 1 community college, and 6 homeowners associations (HOA). The remaining 60 ocean surf bathing beaches are owned and operated by municipalities.

Ninety-two (92) of the 95 ocean surf beaches are regulated under Subpart 6-2 Bathing Beaches of the State Sanitary Code (SSC), and 1 beach is regulated under Article 167 of the NYC Health Code. The proposed amendment that will require all HOA owned and operated ocean surf beaches to be permitted and regulated under Subpart 6-2 will affect the 2 HOA beaches (small businesses) in Suffolk County that are currently exempt from Subpart 6-2 regulations.

Compliance Requirements:

The proposed amendments require the beach operator to have available on-site records of AED program management and use, and copies of certifications in AED training for lifeguards. In addition, operators will need to amend their facility safety plan to reflect the deployment and use of AEDs, and must develop a PAD program. Initiation of the PAD program includes development of a collaborative agreement that is submitted to the appropriate Regional Emergency Medical Services Council (REMSCO). The PAD program specifies requirements for notifying REMSCO of the existence, location, and type of AED; and reporting every AED use.

The two HOA surf beaches in Suffolk County will have additional paperwork and recordkeeping associated with Subpart 6-2 compliance. Annually, each beach operator must apply for and obtain a permit to operate from the Suffolk County Department of Health. Daily logs indicating the number of bathers using the beach, number of lifeguards on duty, weather conditions, water clarity, and reported rescues, injuries, or illnesses must be maintained. In addition, owners/operators are required to report certain injury or illness incidents to the permit-issuing official within 24 hours, and must maintain records of lifeguard certifications and a written safety plan.

Other Affirmative Acts:

Chapter 500 of the Laws of 2008 was signed on September 4, 2008. This law requires amendments to the SSC to mandate beach operators implement a Public Access Defibrillation (PAD) program in compliance with Section 3000-b of the PHL, including the presence of AED equipment and a surf lifeguard trained in AED use. Additionally, the law requires SSC amendments mandating all HOA ocean surf beaches to be supervised by qualified surf lifeguards. The benefits of these changes are specified below.

Related to AED Requirements:

The benefit of AED equipment and at least one lifeguard trained in the use of an AED at surf beaches during all hours of operation improves emergency response for sudden cardiac arrest. Sudden cardiac arrest is one of the leading causes of death in the United States and the administration of a defibrillator within the first few minutes has been shown to be highly successful in preventing death. The presence of an AED and of a lifeguard trained in its use at a surf beach will decrease delays in AED administration, which was previously dependent on a response from a generally off-site emergency medical services provider.

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6 2 of the SSC is essential to protect the public, protect lifeguards while performing their job duties, and to ensure consistency with requirements for operation for other surf beaches. Subpart 6 2 of the SSC requires rescue and first aid equipment, elevated lifeguard stands, and safety plans, and specifies the number and positioning of lifeguards. These requirements are necessary to ensure lifeguards are able to protect swimmers and not place their own safety at risk. A requirement for ocean surf beach safety plans to be developed in consultation with an individual with ocean surf beach lifeguarding experience is added to ensure staff who are knowledgeable in lifeguarding practices and emergency procedures have input in establishing the safety plan.

Professional Services:

Facilities initiating PAD programs must identify a New York State licensed physician or New York State-based hospital knowledgeable and experienced in emergency cardiac care to serve as the Emergency Health Care Provider (EHCP). The EHCP participates in the collaborative agreement developed by the facility and EHCP.

Compliance Costs:

The proposed amendments affect approximately 95 surf beach operations: 60 municipal, 6 HOA, 3 temporary residences, 25 beach clubs, and 1 community college, in NYC and Nassau and Suffolk Counties. Each of the 95 ocean surf beaches may incur costs associated with purchasing and maintaining AED equipment and establishing a Public Access Defibrillation (PAD) Program at the facility. Some may already have and maintain AEDs but the number, if any, is unknown. The cost of an AED device ranges from $1,100 to $3,000. There will be additional expenses related to maintenance and service of the AED. Periodic battery replacement is required (every 3 to 7 years, depending on the AED); replacement batteries average between $50 and $400. Some AED units have the option of using rechargeable batteries; costs range from $415 to $680 for batteries, including chargers. Replacement of pediatric or adult defibrillation pads is necessary after use, and unused pads must be replaced every 2-5 years depending on the unit. Pad replacement is estimated to be between $30 and $100 per set. Alternatively, AEDs can be leased for approximately $70 to $130 per month. Although the law only requires one AED per facility, some beaches may choose to provide more than one AED to facilitate a timely response.

In addition to the cost for purchasing an AED, surf beach operators must develop and implement a PAD program for their facility, which includes obtaining medical direction and program management. Costs for a PAD program, medical direction, and program management are estimated to be between $500 and $1500 a year. Municipalities that have physicians serving as health officers may have no additional expenses associated with medical direction. A single PAD program can be utilized for multiple beaches that have the same owner/operator, such as municipally operated beaches, the NYC Parks Department, and Nassau County Parks.

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Initial Equipment Cost - The cost of equipment, including lifeguard chairs and rescue and first aid equipment, ranges from $1,470 to $3,970, for each required lifeguard. It is likely that beaches have some or all of the required equipment already.

Permit fee - There is an annual permit fee of $230 to operate a bathing beach in Suffolk County.

Drinking fountains and bathhouse facilities - No additional expense is anticipated for these facilities since beach use is restricted to residents, and their living quarters are expected fulfill these needs.

Economic and Technological Feasibility:

The proposal is technologically feasible because it requires use of existing technology for AED equipment.

The proposal is believed to be economically feasible because it reflects only actual costs related to purchase and maintenance of the AED and related to surf lifeguard requirements necessary for compliance with the PHL. The cost difference between providing surf lifeguards at HOA surf beaches as required by the new PHL amendments and costs of requiring all HOA surf beaches to conform to all Subpart 6-2 is justified in order to protect the public and protect lifeguards while performing their job duties. Additionally, HOA beaches in Nassau County are already required by law to comply with SSC requirements.

Minimizing Adverse Impact:

The proposed amendments are largely dictated by PHL; therefore, the aforementioned costs associated with purchase of AED equipment, training, and PAD program development are necessary to follow this mandate. Training costs may be reduced by having lifeguards take a combined CPR/AED training course for their annual CPR re-certification. Municipalities or parks departments that have multiple beach facilities or use AEDs in other settings may be able to receive discounts by purchasing AED units and equipment in bulk. Municipalities that have physicians serving as health officers may have no additional expenses associated with an EHCP. In addition, a single EHCP/PAD program can be utilized for multiple beaches that have the same owner/operator, such as a municipality (e.g. the NYC Park Department, Nassau County).

Granting of variances to surf beaches which allows time for compliance may be considered as an option when related to equipment purchase, etc. Because the PHL amendment requires that surf lifeguards be provided at all ocean surf beaches, but did not mandate compliance with Subpart 6-2 of the SSC in its entirety, one alternative considered was to limit the SSC modifications to only mandating that surf lifeguards be provided. This option was rejected to ensure that lifeguards are provided with the necessary safety equipment and safety plans to protect the public and themselves and to maintain consistency with requirements for operation for other surf beaches.

Small Business and Local Government Participation:

All three LHDs with ocean surf beaches in their jurisdiction have conducted outreach to the affected parties to inform them of the PHL change and future changes to the SSC. Department staff contacted the two HOA in Suffolk County that were previously not regulated to assess the impact of the rule change. The HOAs reported that expenses associated with complying with Subpart 6 2 of the SSC will have a minimal impact in that, when open, both beaches are already supervised by qualified ocean surf lifeguards and they already provide elevated lifeguard stands, first aid and CPR equipment, and spine boards. One beach reported needing a new rescue board and torpedo buoy (rescue can), while the other stated that they already possess the rescue equipment. Additionally, both HOAs reported having AED equipment, which is positioned or can be summoned to the beach within minutes of an emergency, and that all lifeguards are trained in AED use.

Some outreach has been conducted with lifeguarding staff at municipal facilities. The Suffolk County Department of Health and NYC Department of Health and Mental Hygiene officials were contacted and support the proposed revisions to enforce Subpart 6 2 of the SSC in its entirety at HOAs.

Rural Area Flexibility Analysis

No Rural Area Flexibility Analysis is required pursuant to Section 202-bb of the State Administrative Procedure Act. The 95 ocean surf bathing beaches in New York State are located in Nassau and Suffolk Counties and New York City. These jurisdictions are not considered rural areas, as they do not meet the criteria for a rural area under Executive Law Section 481(7), which defines a rural area as either counties within the state having less than 200,000 population, or counties with 200,000 or greater population that contain towns with population densities of 150 persons or less per square mile.

Job Impact Statement

No Job Impact Statement is required pursuant to Section 201-a (2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will have no substantial adverse impact on jobs and employment opportunities. The amendment may increase employment opportunities, as it now requires all ocean surf beaches owned or operated by a homeowners association in Suffolk County to provide surf lifeguards in accordance with Subpart 6-2 of the State Sanitary Code.

Department of Labor

EMERGENCY RULE MAKING

Enhanced Administration of the State's Apprenticeship Training Program and Enhanced Program Sponsor Accountability

I.D. No. LAB-29-09-00004-E
Filing No. 1151
Filing Date: 2009-09-29
Effective Date: 2009-09-29

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

Action taken: Amendment of sections 601.3, 601.4, 601.5, 601.6, 601.7, 601.9, 601.11 and 601.12 of Title 12 NYCRR.

Statutory authority: Labor Law, section 811; and 29 CFR 29

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

Specific reasons underlying the finding of necessity: The Rule enhances consistency in administration of the State's Apprenticeship Training Program, stakeholder participation in program approval, and program sponsor accountability that will ensure a well-trained workforce for the state's future.

Subject: Enhanced administration of the State's apprenticeship training program and enhanced program sponsor accountability.

Purpose: To strengthen the Apprenticeship Training Program in New York, and to ensure a well-trained, skilled workforce for the future.

Substance of emergency rule: Section 601.3(d)(4) of the regulations of the Commissioner of Labor is amended as follows:

(4) involves manual, mechanical or technical skills and knowledge which *ordinarily* require*s* a minimum of 4,000 hours of work and training, which hours may include the time spent at related instruction, except that at the discretion of the commissioner, a new [program] *trade* may require a minimum of 2,000 hours if the commissioner finds that the particular trade can be learned within such time;

Section 601.3 of the regulations of the Commissioner of Labor is amended by adding new subdivision (g) as follows:

(g) Electronic media means media that utilize electronics or electromechanical energy for the end user (audience) to access the content; and include, but are not limited to, electronic storage media, transmission media, the Internet, extranet, lease lines, dial-up lines, private networks, and the physical movement of removable/transportable electronic media and/or interactive distance learning.

Section 601.4 of the regulations of the Commissioner of Labor is amended by adding a new subdivision (i) as follows:

(i) A written public comment period is required for all proposed trades and new apprenticeship program applications. A list of all proposed trades and new apprenticeship program applications will be posted on the Department's website for a minimum period of 30 calendar days. The posting shall include the United States postal and e-mail addresses to which comments may be submitted and the last date by which any public comment must be received for each application or proposed trade. All comments must be submitted in writing and must include: the name, title, and organization name, if applicable, of the party submitting the comment(s). Comments may be submitted via mail or e-mail. Comments received will be considered as part of the Department's review of the application or proposed trade in question. Nothing in this section shall be construed as creating an entitlement on the part of the party submitting public comment to further participation in the deliberation or determination regarding the application for apprenticeship program or trade except as deemed appropriate by the Department.

The first un-numbered paragraph of Section 601.5 of the regulations of the Commissioner of Labor is amended as follows:

No apprenticeship training program shall be registered *or recertified* unless the commissioner determines that the program meets all the following standards prescribed for an apprenticeship program:

Section 601.5(b) of the regulations of the Commissioner of Labor is amended as follows:

(b) The program must contain the equal opportunity pledge prescribed in part 600 of this title and, in programs having [more than] five *or more* registered apprentices:

Section 601.5(c), paragraphs (2) and (8) of the regulations of the Commissioner of Labor is amended as follows:

(2) the term of apprenticeship[, which] *in a trade* shall be not less than two years or 4,000 hours, consistent with training requirements [as] established by industry practice as determined by the commissioner, except that, at the discretion of the commissioner, the term of apprenticeship in a [new program] *trade* [shall] *may* be *established as* not less than one year or 2,000 hours if the commissioner finds after review of written substantiation of the sponsor and the recommendation of the Apprenticeship Council that the particular trade [can] *may* be learned within such time;

(8) the sponsor's statement that [he] *the sponsor* will comply with applicable Federal, State and local occupational safety and health standards, including [his] *the sponsor's* willingness to provide adequate and safe equipment and facilities for training and supervision, and safety training for apprentices on the job;

Section 601.5 of the regulations of the Commissioner of Labor is amended by adding subdivisions (d), (e), (f), (g), (h), and (i) as follows:

(d) All sponsors of apprenticeship training programs, and their signatories, if any, are required to ensure that each of their apprentices maintains a records that documents task rotation and the skills acquired through the program. The apprentice must maintain this record in a format and in a manner approved by the New York State Department of Labor. The apprentice's Blue Book is an acceptable method of recording task rotation and acquisition of skills through the program. Any alternative method of recording task rotation and skills acquisition shall be submitted to the New York State Department of Labor by the program sponsor for approval prior to implementing its use by apprentices. The apprentice's immediate supervisor is required to verify that the information contained in the record is accurate and shall do so by signing the record at least weekly.

(e) Newly approved apprenticeship programs must undergo a two year probationary period. Sponsors of newly approved programs will be advised that their programs are being approved contingent upon successful completion of the probationary period. During the probationary period, a sponsor may not submit any new apprenticeship program applications.

(1) Factors considered during the probationary period include the program sponsor's and signatories' compliance to the satisfaction of the Department with the following:

(i) The continuous enrollment of apprentice(s);

(ii) The payment of wages as specified in the apprenticeship agreement;

(iii) Acceptable and verifiable documentation of task rotation and skill development;

(iv) Acceptable and verifiable documentation of participation in related instruction;

(v) The provision of proper supervision;

(vi) The provision of a safe work environment;

(vii) The terms and conditions/provisions as indicated on the Apprentice Training Program Registration Agreement (Form AT10)

(viii) The provisions of Labor Law, Article 23 and 12 NYCRR Parts 600 and 601; and

(ix)Articles 8 and 9 of the Labor Law, the Workers' Compensation Law, and any other Federal or State laws governing the terms and conditions of employment.

(2) Probation Review Options:

(i) After a review of the new program's performance during the probationary period, the sponsor will be notified whether it:

(a) Passed probation; or

(b) Will have its period of probation extended for a period of no more than one year; or

(c) Failed probation.

(ii) A sponsor of a program that has had its probation extended pursuant to subdivision (e)(2)(i)(b) of this section, or that has failed probation will be informed of the reasons why this decision was made. A sponsor whose program has been placed on an extended probation will be required to submit a proposed corrective action plan that addresses the deficiencies identified in the notice and a proposed time frame for its implementation. Both components of the proposed corrective action must receive New York State Department of Labor approval.

(iii) A sponsor whose program fails probation may file a written appeal of the decision by sending a letter to the commissioner setting forth its arguments why the sponsor's program should not have failed probation.

(f) A sponsor who fails probation will not be permitted to reapply for registration of any apprenticeship program for a period of one year. This period additionally applies to applications for registration of any apprenticeship program by any successor or substantially owned-affiliated entity, as those terms are defined in Labor Law section 220.

(g) All Apprentice Training Program sponsors will undergo a recertification process for each program at or about the time that the program completes its first training cycle following program certification, and at least every five years thereafter.

(1) Each sponsor seeking recertification and all applicants for new apprenticeship programs shall complete a new Apprentice Training Program Registration Agreement (Form AT-10), Sponsor Information Sheet (Form AT-9) and such other information as the commissioner shall deem appropriate for each of their programs.

(i) Simultaneously, every applicant for or sponsor of a Group Joint or Group Non-Joint program must submit a current list of program signatories' names, addresses, and Federal Employer Identification Numbers or Unemployment Insurance Employer Numbers in an electronic format as specified by the New York State Department of Labor.

(ii) The program sponsor must provide assurances in writing to the New York State Department of Labor that the sponsor will hold all signatories to the standards of their Apprentice Training Program Registration Agreement with the New York State Department of Labor.

(2) After a review of the sponsor's performance during the period prior to recertification, the sponsor will receive notification that:

(i) The sponsor's Apprenticeship Training Program has been renewed; or

(ii) The sponsor was found to have committed the violations specified, and is required to submit to the New York State Department of Labor a proposed Corrective Action Plan which addresses the deficiencies identified in the notice and a proposed time frame for the Plan's implementation. Both components of such Plan require Department approval. Formal deregistration will be pursued only if corrective action is not approved by the Department; or the sponsor has not taken the approved corrective action to resolve all issues within a reasonable period of time when compared to the approved time frame, as determined by the Department; or

(iii) The sponsor's Apprenticeship Training Program has been recommended for deregistration and deregistration proceedings will be initiated.

(h) Inter-Registration/Recertification Signatory Reporting Requirements.

All sponsors of group-joint and group non-joint programs must provide the Department with notification when an employer associates with, or disassociates itself from, a program, and must do so within ninety (90) days time. Such notification must include the employer's name, address, and either the employer's Federal Employer Identification Number (FEIN) or Unemployment Insurance Employer Number in an electronic format, as specified by the Department. Employers are considered to be associated with a program even if such association is through some intermediary organization. Employer inactivity in a program shall not, in and of itself, constitute disassociation.

(i) Related Instruction may be provided in person or via electronic media. All Related Instruction providers must be identified on an AT-8 Form and approved by the State Department of Education.

Section 601.7 of the regulations of the Commissioner of Labor is amended by adding a sub-section (d), as follows:

(d) Programs With No Apprentices:

(1) Any program, except for programs operated by the State Department of Correctional Services, that has not had an apprentice registered with the New York State Department of Labor for a period of twelve (12) consecutive months shall be deemed to have been voluntarily deregistered by its sponsor. The Department will follow up such deregistration with a letter acknowledging that the program has been voluntarily deregistered. The letter will include the effects that such deregistration may have on an employer. In order for a sponsor to re-register a program which was voluntarily deregistered, the sponsor must reapply and meet all the requirements contained in Article 23 and Parts 600 and 601.

(2) Within sixty (60) days before the conclusion of the twelve month period referred to in subdivision (1), a sponsor, who would otherwise be ''deemed to have been voluntarily deregistered,'' may request that its program be placed in inactive status (Inactive Program).

(i) The commissioner, in his/her discretion may grant such status only to sponsors found to be in compliance with Article 23, Parts 600 and 601, and other State and Federal laws for the protection of workers.

(ii) If granted, inactive status shall run from the end of the twelve month period referred to in subdivision (1).

(iii) An employer who is associated with an Inactive Program shall not be deemed to have a registered New York State apprentice training program for purposes of work performed pursuant to Articles 8, 8A, and 9 of the Labor Law under that program.

(iv) An Inactive Program shall be deemed reactivated upon:

(a) The registration of an apprentice by filing form AT-401;

(b) The filing of newly updated AT-9 and AT-10 forms, and such other form(s) as the commissioner may require, by the sponsor; and

(c) The review and approval of such forms by the Department.

(v) After a period of twelve (12) months of inactive status, inactive programs will be deemed voluntarily deregistered by its sponsor.

Sections 601.4(a)(1), 601.4(b); 601.6(k); 601.7 subsections (b), (b)(2), and (c)(2); 601.8; 601.9; 601.11(e); and 601.12 of the regulations of the Commissioner of Labor are amended for gender neutrality and to make minor, corrective, non-substantive changes.

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 submitted to the Department of State a notice of proposed rule making, I.D. No. LAB-29-09-00004-EP, Issue of July 22, 2009. The emergency rule will expire November 27, 2009.

Text of rule and any required statements and analyses may be obtained from: Kevin E. Jones, New York State Department of Labor, Room 509, Building 12, State Office Campus, Albany, NY 12240, (518) 457-4380, email: nysdol@labor.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

Labor Law § 811.1 (j) states that the Commissioner of Labor shall have the power to adopt such rules and regulations as may be necessary for the effective administration of the purposes and provisions of Article 23. In addition, the emergency regulations are promulgated under authority granted to the Department under federal regulations found at 29 CFR 29.

2. Legislative objectives:

Labor Law Article 23, § 810 makes it the public policy of the State of New York to develop sound apprenticeship training standards and to encourage industry and labor to institute apprenticeship programs as a preferred method of training and preparing workers in New York. These amendments fulfill these legislative objectives and strengthen

the Apprenticeship Training program in New York by increasing public participation in the apprenticeship process, reinforcing the need to memorialize skill attainment by apprentices, and reaffirming the accountability of program sponsors for their signatories and apprentices.

3. Needs and benefits:

During the past year, the Commissioner of Labor placed a moratorium on the approval of apprenticeship training programs in all trades while a thorough review of the State's Apprenticeship Training Program was conducted. Two independent reviews were conducted, an internal review - the Process Mapping Report - and an External Review conducted by Coffey Consultant's. These reviews sought input from various stakeholders and partners as well as Apprenticeship Training Program staff. Both the internal and external reviews echoed common themes and consistent recommendations to ensure the development of a world class workforce. Those themes included the need for greater stakeholder involvement in the registration process, increased consistency in program implementation, and increased accountability by program sponsors in ensuring the quality and effectiveness of apprenticeship programs. A number of significant recommendations which surfaced from the internal and external reviews are reflected in these regulatory amendments. .

The public comment period for all new program applications affords an opportunity for stakeholders to provide comments on all new programs and new trades initiated in New York State. The requirement for use of Blue Books or other form of documentation of job rotation ensures that apprentices are being rotated to all aspects of their work process resulting in a skilled workforce with portable credentials. Sponsor responsibility for monitoring program signatories and their compliance with apprenticeship training requirements shores up program oversight and accountability. Finally, the program recertification process allows sponsors an opportunity to ensure the Department has current and accurate information on their programs and signatories and ensures periodic monitoring of all apprenticeship programs on a regular basis.

4. Costs:

The implementation of these regulations will result in the need for the apprentice's on-the-job supervisor to sign the apprentice's Blue Book, or other form of documentation of job rotation approved by the Department. It will also require that new sponsors go through a two-year probation period before being certified. Further, the rules call for triennial sponsor recertification, the reporting and monitoring of employer-members and employer-signatories by program sponsors, and, if needed, the preparation and implementation of corrective action plans for sponsors who fail to measure up to program standards. The amount of time and resources needed will be contingent upon the size of the program and the complexity of the corrective action issues.

It is anticipated that the implementation of the regulations will impact Apprenticeship Training Office staff. The caseloads for field staff will be adjusted accordingly to accommodate for these needs; however, additional staff will be required in central office to process the documents for program probation and recertification, for tracking of signatory information, as well as handling the correspondence regarding public comments on new trades and program applications.

5. Local government mandates:

Municipalities, school districts, fire districts and others who currently, or plan to, serve as program sponsors for apprenticeship training programs will have to comply with the new requirements that will apply to any new programs proposed by them including public notice of program applications. All apprenticeship programs in which these entities participate will be subject to ensuring that current and accurate information is held on program signatories. The Department will be responsible for monitoring the signatories on a random sample basis. However, these requirements apply only to local governments that choose to serve as program sponsors for apprenticeship programs. Moreover, the amendments will benefit such local governments by ensuring consistency and accountability among program sponsors and will assist local governments that have enacted local laws requiring public work contractors to participate in state registered apprenticeship training programs by helping to ensure the quality of such programs.

Apprenticeship Training Program staff will be available to provide technical assistance to program sponsors - including local governments choosing to undertake this role - to assist them in complying with the rule.

6. Paperwork:

Apprenticeship programs traditionally require apprentices and their supervisors to track apprentices' progress through various job rotations included in their overall training program. While ''blue books'' have traditionally been used for this purpose, the proposed rule allows for flexibility in this regard by providing for skills attainment to be tracked in some other format approved by the Department.

Additional paperwork that will be required from regulated parties as a result of these rule changes include corrective action plans for program sponsors who fail to comply with program requirements and triennial recertification applications.

At the same time, the Department will have to develop and complete a number of new documents including form letters to address probationary and recertification determinations, form letters to acknowledge receipt of public written comments, as well as revisions to the Apprentice Training Program Registration Agreement.

The database currently used by the Apprenticeship Training Program will also need to be revised to track probationary and recertification periods and program signatories' information.

7. Duplication:

No duplication of rules were identified. Rather, these regulations are intended to clarify existing regulations found in 12 NYCRR § 601.4 Standards for Apprenticeship Programs and 12 NYCRR § 601.5 Standards for Apprenticeship Agreements.

8. Alternatives:

Overall there are no viable alternatives to the requirements set forth in the proposed rule. The rule reinforces basic requirements for program registration, monitoring, and accountability recommended by consultants and various stakeholders folding a long and detailed review of the state's administration of its apprenticeship training program.

9. Federal standards:

United States Department of Labor's proposed rule changes to 29 CFR 29 published in the Federal Register on December 13, 2007, contains a requirement for provisional registration, including a one year provisional approval of newly registered programs after which program approval may be permanent, continued as provisional, or rescinded following a review by the registration agency. New York State's proposed emergency regulation for a probationary period for all new programs mirrors the proposed federal requirement except that the probation period extends for two years. It is believed that this enhanced requirement will result in higher standards for New York's Apprenticeship Training program by offering sponsors additional time to fully develop quality programs, while at the same time, affording the Department an opportunity to assess the success of the program based upon a more representative operating history.

10. Compliance schedule:

The two-year probationary requirement will become effective for new sponsor program applications approved on or after the effective date of these regulations.

The three-year recertification period will be implemented in each geographic region of the state on an incremental scale determined by the age of the program so that one third of the programs within a region - starting with the oldest programs - will be due for recertification each year, commencing on or after the effective date of these regulations.

The establishment of a written public comment period for new trades and program applications will be implemented on or after the effective date of these regulations.

New sponsor mandates with regard to ensuring that current and accurate information is held on their employer signatories will be implemented on or after the effective date of these regulations.

Provisions set forth in the rule clarifying job rotation requirements and acceptable documentation will be effective on or after the effective date of these regulations.

Regulatory Flexibility Analysis

1. Effect of rule:

The provisions of this proposed rule which provide for the use of electronic recordkeeping will help to advance the Department's objectives in improving consistency and quality control of apprenticeship programs across the state without imposing any undue burden on small businesses.

While it is possible for a local government to be a program sponsor, the primary effect of these rules on local governments is incidental to the program. Many local governments have local requirements that require contractors performing work on public work projects have an apprentice training program. However, there is no single source of information from which such local governments may determine which contractors meet this requirement. By collecting and posting a list of program signatories to its website, the Department will be able to address this local government need.

Currently, all registered apprenticeship programs are regulated by the Department of Labor under a uniform set of standards, applicable to large and small businesses and local governments alike. Sponsors of Apprenticeship Training Programs may include building and construction trades, manufacturing trades, local governments (such as villages, school districts, and fire districts), as well as other non-traditional trades (such as baker, chef, or dental lab technician).

There are four types of Apprenticeship Training programs in this state, and each category may include small businesses and local government sponsors or signatories as follows:

- Individual Non-Joint: --- Involves a non-union employer and one or more apprentices or an employer with a union that does not wish to participate in the apprenticeship program. (584 Programs)
- Individual Joint: --- Involves a single employer and the union representing the employer's apprentices. (70 Programs)
- Group Joint: --- Involves a group of employers and one union, which represents the workers of the trade. (194 Programs)
- Group Non-Joint: --- Involves a group of non-union employers or an employer trade association whose members agree to apprenticeship standards among themselves or which contracts with a service provider to administer the apprenticeship program and to provide related instruction classes for the apprentices. (27 Programs)

The data listed above reflects the number of programs in each category, not individual sponsors, since one sponsor may operate multiple programs. The Department's records do not provide information to determine which sponsors are identified as small businesses or local governments. However, there are no exclusions in the types of programs a small business or local government may sponsor, which may include: construction, printing, metal-allied, manufacturing, service & repair, plant maintenance, business services, retail and wholesale, health service, justice, public order & safety, administration of human resources, as well as many others. Nor is the size of programs eligible for participation limited, as long as the sponsor maintains at least one apprentice. While a number of comments suggested that the rules should require a greater number of apprentices (as there is now an incentive for contractors to have programs solely in order to submit bids on certain public works projects), the Department considered the impact that requirement might have on local governments and small businesses, and elected to retain the current requirement of one apprentice.

2. Compliance requirements:

Participation in registered apprenticeship training programs is completely voluntary, and the effect of the proposed changes will be applicable to all programs, both large and small alike. In some instances, small businesses and local governments who already participate in registered programs as group or joint sponsors will be required to provide electronic record keeping, by listing and transmitting the names of member signatories and their identifying data to the Department. Other recordkeeping activities remain unchanged by this proposal, except to the extent that it allows for greater flexibility in providing and recording the apprentices' training and task rotation activities.

Small businesses and local governments who choose to establish new apprenticeship programs will need to comply with all the record keeping required by Section 601, including tracking the apprentice's progress through various task rotations through use of a ''Blue Book'' or some other format approved by the Department. Small businesses and local governments sponsoring apprenticeship training programs will also be responsible for the preparation and implementation of a corrective action plan, if needed, to bring their program into compliance with statutory and regulatory requirements governing apprenticeship programs and the completion of paperwork for recertification every five years.

The amount of time needed for all these activities is contingent upon the size of the program and the degree to which existing programs are already in compliance with requirements of the current regulations. Newly registered programs will undergo a two-year probationary period in which they will by monitored by the Department to ensure they are in compliance with apprenticeship standards. During that time, Apprenticeship Training Representatives will be available to provide any assistance needed to meet program standards.

The Department is not aware of any local government program sponsors at this time.

3. Professional services:

Program sponsors will not be required to retain professional services to comply with the adoption of these regulations. The services and recordkeeping required are performed by the sponsor's apprenticeship coordinator, project manager, or payroll/bookkeeping personnel in the ordinary course of administering an apprenticeship program.

4. Compliance costs:

Other than those small businesses or local governments who do not own or have access to computer services, and who elect to make a capital investment for that purpose, it is not anticipated that sponsors will incur any additional expenses, for personnel or equipment, due to the adoption of these regulations.

The completion of ''Blue Books'' or an alternative method of documentation of task rotation has been a requirement of the program as part of the Department's apprenticeship standards since its inception. All Apprentice Training Program Registration Agreements provide for a specified ratio of apprentices to journey workers, who act as the apprentice's supervisor. Since a supervisor is responsible for a limited number of apprentices and verifying their progress in ''Blue Books,'' or some other approved method of documenting task rotation, the sponsor will not incur any additional expenses for personnel.

Only group non-joint or group-joint sponsors will be required to submit the names and identifying data of signatories to the Department by electronic means.

Every sponsor will be required to apply for the recertification of each of its programs at least once every five years, including completing the recertification paperwork (this is a new federal requirement). The implementation of these regulations will require those sponsors whose programs fail to meet minimum standards to prepare and implement a corrective action plan.

If a sponsor does not have a computer available to develop and send an electronic list of signatories to its group non-joint or group-joint program, sponsors may obtain access to computer equipment at One-Stop Career Centers located across the state. The amount of time needed to prepare such files is contingent upon the size of the program and the complexity of the issues, but it is not expected to have any significant impact on either small businesses or local governments.

5. Economic and technological feasibility:

The adoption of these regulations is not expected to place an undo burden on small business or local government program sponsors.

Wherever possible, the Department will utilize technology to make the filing of documents with the Department easier. For example, by adoption of this proposal, the Department will require group non-joint or group-joint sponsors to submit lists of apprenticeship program signatories in an electronic format, but does not require the purchase or installation of any new software or unique programming. If not already owned or available to the sponsor, computer equipment may be utilized at One-Stop Career Centers for this purpose.

In addition, public comments on new program applications and proposed trades will be accepted via an electronic format, providing better feedback and faster approval of new apprenticeship programs.

Small businesses and local governments may also utilize electronic recordkeeping to document apprentice task rotation, thereby increasing efficiency and reducing costs for time and personnel that otherwise would be needed to perform this function.

Finally, small businesses and local governments, especially those it rural areas, may utilize electronic media approved by the NYS Department of Education in providing related instruction to apprentices thus reducing costs associated with classroom instruction.

6. Minimizing adverse impact:

Sponsors who administer Group-Joint or Group Non-Joint programs currently maintain a list of program signatories in their normal course of business, but will be required to submit those lists and identifying data to the Department by electronic means under this proposal. It is possible that small businesses or local government might be a member of a group or entity that might constitute a program sponsor. However, it is extremely unlikely that this fact alone would result in such group having to purchase equipment to comply with this requirement.

Documentation of task rotation by alternative means approved by the Department, including the submission of electronic records by apprentices, will allow sponsors to be innovative in their approach as they seek to increase efficiency and reduce costs associated with administering apprentice training programs. Program sponsors are currently tracking task rotation using conventional means, i.e. on paper, such as ''Blue Books.'' This proposal will provide more flexibility and a more consistent application of this requirement.

In addition, the new regulations allow the use of electronic media to provide related instruction to apprentices, after each such provider is approved by the New York State Department of Education. The addition of an alternative to traditional classroom instruction allows small business or local government program sponsors in more remote areas another means of providing apprentices with the courses needed to complete their apprenticeship programs, and does so at a lesser cost.

While the Department believes that the possibility that the proposed rule will have an adverse impact is minimal, the Department will provide technical assistance to program sponsors in order to minimize any such adverse impact from this rule on small business and local government sponsors, especially those located in rural areas.

7. Small business and local government participation:

On August 28, 2007, New York State placed a moratorium on the approval of apprenticeship training programs in all trades while a thorough review of the program was conducted. Two independent reviews were conducted which obtained input from various stakeholders and partners as well as Apprenticeship Training Program staff. Small businesses and local governments were given an opportunity to participate in these reviews by responding to questions asked by parties conducting the reviews. The final Reports, authored by Coffey Consulting LLC and the Department, were posted for public review on the Department's website. Also, seven public forums were held throughout the state in August and September 2008, offering the public, including small business and local government sponsors, an opportunity to provide their comments on the reports. All feedback received as a result of these activities was reviewed and considered and a number of recommendations received from stakeholders, interested parties, and the consultants are reflected in this rulemaking.

In addition, the Apprentice Training Council met three times (once in Albany and twice in New York City) since the Emergency Regulations were filed on October 15, 2008 and while this proposal was being developed. Many sponsors attended these meetings, including sponsors located in rural areas. The changes were explained, questions were asked, and input was taken. At the March 18, 2008 meeting of the Apprentice Training Council, for example, one representative identified himself as a ''small upstate sponsor'' of an apprenticeship program, and presented his views on the effect of the new regulations, including the difficulty his company might experience if the Department imposed a requirement of hiring more than one apprentice to be eligible for registration. Further, sponsors were asked to submit written comments and 29 individuals representing 30 organizations provided written comments to the Department. These comments were taken into account and changes were made based upon the input received.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

Apprenticeship training programs may be sponsored by a single employer, a group of employers, or a joint apprenticeship committee representing both employers and a union. There are currently over 450 sponsors operating 650 programs with nearly 6,000 apprentices outside of New York City and Long Island. Many of these programs operate in rural areas of the State.

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

All Apprenticeship Training Program Sponsors in rural areas who conduct Group-Joint or Group Non-Joint programs must provide a list of all employer signatories to NYSDOL in an electronic format including names, addresses, and either their Federal Employer Identification Number (FEIN) or Unemployment Insurance Employer Number.

All program sponsors in rural areas will be required to ensure their apprentices are regularly keeping ''Blue Books,'' or a comparable record, to ensure documentation of task rotation and the attainment of skills.

All program sponsors in rural areas will be required to apply for recertification of programs at or about the time that the program completes its first training cycle following certification, and at least every five years thereafter. Deficiencies in program administration or operation identified during the review will have to be corrected.

All applications for new apprenticeship training programs by sponsors in rural areas will be subject to publication and public comment. Sponsors may be required to respond to inquiries from Apprenticeship Training Program staff in response to comments received from the public.

3. Costs:

The adoption of these regulations is not expected to place an undue burden on program sponsors located in rural areas.

Related Instruction: These new regulations provide no additional requirements over those in the prior regulations. Sponsors incur only the costs associated with classroom learning. Since the New York State Department of Education authorizes and approves instructional programs for apprentices, they are available on a statewide basis at local community colleges or BOCES Centers. Consequently, rural sponsors will not suffer any disadvantage in meeting program requirements. Although minimal costs are incurred in sponsoring and operating an Apprenticeship Program, this proposal will not result in any significant increase in costs. Further, these rules provide specifically for training to be done electronically, eliminating a significant cost to sponsors when they might have to travel to distant locations in order to secure appropriate related instruction.

Additional costs related to the amount of time and resources needed to comply with the following provisions of the proposal will be contingent upon the size of the program and the complexity of corrective action issues.

Although the proposal will require the use of a computer to submit an electronic list of signatories and their identifying data to NYSDOL for group non-joint and group non-joint sponsors, it is highly unlikely that this will result in capital expenses or annual operating costs. This data is already in the possession of each union's contract benefit program office or each group non-joint sponsor's membership office. Electronic data submission to NYSDOL was designed to provide DOL with crucial information necessary to the Department in administering the apprentice training program by the most cost effective method for the Department and the sponsors. Due to the large number of comments from the regulated community, this provision was significantly changed from what the Department's originally proposed (the original proposal required the sponsor to get AT-9 forms completed by each signatory).

The regulations, for the first time, allow electronic record keeping of task rotation. However, sponsors may continue to utilize conventional pre-printed forms or ''Blue Books'' for recording on-the-job

training hours if they so desire. The electronic method of on-the-job training data collection was designed to eliminate costs and to aid in the administration of apprenticeship programs by reducing the time and personnel needed to complete and file conventional printed forms.

Also, the regulated community and any other interested individuals or groups will, for the first time, be able to view both applications for new programs and the details of proposals to recognize new trades on line. Such access was expressly requested by the regulated community and such information was not previously available except through the FOIL process.

Access to computer equipment in order to take advantage of electronic record-keeping of task rotation, access to applications for new programs and the details of proposals to recognize new trades, and a means to create the newly required electronic list of signatories, if not otherwise available to sponsors, will be available at One-Stop Career Centers located across the state.

4. Minimizing adverse impact:

Sponsors in rural areas who administer Group-Joint or Group Non-Joint programs currently maintain a list of program signatories in their normal course of business, but will be required to submit those lists and identity data to NYSDOL by electronic means under this proposal.

Documentation of task rotation by alternative means approved by the Department, including the submission of electronic records will allow sponsors to be innovative in their approach as they seek to increase efficiency and reduce costs associated with administering apprenticeship programs. Program sponsors are currently tracking task rotation using conventional means, such as ''Blue Books and payroll records. This proposal will provide more flexibility and a more consistent application of this requirement.

In addition, the new regulations allow the use of electronic media, if approved by the New York State Department of Education, to provide related instruction to apprentices. The addition of an alternative to traditional classroom instruction allows sponsors in more remote areas a means of providing apprentices with the courses needed to complete their apprenticeship programs at reduced costs.

While the Department believes that the possibility of adverse impact of the proposed rule will be minimal, the Department will provide technical assistance to program sponsors. Such assistance will serve to minimize the adverse impact, if any, from the new rules for sponsors located in rural areas.

5. Rural area participation:

On August 28, 2007, New York State placed a moratorium on the approval of apprenticeship training programs in all trades while a thorough review of the program was conducted. Two independent reviews were conducted which obtained input from various stakeholders and partners as well as Apprenticeship Training Program staff. Sponsors located in rural areas were given an opportunity to participate in these reviews by responding to questions asked by parties conducting the reviews. The final written Reports authored by Coffey Consulting, LLC., and the Department were posted for public review on the Department's website and seven public forums were held throughout the state in August and September 2008, offering the public, including sponsors located in rural areas, an opportunity to provide their comments on the reports. All feedback received as a result of these activities was reviewed and considered and a number of recommendations received from stakeholders, interested parties (some of whom were from rural areas), and the consultants are reflected in this rulemaking. A sampling of the written responses shows that comments received from upstate and rural employers and unions included the Apprenticeship Coordinator for the Bricklayers and Allied Craftsmen Local #3, Ithaca, New York; the Apprenticeship Coordinator for the Bricklayers and Allied Craftsmen Local #2, Albany, New York; the Plumbers and Steamfitters Local #7, Latham, New York; the Eastern New York Laborers' District Council, Glenmont, New York, and the Empire State Carpenters Apprenticeship Committee, Rochester, New York.

In addition, the Apprentice Training Council (ATC) met three times (once in Albany and twice in New York City) since Emergency Regulations were filed on October 15, 2008. Many sponsors attended these meetings, including sponsors located in rural areas. The changes were explained, questions were asked, and input was taken. At the March 18, 2008, meeting of the Apprentice Training Council, for example, one representative identified himself as a ''small upstate sponsor'' of an apprenticeship program, and presented his views on the effect of the new regulations, including the difficulty his company might experience if the Department imposed a requirement of hiring more than one apprentice to be eligible for registration. Further, sponsors were asked to submit written comments and 29 individuals representing 30 organizations provided written comments to the Department. These comments were taken into account, and changes made based upon the input received, and consideration of the Department's objectives.

Job Impact Statement

The emergency regulations will not result in the decrease of any jobs; in fact, apprentice training is designed as a program to increase employment opportunities by training workers and increasing their prospects for long-term employment in the state's skilled labor force. Further, as a part of the program, workers are not only trained, but their wages are set and monitored and they are provided with a safe working environment and provided with better health and safety training than they might otherwise obtain.

NOTICE OF ADOPTION

Enhanced Administration of the State's Apprenticeship Training Program and Enhanced Program Sponsor Accountability

I.D. No. LAB-29-09-00004-A

Filing No. 1153

Filing Date: 2009-09-29

Effective Date: 2009-10-14

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

Action taken: Amendments of sections 601.3, 601.4, 601.5, 601.6, 601.7, 601.8, 601.9, 601.11 and 601.12 of Title 12 NYCRR.

Statutory authority: Labor Law, section 811; and 29 CFR 29

Subject: Enhanced administration of the State's apprenticeship training program and enhanced program sponsor accountability.

Purpose: To strengthen the Apprenticeship Training Program in New York, and to ensure a well-trained, skilled workforce for the future.

Text or summary was published in the July 22, 2009 issue of the Register, I.D. No. LAB-29-09-00004-EP.

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

Text of rule and any required statements and analyses may be obtained from: Kevin E. Jones, New York State Department of Labor, Room 509, Building 12, State Office Campus, Albany, NY 12240, (518) 457-4380, email: nysdol@labor.state.ny.us

Assessment of Public Comment

The Department received comments from seventeen (17) individuals representing twelve (12) different organizations during the comment period following publication of the Notice of the Emergency/Proposed Rule in the State Register on July 22, 2009. The majority of those offering comments were identified as labor organizations, employers, employer associations or apprenticeship coordinators who sponsor registered apprenticeship programs. One submission came from a Designated Local Education Agency (DLEA) responsible for coordinating related instruction for apprenticeship programs.

While most of the comments expressed general support for the changes, noting the regulations were likely to improve performance standards, consistency in administration and in enforcement of standards for apprenticeship programs, each of the commentators offered differing views on the impact of the regulations by requesting clarification, expressing reservations or, in some cases, disapproval of certain aspects of the Proposed Rule changes. Many expressed the view that more rigorous enforcement of regulations was the most efficient way of improving registered programs, while only one commentator proposed that regulation should be reduced rather than expanded. Changes in the Proposed Rule to apply gender neutrality and consistency in terminology and usage either received no comment or were expressly endorsed by commentators. All comments received were reviewed and assessed in accordance with the provisions of the State Administrative Procedure Act.

§ 601.3 Definitions.

Subsection (g) was added to include a definition for the use of electronic media in providing related instruction to apprentices, and adopts the language used in the amended federal regulations to expand the methods

of providing technical instruction. Previously, 29 CFR Part 29.5(b)(4) provided for classroom instruction through traditional means, while no specific method of instruction was authorized by Department regulations. The definition of electronic media was added to keep pace with technological advances and allow more flexibility in meeting the educational needs of apprentices.

Several commentators expressed strong approval for the use of electronic media, while some suggested that it should be limited to no more than 10% of the required instruction and should be closely monitored. Two commentators urged the use of distance learning technology already in use in educational institutions, while one comment opposed its use, believing it would have a negative impact on program quality.

Response:

While the Department recognizes the validity of these concerns, the use of electronic media in providing instruction is necessary to align with technological advances taking place in the delivery of instruction in all aspects of education. Under current law, provisions contained in Article 23 and Part 601 of the Department's regulations require approval and coordination of related instruction with the New York State Department of Education, which provides its experience and expertise in overseeing all new methods of instruction. Since the extent to which sponsors incorporate electronic media into their programs will depend upon the objectives of the particular trade and available resources, no limitation has been placed on its use. The final Rule is adopted without change.

§ 601.4 Eligibility and procedure for registration.

Eligibility requirements have been amended by re-emphasizing the sponsor's responsibility to comply with Department standards for registered programs and the development of an Affirmative Action Plan satisfying the requirements of Part 600 of the Department's regulations. The Rule also requires the Department to post new trades and apprenticeship program applications on its website for a period of thirty (30) days for public comment. Comments received within that time period may be submitted by regular mail or e-mail, and will be considered in evaluating the sponsor's application and eligibility to sponsor a registered apprenticeship program.

A majority of the comments received approved of the Department's emphasis on improving program performance by holding sponsors accountable, and suggested closer monitoring of programs would provide more consistency and better quality. One comment objected to any rejection of a program that fails to meet Affirmative Action standards without providing more definitive criteria. Seven commentators offered strong approval for posting new program applications on the Department's website for public comment, but suggested that a forty-five (45) day period was more appropriate.

Response:

The revised rules recently adopted by the federal government, and made applicable to State agencies administering their own programs, emphasized the need to improve program quality and accountability. The Rule adopted implements these objectives and enhances consistency in enforcement by stricter adherence to Department standards for performance and promoting equal opportunity in the State's apprentice workforce. Part 600 of the Department's Regulations sets forth the standards for submitting Affirmative Action Plans and equal opportunity objectives in accordance with well-established constitutional principles for promoting non-discrimination and equal opportunity.

Posting proposals for new trades and sponsor applications increases public awareness of changes and the availability of new programs in the regulated community. A thirty day time period was deemed sufficient to allow for the submission of public comments. The Rule is adopted as proposed.

§ 601.5 Standards for apprenticeship programs.

The Rule contains new provisions for enhancing program performance by adding subsections (d); (e); (f); (g); (h) and (i) to Section 601.5, reenforcing the Department's oversight of apprenticeship programs.

Subsection (d) requires sponsors to ensure that apprentices maintain records documenting task rotation and acquired skills by using traditional ''Blue Books'' or some other authorized form.

Subsection (e) provides a two-year probationary period for newly approved with identifiable criteria used in determining final approval. The Rule also provides that during the probationary period, sponsors will not be permitted to submit applications for new apprenticeship programs.

Subsection (f) requires sponsors who fail probation to wait at least one year before re-applying for a program.

Subsection (g) applies to existing apprenticeship programs, by requiring recertification at or about the time the program completes its first training cycle, and at least every five years thereafter. The Rule also requires group non-joint and group-joint sponsors to identify their member signatories, and provide the Department with certain identifying information.

Subsection (h) affirms the continuing obligation of group non-joint and group-joint sponsors to provide the Department with updated information on their member signatories, while both subsection (g) and (h) require that group non-joint and group-joint sponsors submit the names and identifying information on their member signatories in an electronic format.

Subsection (i) is added to allow sponsors to provide related instruction to apprentices in person or by electronic media.

Most commentators responding agreed that regular and consistent evaluation of an apprentice's progress through documentation of task rotation using ''blue books'' or some other means would improve program performance. One comment suggested that supervisory approval should be limited to a monthly basis, while another stated that the Department should provide time frames for approval of alternate methods of documentation.

Several comments were received about the imposition of a probationary period for new apprenticeship programs. Three commentators proposed eliminating the probationary period entirely, suggesting it would limit the sponsor's ability to develop a skilled workforce, while one comment stated that a one-year probationary period should be sufficient to evaluate a program's performance. Four comments were received objecting to the limitation on a sponsor's eligibility to submit applications for new programs while on probation, it that it could impair the creation of jobs, especially in rural areas; limit a contractor's ability to bid on municipal projects; or discourage sponsors from developing new programs.

Several comments questioned the need for re-certification of existing programs in view of the Department's regular on-site visits, while some expressed concerns over how the process of re-certification would be implemented. One commentator stated that reviews should be based on specific criteria, which is published and available to the regulated community. One comment proposed that identifying information about a sponsor's signatories should not be required, while another observed that compiling such information could be difficult for some sponsors.

Response:

Task Rotation:

This Rule is not a change in policy, but rather amplifies its importance, since ''Blue Books'' have always been used to document task rotation. Alternative methods of documenting an apprentice's work progression allow sponsors to use electronic records or some other means of fulfilling this responsibility. Earlier comments to the Proposed Rule change requested more flexibility and innovative approaches in measuring an apprentice's progress. In response, this Rule allows sponsors to be innovative in their approach to document task rotation.

The requirement that signatory employers participate in the documentation of task rotation re-enforces Department policy emphasizing the obligation of sponsors and their signatories to comply with program standards, while the time frame for supervisory approval sets a measurable standard for compliance. The Rule is adopted as proposed.

Two-Year Probationary Period for New Programs:

Various alternatives were considered for the probationary period, including the one-year period adopted by USDOL, as set forth in federal standards contained in 29 CFR 29.5(8). Since apprenticeship programs average 48 months to complete, it was determined that a two-year probationary period would provide the optimal basis for an evaluation of a new sponsor's ability to train and instruct apprentices, and is consistent with the Department's efforts to monitor registered programs more closely to improve their overall performance. While a number of comments suggested the limitation on new registrations during the probationary period would impair job growth and discourage sponsors from implementing new programs, the Department notes that sponsors are not limited in the number of new programs they can submit at one time. The Rule is adopted as proposed.

Recertification of Apprenticeship Training Programs:

The Rule providing for recertification of all apprenticeship programs at least every five years was proposed to align with the federal mandate, contained in 29 CFR 29(3)(h), requiring State agencies administering apprenticeship programs to conduct periodic reviews of their existing programs to ensure their quality and conformity to apprenticeship standards. The requirement that sponsors provide the Department with identifying information concerning member signatories ensures the Department has current and accurate information on programs, providing better oversight of the program's quality and performance, and promotes the Department's objectives in reducing paperwork and costs to sponsors. While some comments criticized the lack of objective criteria for recertification, this Rule does not impose any new requirements on sponsors, but rather, recognizes the sponsor's continuing obligation to conform to program standards. Notice is provided to programs that may be deficient, with a time frame for corrective action if appropriate. The Rule is adopted as proposed.

§ 601.7 Voluntary and formal deregistration of registered programs.

Subsection 601.7(d) is added to reflect department policy that a program that has not had a registered apprentice for a period of twelve consecutive

months is deemed to have voluntarily deregistered its program. Subsection (d)(2) allows an program that may be subject to deregistration for not having had a registered apprentice to request the Department to place it on ''Inactive'' status for a period up to twelve months.

The Department received six comments on this Rule, including two calling for its elimination in that it might allow transient programs to benefit from public work projects without a commitment to long-term development of the State's workforce, or discourage sponsors in rural areas from participation in apprenticeship programs. Other comments suggested the Department should provide thirty days notice to sponsors subject to deregistration under this provision.

Response:

The Department's long-standing policy has been that programs designed for the development of a skilled workforce by training and instructing apprentices must continue to employ apprentices if it is to remain viable. Newly adopted federal regulations set forth in 29 CFR Part 29 have similarly recognized that only those programs employing apprentices meet performance standards. While there may be periods of time when an employer is required to reduce its workforce because of lack of work or other economic factors, the objectives of registering an apprenticeship program cannot be met if it remains inactive for an indeterminate period of time. This Rule meets legislative objectives and maintains program standards, while providing an alternative within a reasonable time frame for those programs suffering from inactivity. The Department has administratively determined that it shall give sponsors who meet the 12 month time limit 60 days notice before they are deemed voluntarily deregistered. The Rule is adopted as proposed.

Office of Mental Health

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Medical Assistance Payment for Outpatient Programs

I.D. No. OMH-41-09-00006-EP

Filing No. 1135

Filing Date: 2009-09-28

Effective Date: 2009-09-28

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

Proposed Action: Amendment of Part 588 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 31.04 and 43.02; 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 restoration of funds for continuing day treatment programs licensed solely under Article 31 of the Mental Hygiene Law are a result of the enacted 2009-2010 State budget. The reimbursement methodology restructuring was effective April 1, 2009.

Subject: Medical Assistance Payment for Outpatient Programs.

Purpose: To modify current reimbursement methodology for continuing day treatment programs and restore funding for certain programs.

Substance of emergency/proposed rule (Full text is posted at the following State website:www.omh.state.ny.us): Summary

This rule will amend the provisions of 14 NYCRR Part 588, Medical Assistance Payment for Outpatient Programs that pertain to the reimbursement of continuing day treatment (CDT) programs. This rulemaking implements a change in the reimbursement methodology for services provided on or after April 1, 2009, and restores funding, effective April 1, 2009, for CDT programs licensed solely under Article 31 of the Mental Hygiene Law to the level which existed on December 31, 2008.

Overview

This rulemaking adjusts the current methodology for reimbursing CDT programs for persons with serious mental illness from one based upon hours of attendance in program to one utilizing a modified threshold approach for services provided on or after April 1, 2009. In addition, a reduction in fees paid to CDT programs for services provided on or after January 1, 2009, and prior to April 1, 2009, had been implemented. This rulemaking restores the funding, effective April 1, 2009, for CDT programs licensed solely under Article 31 to the December 31, 2008 level.

Requirements

Under current regulations, reimbursement methodology is based upon the number of hours of an individual's attendance. The rulemaking utilizes a modified threshold fee for reimbursement. Under a threshold fee, a provider receives a fee when an individual receives a reimbursable service, regardless of the duration of the visit. The regulation establishes a methodology in which there are two threshold fees-a half-day fee and a full-day fee. A half-day fee will be paid when an individual attends the program for at least 2 hours and receives at least one reimbursable service. A full-day fee will be paid when an individual attends the program for at least 4 hours and receives at least three reimbursable services. This modified threshold fee approach was delayed until April 1, 2009, to allow providers sufficient time to implement the system changes necessary to operate under the new reimbursement methodology.

Current regulations call for a different fee to be paid to providers based upon the number of hours of attendance, up to five hours, so long as at least one reimbursable service is provided during the visit. On average, individuals receive between two and three services during a five-hour visit. This regulation ensures that individuals will receive at least this level of service across all providers.

The rulemaking also continues the current pass-through methodology for reimbursing the capital costs of continuing day treatment programs operated by general hospitals, which allows for an add-on to the individual provider's fee based upon the capital costs incurred by the provider. The regulation also specifies that outpatient mental health services provided by general hospitals are not considered specialty services within the meaning of the Public Health Law.

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 December 26, 2009.

Text of rule and any required statements and analyses may be obtained from: Joyce Donohue, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: cocbjdd@omh.state.ny.us

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

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

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.

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 588 are consistent with the goals and objectives of the Medicaid program to ensure that individuals with serious mental illness receive effective services to address their illness and that providers receive adequate reimbursement to pay for such care.

3. Needs and benefits: This rulemaking modifies the current methodology for reimbursing continuing day treatment programs for persons with serious mental illness from one based upon hours of attendance in program to one utilizing a modified threshold approach. The reimbursement methodology existing under current regulation continued until April 1, 2009, in order to allow providers sufficient time to implement the systems changes necessary to operate under the new reimbursement methodology. For services provided on or after April 1, 2009, providers will be reimbursed using a modified threshold fee.

Under a threshold fee, a provider receives a fee when an individual receives a reimbursable service, regardless of the duration of the visit. This rulemaking establishes a methodology in which there are two threshold fees-a half-day fee and a full-day fee. A half-day fee will be paid when an individual attends the program for at least 2 hours, and receives at least one reimbursable service. A full-day fee will be paid when an individual attends the program for at least 4 hours, and receives at least three reimbursable services.

Current regulations call for a different fee to be paid to providers based upon the number of hours of attendance, up to five hours, so long as at least one reimbursable service is provided during the visit. On average,

individuals receive between two and three services during a five-hour visit. This rulemaking ensures that individuals will receive at least this level of service across all providers.

The rulemaking also continues the current methodology for reimbursing the capital costs of continuing day treatment programs operated by general hospitals, and specifies that outpatient mental health services provided by general hospitals are not considered specialty services within the meaning of the Public Health Law.

Under a previous rulemaking, a modest rate cut had been effectuated to continuing day treatment programs licensed under Article 31 for services provided on or after January 1, 2009, and prior to April 1, 2009. This rulemaking restores the funding for continuing day treatment programs licensed solely under Article 31 to the December 31, 2008 level, effective April 1, 2009.

4. Costs:

a) Costs to regulated parties: There are no costs to regulated parties as a result of this rulemaking.

b) Costs to State and Local government and the agency: There is an estimated $4 million Medicaid cost ($2 million of which is the State share) to restore the reductions to continuing day treatment programs licensed solely under Article 31 for the period April 1, 2009 through June 30, 2010. The funds necessary for this restoration were included in the enacted 2009-2010 State budget.

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 Office of Mental Health has proposed changes to the reimbursement methodology from hourly fees to half day/full day reimbursement, with a minimum number of services required for each reimbursement category. This simplifies the billing structure, while ensuring that individuals receive at least a standard level of services across providers. Consideration was given to not changing to a half day/full day reimbursement methodology, but the proposed methodology was determined to be preferable to the existing methodology due to the fact that it is less confusing, and more amenable to the establishment of a uniform standard for services. In addition, the rulemaking restores funding for continuing day treatment programs licensed solely under Article 31 to the level which existed on December 31, 2008. The only alternative would have been to not restore that funding, but to do so would be contrary to the enacted 2009-2010 State budget.

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

10. Compliance schedule: This rulemaking is effective upon adoption.

Regulatory Flexibility Analysis

1. Effect of rule: This rulemaking modifies the current methodology for reimbursing continuing day treatment programs for persons with serious mental illness from one based upon hours of attendance in program to one utilizing a modified threshold approach. The rulemaking also continues the current methodology for reimbursing the capital costs of continuing day treatment programs operated by general hospitals, and specifies that outpatient mental health services provided by general hospitals are not considered specialty services within the meaning of the Public Health Law. Under a previous rulemaking, a modest rate cut had been effectuated to continuing day treatment programs licensed under Article 31 for services provided on or after January 1, 2009, and prior to April 1, 2009. This rulemaking restores the funding for continuing day treatment programs licensed solely under Article 31 to the December 31, 2008 level, effective April 1, 2009.

2. Compliance requirements: Regulated parties would be responsible for making system changes to allow for the new reimbursement methodology.

3. Professional services: It is unlikely that professional services would have been required to respond to the changes imposed by this rulemaking.

4. Compliance costs: There are no costs to regulated parties as a result of this rulemaking. There is an estimated $4 million in Medicaid costs ($2 million of which is the State share) to restore the reductions to the continuing day treatment programs licensed solely under Article 31 for the period April 1, 2009, through June 30, 2010. The funds necessary for this restoration were included in the enacted 2009-2010 State budget.

5. Economic and technological feasibility: The changes in reimbursement methodology from hours fees to half day/full day reimbursement with a minimum number of services required for each reimbursement category actually simplifies the billing structure, all while ensuring the individuals receive at least a standard level of services across providers. The rulemaking also restores funding for continuing day treatment programs licensed solely under Article 31 to the level which existed on December 31, 2008. This was consistent with the 2009-2010 enacted State budget.

6. Minimizing adverse impact: The reimbursement methodology existing under current regulation continued until April 1, 2009, in order to allow providers sufficient time to implement the systems changes necessary to operate under the new reimbursement methodology. For services provided on or after April 1, 2009, providers will be reimbursed using a modified threshold fee. Under a threshold fee, a provider receives a fee when an individual receives a reimbursable service, regardless of the duration of the visit. This rulemaking establishes a methodology in which there are two threshold fees-a half-day fee and a full-day fee. A half-day fee will be paid when an individual attends the program for at least 2 hours, and receives at least one reimbursable service. A full-day fee will be paid when an individual attends the program for at least 4 hours, and receives at least three reimbursable services. Current regulations call for a different fee to be paid to providers based upon the number of hours of attendance, up to five hours, so long as at least one reimbursable service is provided during the visit. On average, individuals receive between two and three services during a five-hour visit. This rulemaking ensures that individuals will receive at least this level of service across all providers.

In addition, under a previous rulemaking, a modest rate cut had been effectuated to continuing day treatment programs licensed under Article 31 for services provided on or after January 1, 2009, and prior to April 1, 2009. This rulemaking restores the funding for continuing day treatment programs licensed solely under Article 31 to the December 31, 2008 level, effective April 1, 2009. Providers and local governmental units (LGU) were notified of the amended regulations through an earlier emergency filing. OMH mailed letters to providers and LGUs, detailing the changes.

7. Small business and local government participation: An earlier emergency rulemaking served to notify individuals of the planned amendments. In addition, the rulemaking appeared in the State Register and is on the OMH website. The Conference of Local Mental Hygiene Directors received copies of the rulemaking and the Mental Health Services Council had been briefed on it and voted to approve the rulemaking.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this notice because the rulemaking will not impose any adverse economic impact on rural areas. The rulemaking merely adjusts the methodology for reimbursement of continuing day treatment programs from one based upon hours of attendance in program to one utilizing a modified threshold approach for services provided on or after April 1, 2009. This modified threshold fee approach was delayed until April 1, 2009, to allow providers sufficient time to implement the system changes necessary to operate under the new reimbursement methodology. The rulemaking also restores the funding for continuing day treatment programs licensed solely under Article 31 to the level which existed on December 31, 2008, effective April 1, 2009. This restoration is consistent with the enacted 2009-2010 State budget.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because the rulemaking merely adjusts the methodology for reimbursement of continuing day treatment programs from one based upon hours of attendance in program to one utilizing a modified threshold approach for services provided on or after April 1, 2009. This modified threshold fee approach was delayed until April 1, 2009, to allow providers sufficient time to implement the system changes necessary to operate under the new reimbursement methodology. The rulemaking also restores the funding effective April 1, 2009, for continuing day treatment programs licensed solely under Article 31 to the level which existed on December 31, 2008, as per the enacted 2009-2010 State budget. There will be no adverse impact on jobs and employment opportunities as a result of this rulemaking.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Medical Assistance Rates of Payment for Residential Treatment Facilities for Children and Youth

I.D. No. OMH-41-09-00007-EP

Filing No. 1136

Filing Date: 2009-09-28

Effective Date: 2009-09-28

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

Proposed Action: Amendment of Part 578 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09 and 43.02

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

Specific reasons underlying the finding of necessity: The amendments ensure consistency with the enacted 2009-2010 State budget by reducing the growth rate of Medicaid reimbursement associated with residential treatment facilities for children and youth regulated by the Office of Mental Health, effective 7/1/09.

Subject: Medical Assistance Rates of Payment for Residential Treatment Facilities for Children and Youth.

Purpose: To reduce the growth rate of Medicaid reimbursement associated with residential treatment facilities for children and youth.

Text of emergency/proposed rule: Paragraph (4) of Section 578.8(a) is amended to read as follows:

(4) The allowable costs, as set forth in paragraph (1) of this subdivision, that meet the requirements stated in paragraphs (2) and (3) of this subdivision, shall be trended by the applicable Medicare inflation factor for hospitals and units excluded from the prospective payment system except for the rate period*s* effective July 1, 1996 through June 30, 1997*, and July 1, 2009 through June 30, 2010,* where the inflation factor used to trend costs will be limited to the inflation factor for the first year of the two-year period.

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 December 26, 2009.

Text of rule and any required statements and analyses may be obtained from: Joyce Donohue, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: cocbjdd@omh.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory authority: 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/her jurisdiction.

Section 43.02 of the Mental Hygiene Law provides that the Commissioner has the power to establish standards and methods for determining rates of payment made by government agencies pursuant to Title 11 of Article 5 of the Social Services Law for services provided by facilities, including residential treatment facilities for children and youth licensed by the Office of Mental Health.

2. Legislative objectives: Article 7 of the Mental Hygiene Law reflects the Commissioner's authority to establish regulations regarding mental health programs. The amendments to Part 578 are needed to reduce the growth rate of Medicaid reimbursement associated with residential treatment facilities for children and youth regulated by the Office of Mental Health (OMH) and ensure consistency with the enacted 2009-2010 state budget.

3. Needs and benefits: The amendments remove the 2009-2010 trend factor from the Medicaid rate calculation for residential treatment facilities (RTF) for children and youth, which are identified as a subclass of hospitals under Section 31.26 of the Mental Hygiene Law. As a result, the rate of growth in Medicaid expenditures is slowed, yet the RTF's quality and availability of services are maintained. This is an Administrative Action consistent with the 2009-2010 enacted State Budget, and reflects the serious fiscal condition of the State. This action is consistent with actions taken in the enacted budget applicable to the Department of Health, where trend factors were eliminated from calculation of Medicaid rates for inpatient services effective April 1, 2009.

4. Costs:

(a) cost to State government: These regulatory amendments will not result in any additional costs to State government.

(b) cost to local government: These regulatory amendments will not result in any additional costs to local government.

(c) cost to regulated parties: This regulatory amendment will not result in any additional cost to regulated parties, but will reduce the rate of growth in Medicaid payments that the RTF providers receive. It is estimated that this action will result in an annual reduction in Medicaid growth of approximately $1.9 million State share of Medicaid ($3.8 million gross Medicaid).

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

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

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

8. Alternatives: As noted above, this amendment is consistent with the 2009-2010 enacted State Budget and the budgetary constraints included therein. OMH has determined that the elimination of the trend factor for RTFs would not affect the ability of those programs to continue to function and serve the children and youth who are receiving services there. The only alternative to this rulemaking would have been to make budgetary cuts to another program which would not have been as sustainable as the residential treatment facilities. Therefore, that alternative was not 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 regulatory amendments would become effective immediately upon adoption.

Regulatory Flexibility Analysis

The rulemaking will reduce the rate of growth in Medicaid reimbursement associated with the residential treatment facilities for children and youth regulated by the Office of Mental Health. The proposed change is consistent with the 2009-10 enacted State budget and recognizes the serious fiscal condition of the State. This change removes the program's 2009-10 trend factor from the Medicaid rate calculation and, as a result, slows the rate of growth in Medicaid expenditures, while maintaining the program's quality and availability of services. There will be no adverse economic impact on small businesses or local governments; therefore, 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 rulemaking, which serves to reduce the growth rate of Medicaid reimbursement associated with the residential treatment facilities for children and youth regulated by the Office of Mental Health, will not impose any adverse economic impact on rural areas. The proposed change is consistent with the 2009-10 enacted State budget and recognizes the serious fiscal condition of the State. This change removes the program's 2009-10 trend factor from the Medicaid rate calculation, and as a result slows the rate of growth in Medicaid expenditures, while maintaining the program's quality and availability of services.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because the regulation eliminates the 2009-10 trend factor from the Medicaid rate calculation for residential treatment facilities for children and youth regulated by the Office of Mental Health. This is consistent with the 2009-10 enacted State budget. The result of this rulemaking is the rate of growth in Medicaid expenditures is slowed, but a program's quality and availability of services is maintained. There will be no adverse impact on jobs and employment opportunities.

Office of Mental Retardation and Developmental Disabilities

EMERGENCY RULE MAKING

Trend Factors for 2009

I.D. No. MRD-03-09-00004-E

Filing No. 1134

Filing Date: 2009-09-25

Effective Date: 2009-09-26

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

Action taken: Amendment of sections 81.10, 635-10.5, 671.7, 680.12, 681.14 and 690.7 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.09(b) and 43.02

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

Specific reasons underlying the finding of necessity: Emergency regulations are necessary to continue to reimburse providers and maintain the stability of the current service system, which ensures that individuals have access to necessary supports and services. The rapidly changing and deteriorating economy prevented the State from being able to determine

an appropriate trend factor for the above facilities and services before 2009. This did not allow for proposal and promulgation of these amendments within the regular SAPA procedural time frames. The amendments continue the various reimbursement methodologies used to establish rates/fees for the above facilities and services, thereby maintaining current funding levels for these services and the stability of OMRDD's service system, which in turn ensures that New Yorkers with developmental disabilities continue to have access to necessary supports and services.

Subject: Trend Factors for 2009.

Purpose: To continue the methodologies used to calculate rates/fees for the rate/fee periods beginning with 1/1/09.

Text of emergency rule: Paragraph 81.10(b)(4) - Add new subparagraph (v):

(v) 0.00 percent for the 2009 fee period.

Paragraph 635-10.5(i)(1) - Add new subparagraph (xxvii):

(xxvii) 0.00 percent to trend 2008-2009 costs to 2009-2010.

Note: Rest of paragraph is renumbered accordingly.

Paragraph 635-10.5(i)(2) - Add new subparagraph (xxvii):

(xxvii) 0.00 percent to trend calendar 2008 costs to calendar year 2009.

Note: Rest of paragraph is renumbered accordingly.

Clause 671.7(a)(1)(vi)(a) - Add new subclause (17):

(17) For calendar year 2009:

NYC and Nassau, Rockland, Suffolk, and Westchester Counties	*$ 31.97 per day*
Rest of State	*$ 30.97 per day*

Clause 671.7(a)(1)(xvi)(a) - Add new subclause (15):

(15) 0.00 percent from January 1, 2009 through December 31, 2009.

Clause 671.7(a)(1)(xvi)(b) - Add new subclause (15):

(15) 0.00 percent from July 1, 2009 through June 30, 2010.

Paragraph 680.12(d)(3) - Add new subparagraph (xxii):

(xxii) 0.00 percent for 2009.

Add new subclause 681.14(c)(3)(ii)(b)(9):

(9) If a facility is subject to an expanded desk audit per subclause (2) of this clause, but the desk audit has not been completed by January 1, 2009 or July 1, 2009, OMRDD shall continue the rate established according to the first sentence of subclause (3) of this clause and, if applicable, further trended to 2009 or 2009-2010 dollars until OMRDD completes the expanded desk audit. Upon OMRDD's completion of the expanded desk audit, for the base period and subsequent periods beginning January 1, 2003 or July 1, 2003, the methodology described in this section will apply.

Subparagraphs 681.14(h)(1)(xviii)-(xix) are amended and a new subparagraph (xx) is added as follows:

(xviii) 2.97 percent for 2006-2007 to 2007-2008; [and]

(xix) 3.52 percent for 2007-2008 to 2008-2009 [.] *; and*

(xx) 0.00 percent for 2008-2009 to 2009-2010.

Subparagraphs 681.14(h)(2)(xviii)-(xix) are amended and a new subparagraph (xx) is added as follows:

(xviii) From February 1, 2007 to December 31, 2007, facilities will be reimbursed operating costs that result in a full annual trend factor of 2.97 percent for the rate period. On January 1, 2008, the trend factor for the previous rate period shall be deemed to be the 2.97 percent full annual trend; [and]

(xix) From February 1, 2008 to December 31, 2008, facilities will be reimbursed operating costs that result in a full annual trend factor of 3.52 percent for the 2008 rate period. On January 1, 2009, the trend factor for the previous rate period shall be deemed to be the 3.52 percent full annual trend [.] *; and*

(xx) 0.00 percent for 2008 to 2009.

Subparagraphs 681.14(h)(3)(xxvi)-(xvii) are amended and subparagraph (xxviii) is added as follows:

(xxvi) 2.97 percent for 2006-2007 to 2007-2008; [and]

(xxvii) 3.52 percent for 2007-2008 to 2008-2009 [.]*; and*

(xxviii) 0.00 percent for 2008-2009 to 2009-2010.

Subparagraphs 681.14(h)(4)(xxvi)-(xxvii) are amended and subparagraph (xxviii) is added as follows:

(xxvi) From February 1, 2007 to December 31, 2007, facilities will be reimbursed operating costs that result in a full annual trend factor of 2.97 percent for the rate period. On January 1, 2008, the trend factor for the previous rate period shall be deemed to be the 2.97 percent full annual trend; [and]

(xxvii) From February 1, 2008 to December 31, 2008, facilities will be reimbursed operating costs that result in a full annual trend factor of 3.52 percent for the 2008 rate period. On January 1, 2009, the trend factor for the previous rate period shall be deemed to be the 3.52 percent full annual trend [.] *; and*

(xxviii) 0.00 percent for 2008 to 2009.

Subparagraph 690.7(d)(6)(iii) is amended by adding new clause (g) to read as follows:

(g) From April 1, 2009 to March 31, 2010 the trend factor shall be 0.00 percent for all facilities.

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 submitted to the Department of State a notice of proposed rule making, I.D. No. MRD-03-09-00004-EP, Issue of January 21, 2009. The emergency rule will expire November 23, 2009.

Text of rule and any required statements and analyses may be obtained from: Barbara Brundage, Director, OMRDD Regulatory Affairs Unit, Office of Counsel, 44 Holland Ave., Albany, NY 12229, (518) 474-1830, email: barbara.brundage@omr.state.ny.us

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act, OMRDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S is not needed.

Regulatory Impact Statement

1. Statutory authority:

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

b. OMRDD's responsibility, as stated in section 43.02 of the Mental Hygiene Law, for setting Medicaid rates for services in facilities licensed by OMRDD.

2. Legislative objectives: These amendments further the legislative objectives embodied in sections 13.09(b) and 43.02 of the Mental Hygiene Law. The promulgation of these amendments concerns methodologies for rates or fees for voluntary agency providers of the following services:

a. Programs authorized by OMRDD to operate as integrated residential communities (amendments to section 81.10).

b. Individualized Residential Alternative (IRA) facilities and Home and Community-based (HCBS) Waiver services (amendments to section 635-10.5).

c. Home and Community-based (HCBS) Waiver Community Residential Habilitation Services (amendments to section 671.7).

d. Specialty Hospitals (amendments to section 680.12).

e. Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD) (amendments to section 681.14).

f. Day treatment facilities serving people with developmental disabilities (amendments to section 690.7).

3. Needs and benefits: OMRDD has historically increased operating revenues to providers on an annual basis through the implementation of trend factors. Their purpose has been to ensure that provider reimbursement stays abreast of inflation and to provide resources that enable providers to attract and appropriately compensate staff. For the last nine years, relatively robust economies have dictated annual trend factors averaging 4.84 percent. Once applied, the trend factors accumulated and compounded.

The current economic landscape is vastly different from the ones that gave impetus to the previous trend factors. The economy is in a recession and the State is facing a budget deficit of a size not seen since the Great Depression. Even with the difficult economic situation, OMRDD is expanding its health care adjustment initiative in 2009 by giving eligible providers funding increases for health care premiums and employee health care related benefits.

Economic realities, coupled with the fact that OMRDD providers are receiving additional funding in the form of health care adjustments, all played a factor in the Governor and Legislature's decision not to include any funding in the budget for a trend factor in this State fiscal year. All providers, including OMRDD, are doing without a trend factor for 2009.

The amendments do maintain funding levels for the services by continuing the current reimbursement methodologies.

4. Costs:

a. Costs to the Agency and to the State and its local governments. Since the amendments establish trend factors of zero percent, there are no costs associated with the emergency amendments. They only continue the various reimbursement methodologies used to establish rates/fees for the referenced developmental disabilities facilities and services, thereby maintaining current funding levels.

There are no additional costs to local governments resulting from the emergency amendments.

The amendments to section 671.7 also update the SSI per diem allowances consistent with levels determined by the Federal Social Security Administration. There are no additional costs attributable to this conforming amendment, either to the State or to local governments.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. There are no additional costs

associated with implementation and continued compliance with the rule. The emergency amendments are necessary to continue funding of the affected facilities at levels of reimbursement that are currently in effect.

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: No additional paperwork will be required by the amendments.

7. Duplication: The amendments do not duplicate any existing State or Federal requirements that are applicable to the above cited facilities or services for persons with developmental disabilities.

8. Alternatives: No alternatives to these trend factors were considered. The zero trend factor regulations respond to the current economic climate and present funding increases for OMRDD providers.

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: The emergency rule is effective September 26, 2009. OMRDD has previously filed the rule as a Notice of Emergency Adoption and Proposed Rule Making that was published in the State Register January 21, 2009. This represents the third emergency readoption of these amendments. They do not impose any new requirements with which regulated parties are expected to comply.

Regulatory Flexibility Analysis

1. Effect on small business: These regulatory amendments will apply to voluntary not-for-profit corporations that operate the following facilities and/or provide the following services for persons with developmental disabilities in New York State:

o Programs certified by OMRDD as integrated residential communities (amendments to section 81.10). As of December 2008, there were only two such programs authorized by OMRDD to operate as integrated residential communities. They serve approximately 105 persons.

o Individualized Residential Alternative (IRA) facilities, and Home and Community-based (HCBS) Waiver services (amendments to section 635-10.5). New York State currently funds IRA facilities and all authorized HCBS Waiver residential habilitation, day habilitation, supported employment, respite and prevocational services for the approximately 63,920 persons receiving such services as of December 2008.

o Home and Community-based (HCBS) Waiver Community Residential Habilitation Services (amendments to section 671.7). As of December 2008, OMRDD funds voluntary operated community residence facilities which serve approximately 400 persons.

o Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD), (amendments to section 681.14). As of December 2008, there were approximately 5,530 people served in ICF/DD facilities in New York State.

o Day Treatment Facilities for Persons with Developmental Disabilities, (amendments to section 690.7). As of December 2008, there were approximately 2,260 people served in Day Treatment facilities in New York State.

While most of the above services are provided by voluntary agencies which employ more than 100 people overall, many of the facilities operated by these agencies at discrete sites (e.g. IRAs or Day Habilitation programs) employ fewer than 100 employees at each site, and each site (if viewed independently) would therefore be classified as a small business. Some smaller agencies which employ fewer than 100 employees overall would themselves be classified as small businesses.

There is only one Specialty Hospital (amendments to section 680.12) which serves approximately 50 people, certified to operate in New York State. It employs more than 100 persons and would therefore not be considered a small business as contemplated under the State Administrative Procedure Act (SAPA).

The emergency 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 continue current levels of funding for small business providers of developmental disabilities services.

Since the amendments do not increase funding of the referenced services or programs, they will not result in any costs to local governments.

2. Compliance requirements: There are no additional compliance requirements for small businesses or local governments resulting from the implementation of these amendments.

3. Professional services: In accordance with existing practice, providers are required to submit annual cost reports by certified accountants. The amendments do not alter this requirement. Therefore, no additional professional services are required as a result of most of these amendments. The amendments will have no effect on the professional service needs of local governments.

4. Compliance costs: There are no additional compliance costs to small business regulated parties or local governments associated with the implementation of, and continued compliance with, these amendments. OMRDD has 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, since the emergency rule requires no compliance effort on the part of the regulated service providers (most of which could be considered as small businesses under SAPA), OMRDD does not, at this time, contemplate the development of any such small business regulation guide.

5. Economic and technological feasibility: The emergency amendments are concerned with rate/fee setting in the affected facilities or services. The amendments do not impose on regulated parties the use of any technological processes.

6. Minimizing adverse impact: The purpose of these emergency amendments is to continue to reimburse providers of the referenced services at current levels. The trend factor provisions do not increase or decrease funding of small business providers of services.

These amendments do not decrease funding for regulated parties and have no economic impact on local governments. Therefore, regulatory approaches for minimizing adverse economic impact suggested in section 202-b(1) of the State Administrative Procedure Act are not applicable.

7. Small business and local government participation: OMRDD has discussed the proposal for 0% trend factors with the provider associations. In addition, the proposal was a part of the 2009-10 Executive Budget which has been widely disseminated among local governments and the provider community.

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. The amendments are concerned with the reimbursement methodologies which OMRDD uses in determining the reimbursement of the affected developmental disabilities services or facilities. The amendments will have no adverse fiscal impact on providers as a result of the location of their operations (rural/urban), because the overall reimbursement methodologies are primarily based upon reported budgets and costs of individual facilities, or of similar facilities operated by the provider or similar providers in the same area. Thus, the reimbursement methodologies have been developed to reflect variations in cost and reimbursement which could be attributable to urban/rural and other geographic and demographic factors.

Job Impact Statement

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial impact on jobs and/or employment opportunities. This finding is based on the fact that the amendments are concerned with the reimbursement methodologies which OMRDD uses in determining the appropriate reimbursement of the affected developmental disabilities services or facilities. The amendments continue to reimburse the various facilities or services at current levels of reimbursements for the rate/fee periods beginning January 1, 2009.

Assessment of Public Comment

Comments:

OMRDD conducted hearings on the trend factor regulations in Western New York, the Capital District and New York City. Over 100 individuals presented testimony in person at the hearings. Nearly 300 people attended the hearings (including those testifying). In addition, over 200 individuals sent written comments, and a petition was received with nearly 400 signatures.

Individuals who testified or sent comments are a representative cross section of those involved in the OMRDD system. They included: individuals receiving services, parents and family members of individuals receiving services, direct support professionals (DSPs) and other employees of not-for-profit providers, administrators of not-for-profit providers (including executive directors), members of Boards of Directors, representatives from the Self Advocacy Association of New York State and other advocacy organizations, representatives of unions of employees of not-for-profit providers, and representatives of provider associations.

Many individuals praised what they characterized as the unparalleled system of supports and services to individuals with developmental disabilities provided by not-for-profit agencies. In particular, nearly all individuals described the dedication and competent, loving care provided by DSPs. Direct support professionals were characterized over and over again as the backbone of the service delivery system, working tirelessly at many tasks to ensure the health, safety, happiness and security of the individuals that they support. The jobs of DSPs were described as difficult, mentally challenging and at times physically demanding and dangerous. In addition, family members related personal stories and described how they have come to rely on the high quality of services currently provided by DSPs to their loved ones. Parents' worries when their

son or daughter moved to a residence operated by a provider were alleviated to a large extent because of the confidence they grew to have in the DSPs who provide necessary supports for their loved one on a daily basis.

Nearly all individuals opposed the lack of raises for DSPs in 2009 which they ascribed as a result of the zero percent trend factor. Many feel that DSPs have become a class of working poor because of low or insufficient wages. Individuals stated that the lack of raises caused by a zero trend factor will exacerbate existing problems with turnover and recruitment and retention of DSPs which are caused by inadequate wages. DSPs described the problems they have in making ends meet with the current low wages, such as working two jobs or making hard choices between paying rent and buying food. DSPs described how much they loved their jobs but were not sure they would be able to continue working as a DSP due to the low wages. Individuals receiving services described how much they rely on DSPs for essential services and the difficulties they experience when valued DSPs leave because salaries are too low. Individuals receiving services described the emotional impact that occurs when DSPs leave their jobs and sever relationships. It was also stated that the quality of services can often be significantly diminished while new staff ''learn the ropes'' of the job, and the new staff may not be of the same high quality. Individuals also noted that turnover or the provision of services by less qualified staff can lead to costly mistakes. They observed that additional resources might also be required to address health problems or increases in challenging behaviors resulting from turnover caused by inadequate salaries.

Many alluded to the disparity in earnings between DSPs in the not-for-profit sector compared to State employees doing virtually identical jobs and the fact that State employees benefited from a 3 percent raise this year.

Some individuals stated that a positive trend factor for not-for-profit agencies would not result in additional State expenditures and therefore they did not understand why the State would enact a zero percent trend factor.

Repeatedly, the lack of a trend factor was viewed as in effect a cut in funding for staff salaries. Inflation in the cost of essential items (such as the cost of heat) or other increases in costs such as new local taxes, mean that less dollars are available to pay staff.

Many individuals recognized the trend factor as the key to program continuation and fiscal stability. Individuals from some agencies described the fiscal consequences of the zero trend as exacerbating preexisting program deficits, with negative impacts on the provision of services. It was stated that the zero trend could threaten the fiscal viability of some programs or agencies and could lead to program closures.

Some providers stated that the zero trend factor could detrimentally affect relationships with their banks and lending institutions as loans are approved predicated on the fiscal viability of providers and their ability to substantiate revenue streams.

All of the individuals urged that the State include a positive trend factor for this year or advocated for the inclusion of a positive trend factor in next year's budget.

There were a few proposals suggested as alternatives to the zero trend. They included: streamlining compliance measures for COMPASS agencies by allowing offsite audits, self-disclosures and eliminating duplicative oversight particularly in regard to documentation review; reallocating funds from the highly compensated to direct support staff; reducing funding to Article 16 clinics whose merits were questioned; and eliminating IRAs that serve only a few individuals as they are costly to operate. On the revenue side, one comment urged the State to maximize its Medicaid reimbursement.

Response:

OMRDD appreciates all of the individuals who chose to share their reactions and thoughts through correspondence and testimony.

OMRDD is itself a service provider, and in fact is one of the largest service providers in the nation. OMRDD services also received a zero trend factor in 2009. OMRDD consequently understands firsthand the effects of receiving a zero trend and the difficult choices that providers face in balancing the issues raised.

OMRDD has historically increased operating revenues to providers on an annual basis through the implementation of trend factors. Their purpose has been to ensure that provider reimbursement stays abreast of inflation and to provide resources that enable providers to attract and appropriately compensate staff. For the nine years before 2009, relatively robust economies have dictated annual trend factors averaging 4.84 percent. Once applied, the trend factors accumulated and compounded.

The current economic landscape is vastly different from the ones that gave impetus to the previous trend factors. The economy is in a recession and the State is facing a budget deficit of a size not seen since the Great Depression.

Economic realities, coupled with the fact that OMRDD providers are receiving additional funding in the form of health care adjustments, all played a factor in the Governor and Legislature's decision not to include any funding in the budget for a trend factor in this State fiscal year. All providers, including OMRDD, are doing without a trend factor for 2009.

OMRDD would also like to point out that, in contrast to views or comments, all trend factors do require additional state funding.

OMRDD is strongly committed to working with providers to support direct service professionals in a variety of ways. Among these, the Health Care Adjustments included in the OMRDD budget were primarily targeted to aid direct support professionals and to assist in the recruitment and retention of those professionals. The absence of a trend factor is offset in part by the availability of Health Care Adjustment funds.

OMRDD regulations must be consistent with the enacted 2009-2010 NYS Budget which included a zero trend factor. OMRDD is consequently unable to grant a positive trend factor for 2009 in its regulations.

While there is not expected to be a reinstatement of positive trend factors in the current NYS budget, the comments will be taken into consideration in the development of next year's NYS budget.

NOTICE OF ADOPTION

Trend Factors for 2009

I.D. No. MRD-03-09-00004-A

Filing No. 1154

Filing Date: 2009-09-29

Effective Date: 2009-10-14

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

Action taken: Amendment of sections 81.10, 635-10.5, 671.7, 680.12, 681.14 and 690.7 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.09(b) and 43.02

Subject: Trend factors for 2009.

Purpose: To continue the methodologies used to calculate rates/fees for rate/fee periods beginning 1/1/09.

Text or summary was published in the January 21, 2009 issue of the Register, I.D. No. MRD-03-09-00004-EP.

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

Text of rule and any required statements and analyses may be obtained from: Barbara Brundage, Director, OMRDD Regulatory Affairs Unit, Office of Counsel, 44 Holland Avenue, Albany, NY 12229, (518) 474-1830, email: barbara.brundage@omr.state.ny.us

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act, OMRDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S is not needed.

Assessment of Public Comment

Comments:

OMRDD conducted hearings on the trend factor regulations in Western New York, the Capital District and New York City. Over 100 individuals presented testimony in person at the hearings. Nearly 300 people attended the hearings (including those testifying). In addition, over 200 individuals sent written comments, and a petition was received with nearly 400 signatures.

Individuals who testified or sent comments are a representative cross section of those involved in the OMRDD system. They included: individuals receiving services, parents and family members of individuals receiving services, direct support professionals (DSPs) and other employees of not-for-profit providers, administrators of not-for-profit providers (including executive directors), members of Boards of Directors, representatives from the Self Advocacy Association of New York State and other advocacy organizations, representatives of unions of employees of not-for-profit providers, and representatives of provider associations.

Many individuals praised what they characterized as the unparalleled system of supports and services to individuals with developmental disabilities provided by not-for-profit agencies. In particular, nearly all individuals described the dedication and competent, loving care provided by DSPs. Direct support professionals were characterized over and over again as the backbone of the service delivery system, working tirelessly at many tasks to ensure the health, safety, happiness and security of the individuals that they support. The jobs of DSPs were described as difficult, mentally challenging and at times physically demanding and dangerous. In addition, family members related personal stories and described how they have come to rely on the high quality of services currently provided by DSPs to their loved ones. Parents' worries when their son or daughter moved to a residence operated by a provider were alleviated to a large extent because of the confidence they grew to have in the DSPs who provide necessary supports for their loved one on a daily basis.

Nearly all individuals opposed the lack of raises for DSPs in 2009 which they ascribed as a result of the zero percent trend factor. Many feel that DSPs have become a class of working poor because of low or insufficient wages. Individuals stated that the lack of raises caused by a zero trend factor will exacerbate existing problems with turnover and recruitment and retention of DSPs which are caused by inadequate wages. DSPs described the problems they have in making ends meet with the current low wages, such as working two jobs or making hard choices between paying rent and buying food. DSPs described how much they loved their jobs but were not sure they would be able to continue working as a DSP due to the low wages. Individuals receiving services described how much they rely on DSPs for essential services and the difficulties they experience when valued DSPs leave because salaries are too low. Individuals receiving services described the emotional impact that occurs when DSPs leave their jobs and sever relationships. It was also stated that the quality of services can often be significantly diminished while new staff ''learn the ropes'' of the job, and the new staff may not be of the same high quality. Individuals also noted that turnover or the provision of services by less qualified staff can lead to costly mistakes. They observed that additional resources might also be required to address health problems or increases in challenging behaviors resulting from turnover caused by inadequate salaries.

Many alluded to the disparity in earnings between DSPs in the not-for-profit sector compared to State employees doing virtually identical jobs and the fact that State employees benefited from a 3 percent raise this year.

Some individuals stated that a positive trend factor for not-for-profit agencies would not result in additional State expenditures and therefore they did not understand why the State would enact a zero percent trend factor.

Repeatedly, the lack of a trend factor was viewed as in effect a cut in funding for staff salaries. Inflation in the cost of essential items (such as the cost of heat) or other increases in costs such as new local taxes, mean that less dollars are available to pay staff.

Many individuals recognized the trend factor as the key to program continuation and fiscal stability. Individuals from some agencies described the fiscal consequences of the zero trend as exacerbating preexisting program deficits, with negative impacts on the provision of services. It was stated that the zero trend could threaten the fiscal viability of some programs or agencies and could lead to program closures.

Some providers stated that the zero trend factor could detrimentally affect relationships with their banks and lending institutions as loans are approved predicated on the fiscal viability of providers and their ability to substantiate revenue streams.

All of the individuals urged that the State include a positive trend factor for this year or advocated for the inclusion of a positive trend factor in next year's budget.

There were a few proposals suggested as alternatives to the zero trend. They included: streamlining compliance measures for COMPASS agencies by allowing offsite audits, self-disclosures and eliminating duplicative oversight particularly in regard to documentation review; reallocating funds from the highly compensated to direct support staff; reducing funding to Article 16 clinics whose merits were questioned; and eliminating IRAs that serve only a few individuals as they are costly to operate. On the revenue side, one comment urged the State to maximize its Medicaid reimbursement.

Response:

OMRDD appreciates all of the individuals who chose to share their reactions and thoughts through correspondence and testimony.

OMRDD is itself a service provider, and in fact is one of the largest service providers in the nation. OMRDD services also received a zero trend factor in 2009. OMRDD consequently understands firsthand the effects of receiving a zero trend and the difficult choices that providers face in balancing the issues raised.

OMRDD has historically increased operating revenues to providers on an annual basis through the implementation of trend factors. Their purpose has been to ensure that provider reimbursement stays abreast of inflation and to provide resources that enable providers to attract and appropriately compensate staff. For the nine years before 2009, relatively robust economies have dictated annual trend factors averaging 4.84 percent. Once applied, the trend factors accumulated and compounded.

The current economic landscape is vastly different from the ones that gave impetus to the previous trend factors. The economy is in a recession and the State is facing a budget deficit of a size not seen since the Great Depression.

Economic realities, coupled with the fact that OMRDD providers are receiving additional funding in the form of health care adjustments, all played a factor in the Governor and Legislature's decision not to include any funding in the budget for a trend factor in this State fiscal year. All providers, including OMRDD, are doing without a trend factor for 2009.

OMRDD would also like to point out that, in contrast to views or comments, all trend factors do require additional state funding.

OMRDD is strongly committed to working with providers to support direct service professionals in a variety of ways. Among these, the Health Care Adjustments included in the OMRDD budget were primarily targeted to aid direct support professionals and to assist in the recruitment and retention of those professionals. The absence of a trend factor is offset in part by the availability of Health Care Adjustment funds.

OMRDD regulations must be consistent with the enacted 2009-2010 NYS Budget which included a zero trend factor. OMRDD is consequently unable to grant a positive trend factor for 2009 in its regulations.

While there is not expected to be a reinstatement of positive trend factors in the current NYS budget, the comments will be taken into consideration in the development of next year's NYS budget.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Restructuring of the Reimbursement Methodology for Community Residences

I.D. No. MRD-41-09-00016-P

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

Proposed Action: Amendment of sections 635-10.5, 671.7 and 686.13 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b), 41.36(c) and 43.02

Subject: Restructuring of the reimbursement methodology for community residences.

Purpose: To achieve efficiencies by restructuring community residence reimbursement methodology to conform with IRA methodology.

Public hearing(s) will be held at: 11:00 a.m., Nov. 30, 2009 at Bernard Fineson DDSO, Videoconf. Rm. 2, New Administrative Bldg., 80-45 Winchester Blvd., Queens Village, NY; 2:00 p.m., Dec. 1, 2009 at Capital District DDSO, Bldg. 3, 3rd Fl., Rm. 2, Balltown & Consaul Rds., Schenectady, NY.

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

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

Substance of proposed rule (Full text is posted at the following State website:www.omr.state.ny.us): OMRDD currently has two separate reimbursement methodologies for community residences and Individualized Residential Alternatives (IRAs).

The proposed regulations change the reimbursement methodology for community residences to conform to the methodology currently used for IRAs. The IRA pricing mechanism utilizes a weighted average approach. It aggregates the allowable annual costs of all sites operated by one provider and then recognizes certified capacity and billing periods to render an individual monthly price. The pricing methodology differentiates between supervised sites and supportive sites establishing a singular price for each type of residential facility. These regulations promulgate the consolidation of aggregate costs of community residences with the aggregate costs of IRAs to determine a single agency-specific price for both supervised IRA and supervised community residence facilities and a single agency-specific price for both supportive IRA and supportive community residence facilities.

The proposed regulations would also subject community residences to the billing rules currently in effect for IRAs. Community residences would bill of a full month of service for an individual enrolled in the residence for at least 22 days of the month and having at least four countable service days. Community residences would bill of a half month of service for an individual enrolled in the residence for at least 11 days of the month and having at least two countable service days. The rules for countable service days would be same as those for IRAs.

The proposed regulations would become effective January 1, 2010.

Text of proposed rule and any required statements and analyses may be obtained from: Barbara Brundage, Director, Regulatory Affairs Unit, OMRDD, 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, email: barbara.brundage@omr.state.ny.us

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

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

Additional matter required by statute: Pursuant to the requirements of SEQRA OMRDD, as lead agency, has determined that the action described herein will have no effect on the environment and an E.I.S. is not needed.

Regulatory Impact Statement

1. Statutory authority -

a. The New York State Office of Mental Retardation and Developmental Disabilities' (OMRDD) 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, is stated in the New York Mental Hygiene Law Section 13.07.

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

c. Section 41.36(c) of the Mental Hygiene Law requires OMRDD to establish fees or rates for community residences.

d. Section 43.02 of the Mental Hygiene Law grants the commissioner the authority to establish rates and fees for payment under the Medicaid program for facilities licensed by OMRDD and it requires the commissioner to adopt rules and regulations to effectuate Section 43.02.

2. Legislative objectives - These amendments further the legislative objectives embodied in the sections 13.07, 13.09(b), 41.36(c) and 43.02 of the Mental Hygiene Law. These regulations streamline and consolidate the reimbursement methodology for community residences.

3. Needs and benefits - In recent years, the number of community residences has decreased by 95 per cent as many of these residential facilities have either converted to Individual Residential Alternatives (IRAs) or individuals living in them have transitioned to IRAs. However, OMRDD has maintained two separate reimbursement methodologies with the burdensome effects of dual systems. For billing and reimbursement purposes, these regulations combine the two programs so that they will employ a single pricing mechanism. While this measure is considered cost neutral for providers, there are likely to be administrative efficiencies for both the providers and OMRDD.

4. Costs -

a. There will be no additional costs to community residence providers to comply with the amendments.

b. There will be no additional costs to the state and federal governments as a result of these reimbursement restructuring amendments.

c. There are no additional costs to local governments as a result of these amendments.

5. Paperwork - There will be no additional paperwork required as a result of these amendments.

6. Local government mandates - There are no new requirements imposed on local governments by this amendment.

7. Duplication - The amendment does not duplicate any existing State or Federal requirement.

8. Alternatives - Because they streamline the billing and reimbursement processes for community residences and IRAs, these regulations are designed to achieve administrative efficiencies for both providers and OMRDD beyond what is possible without promulgating this change.

9. Federal standards - The amendment does not exceed any minimum standard of the federal government for the same or similar subject area.

10. Compliance schedule - OMRDD intends to finalize the proposed amendment within and according to the timeframes provided by the State Administrative Procedure Act. (SAPA).

Regulatory Flexibility Analysis

1. Types and number of small businesses and local governments rule applies -

a. These proposed regulatory amendments will apply to agencies which operate community residences for persons with developmental disabilities. While most community residences are operated by voluntary agencies which employ more than 100 people overall, many of the facilities operated by these agencies at discrete sites employ fewer than 100 employees at each site, and each site (if viewed independently) would therefore be classified as a small business. Some smaller agencies which employ fewer than 100 employees would themselves be classified as small businesses.

b. Local governments will not be affected as a result of these amendments.

2. Reporting, recordkeeping, compliance requirements - There will be no additional paperwork as indicated in the Regulatory Impact Statement.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Cost to implement and comply with this rule -

a. There will be no additional costs to community residence operators to implement and comply with the amendments.

b. There will be no additional costs to the state and federal governments as a result of this rulemaking.

c. There are no costs to local governments as a result of these specific amendments.

5. Assessment of the economic and technological feasibility of compliance - There is no new technology required by the rule. The rule is fiscally neutral.

6. How the rule is designed to minimize economic impact - The rule is fiscally neutral and will not have an adverse impact on providers or local governments.

7. Small business and local government participation - The proposal was presented at a meeting of the provider associations for discussion and dissemination to affected provider agencies.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for the proposed amendment is not being submitted because the amendment will not impose any adverse economic impact on rural areas or any reporting, record keeping or other compliance requirements on public or private entities in rural areas. To achieve efficiency, the rule restructures the community residence reimbursement methodology to align that funding mechanism with the funding mechanism used for Individualized Residential Alternatives (IRA). This will eliminate the need for a separate reimbursement methodology for community residences and roll that reimbursement computation for monthly price calculations into the IRA structure.

Job Impact Statement

A Job Impact Statement for the proposed amendments is not being submitted because it is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and/or employment opportunities. To achieve efficiency, the rule restructures the community residence reimbursement methodology to align that funding mechanism with the funding mechanism used for Individualized Residential Alternatives (IRA). This would eliminate the need for a separate reimbursement methodology for community residences and roll that reimbursement computation for monthly price calculations into the IRA structure.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Food Stamp Benefits for Residents of OMRDD-Certified Facilities and Facility Reimbursement Offsets

I.D. No. MRD-41-09-00017-P

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

Proposed Action: Amendment of Subpart 635-9 and Parts 671 and 686 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b), 41.25, 41.36 and 43.02

Subject: Food stamp benefits for residents of OMRDD-certified facilities and facility reimbursement offsets.

Purpose: To establish requirements for obtaining food stamp benefits by or on behalf of persons receiving residential services.

Public hearing(s) will be held at: 11:00 a.m., Nov. 30, 2009 at Bernard Fineson DDSO, Videoconf. Rm. 2, New Administrative Bldg., 80-45 Winchester Blvd., Queens Village, NY; 2:00 p.m., Dec. 1, 2009 at Capital District DDSO, Bldg. 3, 3rd Fl., Rm. 2, Balltown & Consaul Rds., Schenectady, NY.

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

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

Text of proposed rule: Amendments to Section 635-9.1 -- Requirements for residential facilities

Paragraph (a)(1) and subparagraph (a)(1)(x) are amended as follows:

(1) Intermediate care facilities for persons with developmental disabilities (ICF/DDs), community residences *including Individualized Residential Alternatives (IRAs)*, private schools, and specialty hospitals shall assume the cost of:

(x) Three well-balanced meals, or equivalent, and an appropriate number of snacks and any special foods required to meet the nutritional needs of persons in the facility. An exception to the meal/snack requirement is made where a person attends a day program which receives specific funds to cover the cost of a specified daily meal and/or snack. *An*

exception to the meal/snack requirement is also made where, and to the extent that, a person and the community residence or IRA in which the person lives agree that the person will pay for, obtain and prepare some or all of his or her own food.

Amendments to Section 671.7 -- Reimbursement and fiscal reporting for providers of service

Subparagraphs (a)(1)(vi) and (vii) are amended as follows:

(vi) The calculated fee, as computed in accordance with [subparagraphs (iii), (iv) and (v) of this paragraph] *this subdivision* shall be offset by [the appropriate] rent as *determined in accordance with* [allowed in] section 686.13[(d)]*(c)* of this Title and adjusted for a utilization factor of [90 percent for the period March 1, 1993 to May 31, 1994 for community residences in Regions II and III and March 1, 1993 to June 30, 1994 for community residences in Region I. The utilization factor will be] 98.5 percent. [effective June 1, 1994, for community residences in Regions II and III, and effective July 1, 1994, for community residences in Region I.] The rent allowance shall be based on the following:

Note: Clauses (a) - (b) remain unchanged.

(vii) Effective January 1, 2010, the calculated fee for a community residence of 16 or fewer beds shall be offset as follows:

(a) For supervised community residences the offset shall be $1,404 (or a prorated portion thereof for facilities which opened after April, 2009) and beginning January 1, 2010, $156 per month.

(b) For supportive community residences the offset shall be $1,134 (or a prorated portion thereof for facilities which opened after April, 2009) and beginning January 1, 2010, $126 per month.

Note: Current subparagraphs (vii) - (xxix) are renumbered (viii) - (xxx) respectively.

Clauses (a)(1)(ix)(b) is amended and (d) is deleted as follows:

(b) The community residential habilitation services fee shall be equal to the difference between the final net fee minus the room and board allocation in clause (a) of this subparagraph. [For the period March 1, 1993 through May 31, 1994 for Regions II and III community residences and for the period March 1, 1993 through June 30, 1994 for Region I community residences, an implementation adjustment of $0.60 shall be added to the difference. The implementation adjustment addresses costs associated with the authorized provider's implementation of community residential habilitation services. Such costs may include, but are not limited to clinical personnel and/or administrative expenses.]

[(d)] [For the period March 1, 1993 through May 31, 1994 for Regions II and III community residences and for the period March 1, 1993 through June 30, 1994 for Region I community residences, based upon an analysis of each authorized provider's projected operating costs and revenues for the community residences, for the current fee period, the commissioner may allocate, with the approval of the Director of the Division of Budget, an amount up to $ 4,100,000, to target additional implementation resources to providers transitioning to this new fee methodology. This provision shall expire December 31, 1993 for providers in Regions II and III, and June 30, 1994 for providers in Region I.]

Amendments to Part 686 - Operation of Community Residences

Paragraph 686.13(a)(3) is amended as follows:

(3) Financial records shall be maintained for individual*s* [clients] and shall consist of [three] *four* separate accounts to record the revenue and expense as follows:

(i) an account to record the use of the total rent charged to [clients] *individuals* in accordance with subdivision (c) of this section. Such account shall record both the monthly amount collected by the provider as income and any direct payments by [clients] *individuals* for rent and utilities, as well as living expense allowances for such items as [food,] transportation, clothing, etc.;

(ii) an account to record [client] personal allowance, in cases where the [client] *individual* has chosen the option of management of such funds by the provider; and

(iii) an account to record the payments made to providers in the amount of $250 per [client] *individual* per year, paid semiannually by OMRDD, whereby such payments are in addition to the [client] personal allowance. Such records shall document the use of the payments for the following needs of [clients] *individuals*:

(a) replacement of necessary clothing;

(b) personal requirements and incidental needs; and

(c) recreational and cultural activities.

(iv) an account of all food stamp benefits obtained and redeemed for individuals living in a residence with 16 or fewer beds, of all purchases and expenditures for food on behalf of such individuals, of all payments the provider receives from or for such individuals for food, and of all money given to such individuals for the purchase of food. The provider shall maintain such records for four years. Such records shall be subject to audit and review by OMRDD and any other federal or State agencies which regulate the provider or the food stamp benefit program.

Clause 686.13(b)(1)(iv)(b) is amended as follows:

(b) monies received from persons in residence or on their behalf from third-party insurers or medical assistance programs [with the exception of personal care program monies received pursuant to Part 688 of this Title and/or comprehensive Medicaid case management payments].

Subdivision 686.13(c) and paragraph (c)(1) are amended as follows:

(c) Rent charged to [clients] *individuals*.

(1) Rent shall mean the amount of the income and assets which may be used on a monthly basis in payment to the community residence for the goods and services the community residence is required to provide *to the individual*, or used by the [client] *individual* in direct payment to someone other than the community residence for maintenance costs such as [food,] housing, utilities and transportation. *Rent shall not include payment for food under section 686.17.*

Subparagraph 686.13(i)(1)(vi) is amended and a new subparagraph (vii) is added as follows:

(vi) for any month during the fee period that a person is unable to pay an amount, whether from SSI, other benefits or earnings, equal to the rent charged each person and this affects the efficient and economical operation of the residence. An appeal pursuant to this section shall be a rent appeal [and shall only be considered for supervised community residences], *or*

(vii) for any month during the fee period that a person is unable to pay an amount, whether from benefits, earnings or other assets, equal to the amount charged each person for food under section 686.17 and this affects the efficient and economical operation of the residence.

Subparagraph 686.13(i)(2)(ii) is amended as follows:

(ii) In order to appeal a fee in accordance with subparagraphs (1)(i), (v), [and] (vi) *and (vii)* of this subdivision, the community residence must send to OMRDD within one year of the close of the fee period in question, a first level appeal application by certified mail, return receipt requested.

Subparagraph 686.13(k)(1)(v) is amended as follows:

(v) Total allowable room, board and protective oversight costs shall be determined pursuant to subdivision (b) of this section. *Total reimbursable room, board and protective oversight costs shall be the allowable room, board and protective oversight costs net of rent determined pursuant to subdivision (c) of this section and net of the offset specified in subparagraph 671.7(a)(1)(vii) of this Title, both times the certified capacity minus temporary use beds (TUBS).* Room, board and protective oversight costs shall include, but not be limited to the following: capital and start-up costs, administrative personal service costs for protective oversight, building maintenance, cooking or housekeeping, where such functions cannot be integrated as part of the person's residential habilitation services portion of the ISP, as defined in Section 635-10.4(b)(1) of this Title and associated fringe benefits, food, repairs, utilities, equipment other than adaptive technologies, household supplies, linen, clothing and prorated administration and overhead costs.

A new Section 686.17 is added to read as follows:

Section 686.17 Food stamp benefits.

(a) Applicability. This section applies to non-profit organizations and governmental entities (other than OMRDD) with an OMRDD - issued operating certificate to operate an IRA or community residence of 16 or fewer beds, and to all individuals living in IRAs or community residences of 16 or fewer beds operated by non-profit organizations or governmental entities (other than OMRDD).

(b) Applying for food stamp benefits.

(1) The provider shall apply for food stamp benefits for each individual for whom an application for food stamp benefits has not already been made, unless:

(i) the individual is capable of independently managing money and does not allow the provider to apply for food stamp benefits; or

(ii) the individual and provider agree that the individual will pay for, obtain and prepare all of his or her own food; or

(iii) the individual pays the provider $200 per month for food.

(2) Each individual capable of independently managing money, and for whom an application for food stamp benefits has not already been made, shall apply for food stamp benefits unless:

(i) the individual allows the provider to apply on his or her behalf; or

(ii) the individual and provider agree that the individual will pay for, obtain and prepare all of his or her own food; or

(iii) the individual pays the provider $200 per month for food.

(c) Maintaining eligibility for food stamp benefits.

(1) As used in this section ''maintain eligibility for food stamp benefits'' means recertifying eligibility for food stamp benefits, providing information for purposes of determining and verifying eligibility for food stamp benefits and otherwise cooperating with federal, State and local government agencies in the administration of the food stamp program. It does not mean refusing employment, public benefits, gifts or receipt of other income or assets which would make the individual ineligible for food stamp benefits.

(2) The provider shall maintain eligibility for food stamp benefits for each individual for whom the provider has applied for such benefits.

(3) Each individual for whom the provider has not applied for food stamp benefits must maintain his or her eligibility for food stamp benefits, or allow the provider to maintain eligibility and give the provider whatever information is needed to do so.

(d) Redeeming food stamp benefits or paying for food.

(1) The provider may obtain and redeem food stamp benefits for each individual for whom the provider applied for such benefits.

(2) Each individual for whom the provider has not applied for food stamp benefits must either:

(i) Allow the provider to obtain and redeem his or her food stamp benefits; or

(ii) If the provider agrees, pay for, obtain and prepare all of his or her own food; or

(iii) If the provider requests, pay the provider for food as follows:

(a) If the individual receives food stamp benefits, the individual must pay an amount equal to the food stamp benefits the individual receives.

(b) If the individual does not allow the provider to apply for food stamp benefits, does not make his or her own application or maintain his or her own eligibility for food stamp benefits, and does not present documentation of an inability to pay $200 per month, the individual must pay $200 per month for food.

(c) If the application for food stamp benefits for the individual was denied, or if the individual presents documentation that he or she cannot pay $200 per month, the individual shall pay an amount he or she is able to pay.

(d) If the individual and the provider agree upon a reduced amount, the individual must pay the agreed-upon reduced amount for food and/or allow the provider to obtain and redeem the agreed-upon amount of the individual's food stamp benefits.

(e) The provider may not unreasonably withhold agreement to an arrangement whereby an individual pays for, obtains and prepares his or her own food. The provider shall base a decision on whether to agree to such an arrangement on the best interests and needs of the individual in accordance with his or her plan of services, and may not base such a decision on the provider's convenience or finances.

(f) The provider shall not decrease the amount of money it gives an individual for food purchases, whether from the individual's food stamp benefits or otherwise, or change any arrangement with the individual whereby the individual purchases or prepares some of his or her food or meals, unless such change is based on the individual's best interests and needs in accordance with his or her plan of services.

(g) A provider may not discharge an individual from a residence or deny an individual admission to a residence because of failure to pay for food or because of OMRDD's failure to grant an appeal pursuant to subparagraph 686.13(i)(1)(vii).

(h) A provider's obligation to provide for the nutritional needs of a person as set forth in paragraph 633.4(a)(4) and subparagraph 635-9.1(a)(1)(x) of this Title is not diminished or altered because of an individual's receipt or lack of receipt of food stamp benefits or because of fluctuations in the amount of food stamp benefits.

Text of proposed rule and any required statements and analyses may be obtained from: Barbara Brundage, Director, Regulatory Affairs Unit, OMRDD, 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, email: barbara.brundage@omr.state.ny.us

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

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

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act, OMRDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

Regulatory Impact Statement

1. Statutory authority:

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

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

c. Section 41.25 of the Mental Hygiene Law allows providers of services to establish fee schedules for services and requires that fees charged or payments requested take into account costs and ability to pay, considering resources available from private and public assistance programs.

d. Section 41.36 of the Mental Hygiene Law authorizes OMRDD to make state aid payments for services in community residences and requires OMRDD to establish fees or rates for community residence services. This section also allows providers to charge for services in accordance with the individual's ability to pay.

e. OMRDD's responsibility, as stated in section 43.02 of the Mental Hygiene Law, for setting Medicaid rates and fees for services in facilities licensed or operated by OMRDD.

2. Legislative objectives: These proposed amendments further the legislative objectives embodied in sections 13.07, 13.09, 41.25, 41.36 and 43.02 of the Mental Hygiene Law by regulating providers' charges to individuals for food, promoting personal responsibility to contribute to the cost of care, protecting individuals' rights to choice and independence, and ensuring that scarce State resources are used efficiently. The proposed amendments will establish a process that will require individuals with developmental disabilities who live in OMRDD-certified individualized residential alternatives and community residences to obtain and maintain food stamp benefits or to pay for cost that would otherwise be borne by food stamp benefits.

3. Needs and benefits: OMRDD reimburses its voluntary residential providers for the cost of food provided to individuals. In general, individuals in congregate care living arrangements such as Individualized Residential Alternatives (IRAs) and Community Residences operated by OMRDD certified providers are categorically eligible for food stamp benefits. The food stamp benefits received by the individuals living in these residences can be used by the operator of the residence to pay for the cost of food served in the residence or otherwise provided to the individual.

Prior to October 1, 2008 the monthly amount an eligible individual received was capped at $44. Since that date maximum amounts have increased to $176 effective October 1, 2008 and to $200 effective April 1, 2009. (See US Department of Agriculture Memorandum, dated February 18, 2009, to all Regional Directors regarding the Supplemental Nutrition Assistance Program and increases made by the federal American Recovery and Reinvestment Act of 2009.)

The overwhelming majority of persons served by the OMRDD residential programs, therefore, qualify for a level of food stamp benefits that can fund a significant percentage of the cost of their meals and other nutritional needs. There is no reason why OMRDD should not encourage individuals to use this benefit. In recognizing the availability of this benefit and assisting individuals to realize this entitlement, OMRDD is practicing responsible stewardship.

OMRDD acknowledges that some individuals may have the ability and desire to act on their own behalf with respect to receiving their own food stamp benefits and/or purchasing their own food and preparing their own meals. The regulations accommodate these individuals but place a responsibility upon them to utilize food stamp benefits towards the cost of their meals or pay directly in place of food stamp benefits if they do not wish to file.

The regulations provide numerous protections for the individual. They promote choice by clarifying a residential provider's responsibility to recognize and accommodate a capable individual's desire to pay for, obtain and prepare his or her own food. The regulations guarantee that an individual's funding for food cannot be negatively impacted due to the non-receipt or fluctuations in the food stamp benefits.

The regulations prohibit a residential provider from changing any arrangement with the individual whereby the individual purchases or prepares some of his or her food or meals, unless such change is based on the individual's best interests and needs in accordance with his or her plan of services.

The regulations also confirm a provider's obligation to provide for the nutritional needs of the individual regardless of receipt of food stamp benefits and guarantee admission to, and continuation of, ongoing residential services whether or not an individual receives food stamp benefits or contributes toward the cost of food.

Finally, the regulations include an offset to the reimbursement provided to non-profit residential provider agencies by the State. The offset is $156 per month per person for supervised community residences or IRAs and $126 per month per person for supportive community residences or IRAs, beginning the effective date of the regulations on January 1, 2010. In addition, the offset incorporates a per person amount which is equivalent to the monthly changes that would have been applied between April 1, 2009 and the effective date of the regulations.

4. Costs:

a. Costs to the Agency and to the State and its local governments: OMRDD will not incur any new costs as a result of these amendments. OMRDD estimates that implementation of the regulations will create an estimated recurring annual savings to the State of approximately $23 million due to the reimbursement offset.

There will be no additional costs to local governments as a result of these specific amendments.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. There are some administrative costs associated with applying for and maintaining food stamp eligibility for eligible individuals. OMRDD has recognized these costs as well as the possibility that not all individuals will apply and that not all individuals who apply will be eligible for the maximum level of food stamp benefits. OMRDD has taken these factors into consideration in establishing its methodology for the reimbursement offset.

c. Costs to individuals and families: Although the regulations require that an individual apply for food stamp benefits, or allow his or her residential provider to apply on his or her behalf, or assume the cost of food that would otherwise be paid for by food stamp benefits, individuals in need of developmental disabilities services will not suffer any loss of services for failure to take these actions.

Individuals will be expected to cooperate with the provider of services to apply for food stamp benefits and maintain eligibility for these benefits. OMRDD will continue to assist individuals in filing for food stamps through the technical assistance of OMRDD's network of Revenue Support Field Offices (RSFOs).

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: For individuals and their representatives, the requirement to file for food stamp benefits will involve completion of the necessary application paperwork (by themselves or the provider). The maintenance of food stamp benefits normally involves filing recertification applications and reporting changes in income, resources or residence to maintain the individual's continued eligibility.

The regulations also require that the provider of residential services maintain separate accounts to track use and disbursement of food stamp benefits received on behalf of individuals, all payments the provider receives from or for such individuals for food, and all money given to individuals for the purchase of food.

7. Duplication: The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to the above cited services for persons with developmental disabilities.

8. Alternatives: There is no viable alternative to issuance of a regulation that requires individuals to file for food stamp benefits or pay for their food. OMRDD has been working with its service providers to maximize participation in the food stamp program. However, a small number of individuals and family members have said that they will not act until the State mandates full cooperation. These regulations will ensure that all individuals living in non-profit Community Residences and Individualized Residential Alternatives are treated in an identical fashion, and that food stamp benefits are claimed to subsidize the cost of food when individuals are eligible. Providers of services have, themselves, suggested that establishing, in regulation, the requirement to apply for food stamp benefits and make these benefits available to the residential provider would help them to enforce OMRDD policy.

9. Federal standards: The proposed regulations do not exceed any applicable federal standards.

10. Compliance schedule: OMRDD's initiative to maximize food stamp benefits for individuals residing in non-profit Community Residences and Individualized Residential Alternatives commenced earlier this year. OMRDD has worked through its Provider Associations to assist its non-profit residential providers to maximize participation in the food stamp program for all individuals residing in eligible living arrangements. OMRDD is aware that the overwhelming majority of non-profit residential providers already apply for food stamp benefits on behalf of the individuals they serve, and had notified providers that it would be implementing the offsets to state funding that are contained in the regulations. The regulation is expected to become effective January 1, 2010.

Regulatory Flexibility Analysis

1. Effect of rule: These proposed regulatory amendments will apply to agencies which provide residential developmental disabilities services under the auspices of OMRDD. While most services are provided by non-profit agencies which employ more than 100 people overall, many of the facilities and services operated by these agencies at discrete sites (i.e., Individualized Residential Alternatives (IRAs) and community residences) employ fewer than 100 employees at each site, and each site (if viewed independently) would therefore be classified as a small business. Some smaller agencies which employ fewer than 100 employees overall would themselves be classified as small businesses. As of September 2009, OMRDD estimates that there are approximately 270 provider agencies that would be affected by the proposed amendments.

The proposed 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 have any negative effects on these small business providers of residential developmental disabilities services.

OMRDD reimburses its voluntary residential providers for the cost of food provided to individuals. In general, individuals in congregate care living arrangements such as Individualized Residential Alternatives (IRAs) and Community Residences operated by OMRDD certified providers are categorically eligible for food stamp benefits. Prior to October 1, 2008 the monthly amount an eligible individual received was capped at $44. Since that date maximum amounts have increased to $176 effective October 1, 2008 and to $200 effective April 1, 2009. The overwhelming majority of persons served by the OMRDD residential programs, therefore, qualify for a level of food stamp benefits that can fund a significant percentage of the cost of their meals and other nutritional needs. There is no reason why OMRDD should not encourage individuals to use this benefit. In recognizing the availability of this benefit and assisting individuals to realize this entitlement, OMRDD is practicing responsible stewardship.

OMRDD acknowledges that some individuals may have the ability and desire to act on their own behalf with respect to receiving their own food stamp benefits and/or purchasing their own food and preparing their own meals. The regulations accommodate these individuals but place a responsibility upon them to utilize food stamp benefits towards the cost of their meals or pay directly in place of food stamp benefits if they do not wish to file.

The regulations provide numerous protections for the individual. They promote choice by clarifying a residential provider's responsibility to recognize and accommodate a capable individual's desire to pay for, obtain and prepare his or her own food. The regulations guarantee that an individual's funding for food cannot be negatively impacted due to the non-receipt or fluctuations in the food stamp benefits.

The regulations prohibit a residential provider from changing any arrangement with the individual whereby the individual purchases or prepares some of his or her food or meals, unless such change is based on the individual's best interests and needs in accordance with his or her plan of services.

The regulations also confirm a provider's obligation to provide for the nutritional needs of the individual regardless of receipt of food stamp benefits and guarantee admission to, and continuation of, ongoing residential services whether or not an individual receives food stamp benefits or contributes toward the cost of food.

Finally, the regulations include an offset to the reimbursement provided to non-profit residential provider agencies by the State.

2. Compliance requirements: As discussed in the Regulatory Impact Statement, there will be some administrative effort associated with applying for and maintaining food stamp eligibility on behalf of eligible individuals. Individuals will be expected to cooperate with the provider of services to apply for food stamp benefits and maintain eligibility for these benefits.

The regulations also require that the provider of residential services maintain separate accounts to track use and disbursement of food stamp benefits received on behalf of individuals, all payments the provider receives from or for such individuals for food, and all money given to individuals for the purchase of food.

For individuals and their representatives, the requirement to file for food stamp benefits will involve completion of the necessary application paperwork (by themselves or the provider). The maintenance of food stamp benefits normally involves filing recertification applications and reporting changes in income, resources or residence to maintain the individual's continued eligibility.

OMRDD will continue to assist individuals in filing for food stamps through the technical assistance of OMRDD's network of Revenue Support Field Offices (RSFOs).

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: As stated, there will be some administrative costs for small business providers of services associated with applying for and maintaining eligibility for food stamp benefits on behalf eligible individuals. The regulations also require that the provider of residential services maintain separate accounts to track use and disbursement of food stamp benefits received on behalf of individuals, all payments the provider receives from or for such individuals for food, and all money given to individuals for the purchase of food.

OMRDD has recognized these costs as well as the possibility that not all individuals will apply and that not all individuals who apply will be eligible for the maximum level of food stamp benefits. OMRDD has taken these factors into consideration in establishing its methodology for the reimbursement offset.

5. Economic and technological feasibility: The proposed amendments are concerned with fiscal and administrative issues, and do not impose on regulated parties the use of any new technological processes.

6. Minimizing adverse impact: The amendments should not result in any adverse economic impacts.

7. Small business and local government participation: The proposed rulemaking is in response to the concern expressed by providers that regulations are necessary to assist them in maximizing food stamp benefits for which individuals in residential services are eligible. OMRDD has worked through its Provider Associations to encourage and support its non-profit residential providers in the efforts to maximize participation in the food stamp program for all individuals residing in eligible living arrangements. OMRDD is aware that the overwhelming majority of non-profit residential providers already apply for food stamp benefits on behalf of the individuals they serve, and had notified providers that it would be implementing the offsets to state funding that are contained in the regulations.

Thus, the proposed regulations have been developed in consultation with small business providers of services. Most recently, the draft regulations were shared with representatives of provider associations, which have, in turn, disseminated them to providers for review and comment. The regulations were also shared with Parent to Parent (a parent organization) as well as with advocates for Willowbrook Class members including the Consumer Advisory Board and New York Lawyers for the Public Interest.

OMRDD's Provider Associations have responded favorably to the provisions of the regulations as they clearly define both the rights and responsibilities of residential service providers and those of the individuals they serve.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for this rule making 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. The amendments address requirements for obtaining food stamp benefits by or on behalf of individuals in non-profit community residences, including Individualized Residential Alternatives (IRAS). As discussed in the Regulatory Impact Statement, providers of services may find there is some administrative effort associated with applying for food stamps on behalf of individuals they serve. This administrative effort has been addressed in the offset to the reimbursements of provider agencies. In any case, these relatively minor effects will not disproportionately impact providers as a result of the region of New York State in which they provide services or the location (rural, urban or suburban) of their operations.

Job Impact Statement

A Job Impact Statement for this rule making is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial impact on jobs and/or employment opportunities. The proposed amendments are concerned with requirements for obtaining food stamp benefits by or on behalf of individuals in non-profit community residences, including Individualized Residential Alternatives (IRAs). The proposed regulations will not change the nature or volume of services provided under the auspices of OMRDD to persons with developmental disabilities, so that it is reasonable to expect that they will have no impact on jobs and/or employment opportunities in New York State.

Department of Motor Vehicles

NOTICE OF ADOPTION

Protective Helmets, Goggles, Face Shields and Wind Screens for Motorcycles

I.D. No. MTV-09-09-00014-A

Filing No. 1133

Filing Date: 2009-09-28

Effective Date: 2009-10-14

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

Action taken: Amendment of Part 54 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 381(6)

Subject: Protective helmets, goggles, face shields and wind screens for motorcycles.

Purpose: To delete a reference of an obsolete standard for motorcycle operator protective equipment.

Text or summary was published in the March 4, 2009 issue of the Register, I.D. No. MTV-09-09-00014-P.

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

Text of rule and any required statements and analyses may be obtained from: Heidi A. Bazicki, Counsel's Office, Department of Motor Vehicles, 6 Empire State Plaza, Room 526, Albany, New York 12228, (518) 474-0871

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

NOTICE OF ADOPTION

Fixed Price Option

I.D. No. PSC-43-07-00016-A

Filing Date: 2009-09-28

Effective Date: 2009-09-28

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

Action taken: On 9/28/09, the PSC adopted changes to the methods for calculating the non-bypassable charges of New York State Electric & Gas Corporation and Rochester Gas & Electric Corporation.

Statutory authority: Public Service Law, sections 5(1)(b), 64, 65(1) and 66(1)

Subject: Fixed Price Option.

Purpose: To adopt changes to the methods for calculating the non-bypassable charges.

Substance of final rule: The Commission, on September 28, 2009, adopted changes to the methods for calculating the non-bypassable charges of New York State Electric & Gas Corporation and Rochester Gas & Electric Corporation for electric delivery service, by offsetting the charges with credits applicable to all customers in a service classification notwithstanding the type or source of electric commodity supply taken by the customer, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(07-E-0479SA4)

NOTICE OF ADOPTION

Modifications to Billing Service Agreements

I.D. No. PSC-31-08-00017-A

Filing Date: 2009-09-25

Effective Date: 2009-09-25

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

Action taken: On 9/17/09, the PSC adopted an order directing Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (KEDNY) to modify its Billing Services Agreements used to implement Purchased of Accounts Receivable Programs.

Statutory authority: Public Service Law, sections 65 and 66

Subject: Modifications to Billing Service Agreements.

Purpose: To revise Billing Service Agreements.

Substance of final rule: The Commission, on September 17, 2009, adopted an order directing Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (KEDNY) to revise the Billing Services

Agreements used to implement the Purchased of Accounts Receivables Programs, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(06-G-1185SA5)

NOTICE OF ADOPTION

Accounting Treatment to Retain a Portion of a Litigation Settlement

I.D. No. PSC-43-08-00015-A

Filing Date: 2009-09-24

Effective Date: 2009-09-24

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

Action taken: On 9/17/09, the PSC adopted the terms of a Joint Proposal submitted 8/13/09 by United Water New York, Inc. (company) & staff of the PSC, for the rate treatment of $4.1 million which the company will receive from a litigation settlement.

Statutory authority: Public Service Law, section 89-c

Subject: Accounting treatment to retain a portion of a litigation settlement.

Purpose: To approve the accounting treatment to retain a portion of a litigation settlement.

Substance of final rule: The Commission on September 17, 2009, adopted the terms of a Joint Proposal submitted August 13, 2009 by United Water New York, Inc. (company) and staff of the Department of Public Service, for the rate treatment of $4.1 million which the company will received as settlement proceeds in litigation to recover damages for water pollution caused by Methyl Tertiary Butyl Ether, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(08-W-1139SA1)

NOTICE OF ADOPTION

Mini Rate Filing

I.D. No. PSC-14-09-00016-A

Filing Date: 2009-09-23

Effective Date: 2009-09-23

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

Action taken: On 9/17/09, the PSC adopted an order approving, with modifications Village of Groton's amendments to PSC 1—Electricity, to increase its annual electric revenues of $184,879 or 22.7% effective October 1, 2009.

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

Subject: Mini rate filing.

Purpose: To approve an increase in annual electric revenues of $184,879 or 22.7%.

Substance of final rule: The Commission, on September 17, 2009, adopted an order approving, with modifications Village of Groton's amendments to PSC 1 - Electricity, to increase its annual electric revenues by $184,879 or 22.7%. The increase will be spread over two years to mitigate customer impacts. A $92,440 (11.4%) rate increase will become effective October 1, 2009 and the remaining rate increase of $92,440 will become effective October 1, 2010, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(09-E-0247SA1)

NOTICE OF ADOPTION

Modifications to Billing Service Agreements

I.D. No. PSC-17-09-00008-A

Filing Date: 2009-09-25

Effective Date: 2009-09-25

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

Action taken: On 9/17/09, the PSC adopted an order directing KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island (KEDLI) to modify its Billing Services Agreements used to implement Purchased of Accounts Receivable Programs.

Statutory authority: Public Service Law, sections 4(1), 65 and 66

Subject: Modifications to Billing Service Agreements.

Purpose: To revise Billing Service Agreements.

Substance of final rule: The Commission, on September 17, 2009, adopted an order directing KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island (KEDLI) to revise the Billing Services Agreements used to implement the Purchased of Accounts Receivables Programs, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(06-G-1186SA5)

NOTICE OF ADOPTION

Petition for the Submetering of Electricity

I.D. No. PSC-18-09-00015-A

Filing Date: 2009-09-25

Effective Date: 2009-09-25

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

Action taken: On 9/17/09, the PSC adopted an order approving the Petition of MP Liberty, LLC, to submeter electricity at 200 North End Avenue, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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 MP Liberty, LLC, to submeter electricity at 200 North End Avenue, New York, New York.

Substance of final rule: The Commission, on September 17, 2009,

adopted an order approving the Petition of MP Liberty, LLC, to submeter electricity at 200 North End Avenue, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc., subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(09-E-0332SA1)

NOTICE OF ADOPTION

Petition for the Submetering of Electricity

I.D. No. PSC-18-09-00016-A

Filing Date: 2009-09-25

Effective Date: 2009-09-25

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

Action taken: On 9/17/09, the PSC adopted an order approving the Petition of MP Freedom, LLC, to submeter electricity at 300 North End Avenue, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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 MP Freedom, LLC, to submeter electricity at 300 North End Avenue, New York, New York.

Substance of final rule: The Commission, on September 17, 2009, adopted an order approving the Petition of MP Freedom, LLC, to submeter electricity at 300 North End Avenue, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc., subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(09-E-0333SA1)

NOTICE OF ADOPTION

Mini Rate Filing

I.D. No. PSC-24-09-00008-A

Filing Date: 2009-09-23

Effective Date: 2009-09-23

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

Action taken: On 9/17/09, the PSC adopted an order approving, with modifications Village of Groton's proposal to spread the rate increase over two years to mitigate customer impacts of amendments to PSC 1—Electricity.

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

Subject: Mini rate filing.

Purpose: To approve an increase in annual electric revenues of $184, 879, or 22.7% spread over a two year period.

Substance of final rule: The Commission, on September 17, 2009, adopted an order approving, with modifications Village of Groton's proposal to increase annual revenues by $184,879 or 22.7% and to spread the rate increase over two years. An increase of $92,440 or 11.4% will become effective October 1, 2009, and the remaining $92,440, or 11.4% will become effective October 1, 2010, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(09-E-0247SA2)

NOTICE OF ADOPTION

Fixed Price Option

I.D. No. PSC-30-09-00013-A

Filing Date: 2009-09-28

Effective Date: 2009-09-28

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

Action taken: On 9/17/09, the PSC adopted the terms and conditions for non-bypassable and variable commodity charges for New York State Electric & Gas Corporation.

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

Subject: Fixed Price Option.

Purpose: To adopt terms and conditions for non-bypassable and variable commodity charges.

Substance of final rule: The Commission, on September 17, 2009, adopted the terms and conditions for non-bypassable and variable commodity charges for New York State Electric & Gas Corporation (Company) and directed the company to file further revisions by October 28, 2009 to become effective January 1, 2010, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann__ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(09-E-0227SA2)

NOTICE OF ADOPTION

Fixed Price Option

I.D. No. PSC-30-09-00014-A

Filing Date: 2009-09-28

Effective Date: 2009-09-28

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

Action taken: On 9/17/09, the PSC adopted the terms and conditions for non-bypassable and variable commodity charges for Rochester Gas and Electric Corporation.

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

Subject: Fixed Price Option.

Purpose: To adopt terms and conditions for non-bypassable and variable commodity charges.

Substance of final rule: The Commission, on September 17, 2009, adopted the terms and conditions for non-bypassable and variable commodity charges for Rochester Electric and Gas Corporation (Company)

and directed the company to file further revisions by October 28, 2009 to become effective January 1, 2010, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(09-E-0228SA2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Revenue Decoupling Mechanism in KEDNY's Service Territory

I.D. No. PSC-41-09-00009-P

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

Proposed Action: The Commission is considering whether to establish a revenue decoupling mechanism in the service territory of The Brooklyn Union Gas Company d/b/a National Grid NY (KEDNY).

Statutory authority: Public Service Law, sections 4(1), 5(1), (2) and 66(1)

Subject: Revenue decoupling mechanism in KEDNY's service territory.

Purpose: To encourage KEDNY to support gas conservation by its customers.

Substance of proposed rule: The Commission is considering whether to adopt, in whole or in part, to reject, or to take any other action with respect to the terms of a joint proposal filed by the Staff of the Department of Public Service and The Brooklyn Union Gas Company d/b/a National Grid NY (KEDNY) on September 25, 2009. Such terms concern the establishment of a revenue decoupling mechanism in KEDNY's service territory.

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: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn_brilling@dps.state.ny.us

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

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

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

(06-G-1185SP9)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

National Grid's Economic Development Plan

I.D. No. PSC-41-09-00010-P

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

Proposed Action: The Commission is considering a filing dated August 31, 2009 from Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) proposing budgets, terms and conditions for an economic development plan.

Statutory authority: Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(1), (3), (5), (10), (12) and (12-b)

Subject: National Grid's economic development plan.

Purpose: Consideration of National Grid's economic development plan.

Substance of proposed rule: The Commission is considering a filing dated August 31, 2009 from Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) proposing budgets, terms and conditions for an economic development plan. National Grid plans to spend approximately $9.0 million on non-rate economic development plan programs in 2010, to add a new Renewable Energy and Economic Development program, to modify the existing Capital Investment Incentive program, and to make other minor changes to its economic development plan. 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: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn_brilling@dps.state.ny.us

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

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

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

(01-M-0075SP46)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Revenue Decoupling Mechanism in KEDLI's Service Territory

I.D. No. PSC-41-09-00011-P

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

Proposed Action: The Commission is considering whether to establish a revenue decoupling mechanism in the service territory of KeySpan Gas East Corporation d/b/a National Grid (KEDLI).

Statutory authority: Public Service Law, sections 4(1), 5(1), (2) and 66(1)

Subject: Revenue decoupling mechanism in KEDLI's service territory.

Purpose: To encourage gas conservation in KEDLI's service territory.

Substance of proposed rule: The Commission is considering whether to adopt, in whole or in part, to reject, or to take any other action with respect to the terms of a joint proposal filed by the Staff of the Department of Public Service and The KeySpan Gas East Corporation d/b/a National Grid (KEDLI) on September 25, 2009. The terms concern the establishment of a revenue decoupling mechanism in KEDLI's service territory.

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: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn_brilling@dps.state.ny.us

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

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

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

(06-G-1186SP6)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Treatment of Revenues and Costs Associated with Transportation of Natural Gas Produced near the Company's Service Area

I.D. No. PSC-41-09-00012-P

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

Proposed Action: The PSC is considering whether to approve, modify, or reject, in whole or in part, a petition filed by Corning Natural Gas Corporation (Company) regarding the treatment of revenues and costs associated with transportation of locally-produced natural gas.

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

Subject: Treatment of revenues and costs associated with transportation of natural gas produced near the company's service area.

Purpose: To address the revenue generated from the Root Pipeline beginning in January 2009.

Substance of proposed rule: The Commission is considering whether to approve, modify, or reject, in whole or in part, Corning Natural Gas Corporation's (Corning or Company) petition dated July 30, 2009, seeking a ruling that the mechanism for sharing local production access / interconnection revenues established in the Commission's December 13, 2007 Order Authorizing Rate Increase in this proceeding does not apply to revenues from transportation of local production through the Company's Root Pipeline. Alternatively, Corning requests that if the Commission concludes that the aforementioned mechanism applies to transportation revenues generated by the Root Pipeline, then Corning seeks a waiver of the 90% / 10% sharing between customers and shareholders, respectively.

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: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn_brilling@dps.state.ny.us

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

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

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

(07-G-0772SP3)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Specific Commercial and Industrial Electric and Gas Energy Efficiency Programs

I.D. No. PSC-41-09-00013-P

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

Proposed Action: The Commission is considering commercial and industrial electric and gas energy efficiency program proposals as a component of the Energy Efficiency Portfolio Standard.

Statutory authority: Public Service Law, sections 4(1), 5(2) and 66(1)

Subject: Specific commercial and industrial electric and gas energy efficiency programs.

Purpose: To encourage electric and gas energy conservation in the State.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, (a) commercial and industrial electric energy efficiency program proposals made in response to an order in Case 07-M-0548 entitled ''Order Establishing Energy Efficiency Portfolio Standard and Approving Programs'' issued by the Public Service Commission on June 23, 2008 [see Ordering Clauses 8, 10 & 17]; and (b) commercial and industrial gas energy efficiency program proposals made in response to a notice in Case 07-M-0548 entitled ''Notice Requesting Proposals'' issued by the Secretary to the Public Service Commission on April 20, 2009. For potential independent program administrators that submitted updated proposals for programs in accordance with Ordering Clause 8 of the aforementioned June 23, 2008 Order, such submissions shall be considered as pre-filed comments responsive to this notice to the degree that they relate to the provision of energy efficiency programs for commercial and industrial customers. The program proposals under consideration for this rule include the following:

1. Case 07-M-0548 - New York State Research and Development Authority, ''Energy Efficiency Portfolio Program Administrator Proposal'' dated November 21, 2008 and update dated June 2, 2009: (a) Industrial and Process Efficiency Program (bidding component) (electric) and (b) Industrial and Process Efficiency Program (bidding component) (gas).

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: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn_brilling@dps.state.ny.us

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-1127SP10)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Transfer of Water Supply Assets

I.D. No. PSC-41-09-00014-P

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

Proposed Action: The PSC is considering a Joint Petition by Rand Water Corp. and the Town of East Fishkill for approval to transfer all assets serving Dogwood Knolls Subdivision to the Town of East Fishkill & transfer remaining assets to a new Transportation Corporation.

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

Subject: Transfer of water supply assets.

Purpose: Transfer the water supply assets of Rand Water Corporation serving Dogwood Knolls Subdivision to the Town of East Fishkill.

Text of proposed rule: Rand Water Corporation (Rand or the company) provides water service to two separate water systems in the Town of East Fishkill, Dutchess County; unmetered water service to approximately 256 customers in the Dogwood Knolls Estates subdivision and metered water service to approximately 188 residential and 4 commercial customers in the Brandt Farms Estates subdivision. On August 27, 2009, the company and the Town of East Fishkill filed a joint petition requesting approval of the transfer of all of the water supply assets serving the Dogwood Knolls Subdivision to the Town of East Fishkill and the transfer of its remaining assets to a new transportation corporation to serve customers in the Brandt Farms Estates Development. Subsequently, on September 21, 2009, Rand filed an amendment to its joint petition of August 27, 2009, seeking Commission approval for the dissolution of the company and authorization to file a Certificate of Dissolution with the New York Department of State, pursuant to Public Service Law § 108. The Commission may approve or reject, in whole or in part, or modify the company's request.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.state.ny.us/f96dir.htm. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New

York 12223-1350, (518) 474-6530, email: jaclyn__brilling@dps.state.ny.us

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.

(09-W-0644SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Amendments to 16 NYCRR Parts 10 and 257

I.D. No. PSC-41-09-00015-P

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

Proposed Action: This is a consensus rule making to amend Parts 10 and 257 of Title 16 NYCRR.

Statutory authority: Public Service Law, sections 65(1) and 66(2)

Subject: Amendments to 16 NYCRR Parts 10 and 257.

Purpose: To consider proposed amendments to 16 NYCRR Parts 10 and 257.

Substance of proposed rule (Full text is posted at the following State website:www.dps.state.ny.us): The proposed changes to Title 16 NYCRR Part 10, Referenced Material and 16 NYCRR Part 257, Liquefied Petroleum Gas Plants will bring these Parts pertaining to safe operation and maintenance of liquefied petroleum gas plants into alignment with the requirements found in Title 16 NYCRR, Chapter III, Gas Utilities, Subchapter C, Safety, Part 255, Transmission and Distribution of Gas.

Over the past few decades, Part 255 has been updated numerous times to take advantage of newer technologies and practices that have greatly enhanced public safety. Part 257 has only had one amendment since its original adoption in 1977. The most notable amendment being proposed addresses requirements for nondestructive inspection of welds. When Part 257 was last amended, state-of-the-art nondestructive inspection was not viable on piping smaller than 4-inches. The proposed amendments to Part 257 will bring it into conformance with Part 255 and keep it current with the state of the art for nondestructive inspection and require nondestructive inspection of piping as small as 2-inch diameter.

Additionally, minor clarification and technical changes are being made. The most notable clarification is the update of the reference to ''Gas Division'' to the most current Department staff organization.

The proposed revisions to the Commission's regulations contained in 16 NYCRR Part 10, Referenced Material, will also bring the New York regulations up-to-date with the edition of industry consensus standard incorporated by reference in the Federal Regulations contained in Title 49, Code of Federal Regulations, Part 192, Transportation of Natural Gas (49 CFR Part 192).

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: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann__ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn__brilling@dps.state.ny.us

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

Consensus Rule Making Determination The proposed rule is considered to be a consensus rule because the changes are technical in nature and they are believed to be non-controversial since they will align the Commission's regulations for liquefied petroleum gas plants to existing safety regulations that the Commission has adopted for natural gas transmission and distribution. The proposed changes have been reviewed by personnel at the two gas corporations that currently have, or have had, liquefied petroleum gas plants: Central Hudson Gas & Electric and Orange and Rockland Utilities and their comments have been incorporated. Therefore, no objections to the proposed amendments are anticipated.

Job Impact Statement

1. Nature of impact: It is believed will this rule will not have any impact on jobs and employment opportunities.
2. Categories and numbers affected: Not Applicable.
3. Regions of adverse impact: None.
4. Minimizing adverse impact: None needed.
5. (IF APPLICABLE) Self-employment opportunities: Not Applicable.

(08-G-1006SP1)

Department of State

NOTICE OF ADOPTION

Campus Fire Safety

I.D. No. DOS-16-09-00002-A
Filing No. 1149
Filing Date: 2009-09-30
Effective Date: 2009-10-14

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

Action taken: Amendment of Part 500 of Title 19 NYCRR.

Statutory authority: Executive Law, section 156-e

Subject: Campus fire safety.

Purpose: Clarify procedures and add a new fire reporting requirement.

Substance of final rule: PART 500

CAMPUS FIRE SAFETY

Section 500.1 Authority, intent, purpose and scope. The amendments to this section make minor technical corrections to this section and includes "other applicable safety standards" as part of the Office of Fire Prevention and Control's inspection authority to be consistent with Executive Law § 156-e.

Section 500.2 Inspections and reports. The amendments to this section make minor technical corrections to this section; and includes "other applicable safety standards" and "other building construction and all records related thereto" as part of the Office of Fire Prevention and Control's inspection authority to be consistent with Executive Law § 156-e.

Section 500.3 Report of Inspection/Notice of Violation. The amendments to this section make minor technical corrections and clarifications to this section; and includes "other applicable safety standards" as part of the Office of Fire Prevention and Control's inspection authority to be consistent with Executive Law § 156-e.

Section 500.4 Order to Comply. This section deals with the office of Fire Prevention and Control's authority to issue an order to comply in situations that present threats to public health and safety.

Section 500.5 Penalties. The amendments to this section contain a minor technical correction to include the title "monetary penalties;" and deal with the time within which a compromise may be requested and how any compromise money shall be used.

Section 500.6 Methods of Abatement. The amendments to this section make minor technical corrections to this section and includes "other applicable safety standards" as part of the Office of Fire Prevention and Control's inspection authority to be consistent with Executive Law § 156-e.

Section 500.7 Compliance Plans. This section deals with the ability of a college or university to submit a compromise plan and addresses the responsibility of the college or university under such plan.

Section 500.8 Certificate of Compliance. The amendments to this section make minor technical corrections to this section and includes "other applicable safety standards" as part of the Office of Fire Prevention and Control's inspection authority to be consistent with Executive Law § 156-e. This section also repeals the old title of section 500.8, revocation of a certificate of compliance, but keeps the content of the rule.

Section 500.9 Imminent Threat to Public Health or Safety. This section deals with the Office of Fire Prevention and Control's authority to take corrective action when an imminent threat to health and safety exists.

Section 500.10 Reporting of Fires. This section deals with the responsibility of a college or university to report, to the Office of Fire Prevention and Control, any fire that occurs on its property.

Section 500.11 Delegation of inspection authority to local governments. This rule does not make any changes to this section.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 500.4(b) and 500.10(c).

Text of rule and any required statements and analyses may be obtained from: Elisha S. Tomko, Esq, Department of State, 99 Washington Avenue, Albany, New York 12231, (518) 474-6740

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

The rule as adopted contains nonsubstantial revisions. These revisions do not necessitate that a revised Regulatory Impact Statement, revised Regulatory Flexibility Analysis for Small Businesses and Local Governments, revised Rural Area Flexibility Analysis, or revised Job Impact Statement be issued.

Assessment of Public Comment

The Department of State received one comment from the State University of New York (SUNY) regarding the Proposed Rulemaking for 19 NYCRR Part 500 published in the April 22, 2009 Register.

SUNY had the following comments regarding the Proposed Rulemaking:

1. Sections 500.1, 500.2 and 500.3 use the term ''other applicable fire safety standards''. SUNY requested that the term ''other applicable fire safety standards'' be identified to allow colleges to know what their compliance obligations are.

Sections 500.1, 500.2 and 500.3 comports with the statutory language that authorizes the Office of Fire Prevention and Control to inspect colleges and universities for compliance with ''the uniform fire prevention and building codes; or any other applicable code, rule or regulation pertaining to fire safety.'' (Executive Law section 156-e). The term ''other applicable fire safety standards'' is necessary to ensure that colleges and universities are aware that they need to comply with the applicable reference standards contained within the Uniform Fire Prevention and Building Codes (UFBPC) and that such reference standards are enforceable.

2. Section 500.4 uses the term ''severe or serious violation''. SUNY asked for clarification as to whether these terms are the same as defined in section 500.5.

The Department of State is amending the proposed text in section 500.4 to define the terms ''severe'' and ''serious'' as defined in 500.5.

3. Section 500.9 grants the Office of Fire Prevention and Control authority to close college and university buildings, or parts thereof, when a severe or serious or the cumulative effect of significant violations create an imminent threat to public health or safety. SUNY recommended that this authority be restricted to threats involving fire safety.

The term ''public health or safety'' is a term used the enabling law, Executive Law section 156-e, and is commonly used to cover fire and life safety. In addition, the intent of the UFBPC is to address issues of public safety, health, general welfare and life safety.

4. Section 500.10 creates a new fire reporting requirement for colleges and universities. SUNY questions the need of the reporting requirement in light of the new federal reporting requirement under the Higher Education Opportunity Act. Further, SUNY requested: that the terms ''reportable fire'' and ''under the jurisdiction'' be defined; that the reporting time frames of 24 hours notice for all fires and one hour a fire resulting in injury or death be further justified; and that the fire department maintain responsibility over reporting rather than the colleges and universities.

The federal reporting requirement is part of an annual report to the U.S. Department of Education for statistical purposes to inform the public regarding campus fire safety. The reporting requirement in section 500.10 was created to further ensure public safety on colleges and universities in the aftermath of a fire. Depending on severity of the fire, the Office of Fire Prevention and Control may need to ensure the effected buildings, facilities and equipment are safe for re-occupancy and use.

The Department will be amending the proposed rulemaking to align the definition of fire to the federal definition.

The use of the term ''under the jurisdiction'' is used in the enabling law, Executive Law section 156-e and the existing Part 500. This fire reporting requirement will cover all buildings that the Office of Fire Prevention and Control is responsible for enforcing. SUNY recommended that the reporting requirement only cover property owned or operated by a college. Restricting the reporting of fires to property owned or operated by a college would not sufficiently cover all property under the jurisdiction of a college. For instance, when a college leases a building to house a student, that building would not be under the operational control of a college per se, but the college stills maintain a sufficient relationship to remain responsible under the law. It is expected that the college ensure its student's safety when placing him or her in housing. This interpretation is aligned with the federal campus fire safety guidelines.

The 24 hour reporting requirement is to ensure public safety on colleges and universities in the aftermath of a fire. Depending on severity of the fire, the Office of Fire Prevention and Control may need to ensure the effected buildings, facilities and equipment are safe for re-occupancy and use or the temporary facilities and alternatives employed to provide equivalent fire and life safety levels adequately comply with the UFPBC. Further, it is within the public's best interest to assure that a thorough fire cause investigation is conducted.

The 1 hour reporting requirement in the event of an injury or death resulting from a fire is necessary to ensure that, after such injury or death occurs, the scene integrity is maintained for an appropriate and thorough fire cause investigation to be conducted.

While fire departments have a separate reporting requirement, the fire department's report is currently limited in scope and does not have an established time frame for filing. Further, not all fire departments participate in the New York State Fire Reporting System. Additionally, there are instances where fire departments are not even notified by colleges that a fire has occurred.

Susquehanna River Basin Commission

INFORMATION NOTICE

Notice of Commission Acts

Notice of Actions Taken at September 10, 2009, Meeting

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice of Commission Actions.

SUMMARY: At its regular business meeting on September 10, 2009, in North East, Maryland, the Commission held a public hearing as part of its regular business meeting. At the public hearing, the Commission: 1) approved and tabled certain water resources projects; 2) rescinded approval for two water resources projects; 3) approved settlements involving two water resources projects; and 4) tabled a request for an administrative hearing on a project previously approved by the Commission. Details concerning these and other matters addressed at the public hearing and business meeting are contained in the Supplementary Information section of this notice.

DATE: September 10, 2009.

ADDRESSES: Susquehanna River Basin Commission, 1721 N. Front Street, Harrisburg, PA 17102-2391.

FOR FURTHER INFORMATION CONTACT: Richard A. Cairo, General Counsel, telephone: (717) 238-0423, ext. 306; fax: (717) 238-2436; e-mail: rcairo@srbc.net; or Stephanie L. Richardson, Secretary to the Commission, telephone: (717) 238-0423, ext. 304; fax: (717) 238-2436; e-mail: srichardson@srbc.net. Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: In addition to the public hearing and its related action items identified below, the following items were also presented or acted on at the business meeting: 1) a report on the present hydrologic conditions of the basin indicating widespread recovery from winter precipitation deficits; 2) a panel discussion on the Chesapeake Bay and Ecosystems as two of the Commission's ''priority management areas''; 3) presentation of the William W. Jeanes Award for Environmental Excellence to The Nature Conservancy; 4) an update on the Maryland Lt. Governor's Water Summit; 5) adoption of a final rulemaking action regarding the use of Commission-approved water sources for natural gas well development and clarifying administrative procedures; 6) adoption of an Access to Records Policy; and 7) ratification of several grants regarding surface water assessments, total maximum daily loads, the State of the Susquehanna project and the Susquehanna Flood Forecast and Warning System. The Commission also heard counsel's report on legal matters affecting the Commission.

The Commission convened a public hearing and took the following actions:

Public Hearing – Compliance Actions

The Commission approved settlements in lieu of civil penalties for the following projects:

1. Allegheny Energy Supply Company, LLC and UGI Development Company, Hunlock Creek Electric Generating Station - $35,000

2. Chief Oil & Gas, LLC, Phelps 1H Well - $25,000

Public Hearing – Projects Approved

1. Project Sponsor: Antrim Treatment Trust. Project Facility: Antrim No. 1, Duncan Township, Tioga County, Pa. Surface water withdrawal of up to 0.720 mgd.

2. Project Sponsor and Facility: Charles Header-Laurel Springs Development, Barry Township, Schuylkill County, Pa. Groundwater withdrawal of 0.040 mgd from Laurel Springs 1 and 2.

3. Project Sponsor and Facility: Charles Header-Laurel Springs Development, Barry Township, Schuylkill County, Pa. Consumptive water use of up to 0.080 mgd.

4. Project Sponsor: Community Refuse Service, Inc. Project Facility: Cumberland County Landfill, Hopewell and North Newton Townships,

Cumberland County, Pa. Modification to increase consumptive water use from a peak day of 0.090 mgd up to 0.140 mgd (Docket No. 20050907).

5. Project Sponsor: Community Refuse Service, Inc. Project Facility: Cumberland County Landfill, Hopewell and North Newton Townships, Cumberland County Pa. Groundwater withdrawal of 0.053 mgd from eight wells for consumptive water use.

6. Project Sponsor and Facility: EXCO-North Coast Energy, Inc. (Tunkhannock Creek – Dobrinski), Tunkhannock Township, Wyoming County, Pa. Surface water withdrawal of up to 0.999 mgd.

7. Project Sponsor and Facility: Fortuna Energy Inc. (Towanda Creek – Franklin Township Volunteer Fire Department), Franklin Township, Bradford County, Pa. Surface water withdrawal of up to 2.000 mgd.

8. Project Sponsor and Facility: LHP Management, LLC (Fishing Creek – Clinton Country Club), Bald Eagle Township, Clinton County, Pa. Surface water withdrawal of up to 0.100 mgd.

9. Project Sponsor and Facility: Seneca Resources Corporation (Arnot No. 5), Bloss Township, Tioga County, Pa. Surface water withdrawal of up to 0.499 mgd.

10. Project Sponsor and Facility: Southwestern Energy Company (Cold Creek – Giroux), Herrick Township, Bradford County, Pa. Surface water withdrawal of up to 0.249 mgd.

11. Project Sponsor and Facility: Southwestern Energy Company (Mill Creek – Kennedy), Stevens Township, Bradford County, Pa. Surface water withdrawal of up to 0.249 mgd.

12. Project Sponsor and Facility: Southwestern Energy Company (Ross Creek – Billings), Stevens Township, Bradford County, Pa. Surface water withdrawal of up to 0.249 mgd.

13. Project Sponsor and Facility: Southwestern Energy Company (Tunkhannock Creek – Price), Lenox Township, Susquehanna County, Pa. Surface water withdrawal of up to 0.380 mgd.

14. Project Sponsor and Facility: Southwestern Energy Company (Wyalusing Creek – Ferguson), Wyalusing Township, Bradford County, Pa. Surface water withdrawal of up to 1.500 mgd.

15. Project Sponsor and Facility: Southwestern Energy Company (Wyalusing Creek – Campbell), Stevens Township, Bradford County, Pa. Surface water withdrawal of up to 1.500 mgd.

16. Project Sponsor: UGI Development Company. Project Facility: Hunlock Power Station, Hunlock Township, Luzerne County, Pa. Surface water withdrawal from the Susquehanna River of up to 55.050 mgd.

17. Project Sponsor: UGI Development Company. Project Facility: Hunlock Power Station, Hunlock Township, Luzerne County, Pa. Consumptive water use of up to 0.870 mgd.

18. Project Sponsor and Facility: Ultra Resources, Inc. (Elk Run), Gaines Township, Tioga County, Pa. Corrective modification to passby flow condition (Docket No. 20090631).

19. Project Sponsor: United Water Resources. Project Facility: United Water PA–Harrisburg Operation, Newberry Township, York County, Pa. Groundwater withdrawal of up to 0.121 mgd from Paddletown Well.

Public Hearing – Projects Tabled

1. Project Sponsor and Facility: ALTA Operating Company, LLC (Berkowitz Pond), Forest Lake Township, Susquehanna County, Pa. Surface water withdrawal of up to 0.249 mgd.

2. Project Sponsor and Facility: J-W Operating Company (Abandoned Mine Pool – Unnamed Tributary to Finley Run), Shippen Township, Cameron County, Pa. Application for surface water withdrawal of up to 0.090 mgd.

3. Project Sponsor and Facility: Mansfield Borough Municipal Authority, Richmond Township, Tioga County, Pa. Application for groundwater withdrawal of up to 0.079 mgd from Well 3.

4. Project Sponsor and Facility: Southwestern Energy Company (Sutton Big Pond), Herrick Township, Bradford County, Pa. Application for surface water withdrawal of up to 5.000 mgd.

Public Hearing – Rescission of Project Approvals

1. Project Sponsor and Facility: East Resources, Inc. (Tioga River) (Docket No. 20080609), Mansfield, Richmond Township, Tioga County, Pa.

2. Project Sponsor and Facility: Montrose Country Club (Docket No. 20020603), Bridgewater Township, Susquehanna County, Pa.

Public Hearing – Rescission of Project Approvals Tabled

1. Project Sponsor and Facility: Chesapeake Appalachia, LLC (Susquehanna River) (Docket No. 20080903), Town of Tioga, Tioga County, N.Y.

2. Project Sponsor and Facility: Chesapeake Appalachia, LLC (Susquehanna River) (Docket No. 20080906), Athens Township, Bradford County, Pa.

3. Project Sponsor and Facility: Chesapeake Appalachia, LLC (Susquehanna River) (Docket No. 20080907), Oakland Township, Susquehanna County, Pa.

Public Hearing – Administrative Appeals

1. Docket No. 20090315, from petitioner Paul R. Miller allegedly on behalf of Delta Borough –The Commission tabled action on this appeal at the request of the petitioner and the Delta Borough Authority.

AUTHORITY: Pub. L. 91-575, 84 Stat. 1509 et seq., 18 CFR Parts 806, 807, and 808.

Dated: September 25, 2009.

Stephanie L. Richardson

Secretary to the Commission

Workers' Compensation Board

EMERGENCY RULE MAKING

Pharmacy and Durable Medical Equipment Fee Schedules and Requirements for Designated Pharmacies

I.D. No. WCB-41-09-00002-E

Filing No. 1132

Filing Date: 2009-09-25

Effective Date: 2009-09-25

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

Action taken: Addition of Parts 440 and 442 to Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117, 13 and 13-o

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

Specific reasons underlying the finding of necessity: This rule provides pharmacy and durable medical equipment fee schedules, the process for payment of pharmacy bills, and rules for the use of a designated pharmacy or pharmacies. Many times claimants must pay for prescription drugs and medicines themselves. It is unduly burdensome for claimants to pay out-of-pocket for prescription medications as it reduces the amount of benefits available to them to pay for necessities such as food and shelter. Claimants also have to pay out-of-pocket many times for durable medical equipment. Adoption of this rule on an emergency basis, thereby setting pharmacy and durable medical equipment fee schedules will help to alleviate this burden to claimants, effectively maximizing the benefits available to them. Benefits will be maximized as the claimant will only have to pay the fee schedule amount and there reimbursement from the carrier will not be delayed. Further, by setting these fee schedules, pharmacies and other suppliers of durable medical equipment will be more inclined to dispense the prescription drugs or equipment without requiring claimants to pay up front, rather they will bill the carrier. Adoption of this rule further advances pharmacies directly billing by setting forth the requirements for the carrier to designate a pharmacy or network of pharmacies. Once a carrier makes such a designation, when a claimant uses a designated pharmacy he cannot be asked to pay out-of-pocket for causally related prescription medicines. This rule sets forth the payment process for pharmacy bills which along with the set price should eliminate disputes over payment and provide for faster payment to pharmacies. Finally, this rule allows claimants to fill prescriptions by the internet or mail order thus aiding claimants with mobility problems and reducing transportation costs necessary to drive to a pharmacy to fill prescriptions. Accordingly, emergency adoption of this rule is necessary.

Subject: Pharmacy and durable medical equipment fee schedules and requirements for designated pharmacies.

Purpose: To adopt pharmacy and durable medical equipment fee schedules, payment process and requirements for use of designated pharmacies.

Substance of emergency rule: Chapter 6 of the Laws of 2007 added Section 13-o to the Workers' Compensation Law (''WCL'') mandating the Chair to adopt a pharmaceutical fee schedule. WCL Section 13(a) mandates that the Chair shall establish a schedule for charges and fees for medical care and treatment. Part of the treatment listed under Section 13(a) includes medical supplies and devices that are classified as durable medical equipment. The proposed rule adopts a pharmaceutical fee schedule and durable medical equipment fee schedule to comply with the mandates. This rule adds a new Part 440 which sets forth the pharmacy fee schedule and procedures and rules for utilization of the pharmacy fee schedule and a new Part 442 which sets forth the durable medical equipment fee schedule.

Section 440.1 sets forth that the pharmacy fee schedule is applicable to prescription drugs or medicines dispensed on or after the most recent effective date of § 440.5 and the reimbursement for drugs dispensed before that is the fee schedule in place on the date dispensed.

Section 440.2 provides the definitions for average wholesale price, brand name drugs, controlled substances, generic drugs, independent pharmacy, pharmacy chain, remote pharmacy, rural area and third party payor.

Section 440.3 provides that a carrier or self-insured employer may designate a pharmacy or pharmacy network which an injured worker must use to fill prescriptions for work related injuries. This section sets forth the requirements applicable to pharmacies that are designated as part of a pharmacy network at which an injured worker must fill prescriptions. This section also sets forth the procedures applicable in circumstances under which an injured worker is not required to use a designated pharmacy or pharmacy network.

Section 440.4 sets forth the requirements for notification to the injured worker that the carrier or self-insured employer has designated a pharmacy or pharmacy network that the injured worker must use to fill prescriptions. This section provides the information that must be provided in the notice to the injured worker including time frames for notice and method of delivery as well as notifications of changes in a pharmacy network.

Section 440.5 sets forth the fee schedule for prescription drugs. The fee schedule in uncontroverted cases is average wholesale price minus twelve percent for brand name drugs and average wholesale price minus twenty percent for generic drugs plus a dispensing fee of five dollars for generic drugs and four dollars for brand name drugs, and in controverted cases is twenty-five percent above the fee schedule for uncontroverted claims plus a dispensing fee of seven dollars and fifty cents for generic drugs and six dollars for brand-name drugs. This section also addresses the fee when a drug is repackaged.

Section 440.6 provides that generic drugs shall be prescribed except as otherwise permitted by law.

Section 440.7 sets forth a transition period for injured workers to transfer prescriptions to a designated pharmacy or pharmacy network. Prescriptions for controlled substances must be transferred when all refills for the prescription are exhausted or after ninety days following notification of a designated pharmacy. Non-controlled substances must be transferred to a designated pharmacy when all refills are exhausted or after 60 days following notification.

Section 440.8 sets forth the procedure for payment of prescription bills or reimbursement. A carrier or self-insured employer is required to pay any undisputed bill or portion of a bill and notify the injured worker by certified mail within 45 days of receipt of the bill of the reasons why the bill or portion of the bill is not being paid, or request documentation to determine the self-insured employer's or carrier's liability for the bill. If objection to a bill or portion of a bill is not received within 45 days, then the self-insured employer or carrier is deemed to have waived any objection to payment of the bill and must pay the bill. This section also provides that a pharmacy shall not charge an injured worker or third party more than the pharmacy fee schedule when the injured worker pays for prescriptions out-of-pocket, and the worker or third party shall be reimbursed at that rate.

Section 440.9 provides that if an injured worker's primary language is other than English, that notices required under this part must be in the injured worker's primary language.

Section 440.10 provides penalties for failing to comply with this Part and that the Chair will enforce the rule by exercising his authority pursuant to Workers' Compensation Law § 111 to request documents.

Part 442 sets forth the fee schedule for durable medical equipment.

Section 442.1 sets for that the fee schedule is applicable to durable medical goods and medical and surgical supplies dispensed on or after July 11, 2007.

Section 442.2 sets forth the fee schedule for durable medical equipment as indexed to the New York State Medicaid fee schedule, except the payment for bone growth stimulators shall be made in one payment. This section also provides for the rate of reimbursement when Medicaid has not established a fee payable for a specific item and for orthopedic footwear. This section also provides for adjustments to the fee schedule by the Chair as deemed appropriate in circumstances where the reimbursement amount is grossly inadequate to meet a pharmacies or providers costs and clarifies that hearing aids are not durable medical equipment for purposes of this rule.

Appendix A provides the form for notifying injured workers that the claim has been contested and that the carrier is not required to reimburse for medications while the claim is being contested.

Appendix B provides the form for notification of injured workers that the self-insured employer or carrier has designated a pharmacy that must be used to fill prescriptions.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires December 23, 2009.

Text of rule and any required statements and analyses may be obtained from: Cheryl M. Wood, Special Counsel to the Chair, New York State Workers' Compensation Board, 20 Park Street, Room 400, Albany, New York 12207, (518) 408-0469, email: regulations@wcb.state.ny.us

Summary of Regulatory Impact Statement

Section 1 provides the statutory authority for the Chair to adopt a pharmacy fee schedule pursuant to Workers' Compensation Law Section (WCL) 13-o as added to the WCL by Chapter 6 of the Laws of 2007 which requires the Chair to adopt a pharmaceutical fee schedule. Chapter 6 also amended WCL Section 13(a) to mandate that the Chair establish a schedule for charges and fees for medical care and treatment. Such medical care and treatment includes supplies and devices that are classified as durable medical equipment (hereinafter referred to as DME).

Section 2 sets forth the legislative objectives of the proposed regulations which provide the fee schedules to govern the cost of prescription medicines and DME. This section provides a summary of the overall purpose of the proposed regulation to reduce costs of workers' compensation and the scope of the regulation with regard to process and guidance to implement the rule.

Section 3 explains the needs and benefits of the proposed regulation. This section provides the explanation of the requirement of the Chair to adopt a pharmacy fee schedule as mandated by Chapter 6 of the Laws of 2007. The legislation authorizes carriers and self-insured employers to voluntarily decide to designate a pharmacy or pharmacy network and require claimants to obtain their prescription medicines from the designated pharmacy or network. This section explains how prescriptions were filled prior to the enactment of the legislation and the mechanisms by which prescriptions were reimbursed by carriers and self-insured employers. This section also provides the basis for savings under the proposed regulation. The cost savings realized by using the pharmacy fee schedule will be approximately 12 percent for brand name drugs and 20 percent for generic drugs from the average wholesale price. This section explains the issues with using the Medicaid fee schedule. The substantive requirements are set forth that carriers must follow to notify a claimant of a designated pharmacy or network. This includes the information that must be included in the notification as well as the time frames within which notice must be provided. This section also describes how carriers and self-insured employers will benefit from a set reimbursement fee as provided by the proposed regulation. This section provides a description of the benefits to the Board by explaining how the proposed regulation will reduce the number of hearings previously necessary to determine proper reimbursement of prescription medications by using a set fee schedule.

Section 4 provides an explanation of the costs associated with the proposed regulation. It describes how carriers are liable for the cost of medication if they do not respond to a bill within 45 days as required by statute. This section describes how carriers and self-insured employers which decide to require the use of a designated network will incur costs for sending the required notices, but also describes how the costs can be offset to a certain degree by sending the notices listed in the Appendices to the regulation with other forms. Pharmacies will have costs associated with the proposed regulation due to a lower reimbursement amount, but the costs are offset by the reduction of administrative costs associated with seeking reimbursement from carriers and self-insured employers. Pharmacies will be required to post notice that they are included in a designated network and a listing of carriers that utilize the pharmacy in the network. This section describes how the rule benefits carriers and self-insured employers by allowing them to contract with a pharmacy or network to provide drugs thus allowing them to negotiate for the lowest cost of drugs.

Section 5 describes how the rule will affect local governments. Since a municipality of governmental agency is required to comply with the rules for prescription drug reimbursement the savings afforded to carriers and self-insured employers will be substantially the same for local governments. If a local government decides to mandate the use of a designated network it will incur some costs from providing the required notice.

Section 6 describes the paperwork requirements that must be met by carriers, employers and pharmacies. Carriers will be required to provide notice to employers of a designated pharmacy or network, and employers in turn will provide such notice to employees so that employees will know to use a designated pharmacy or network for prescription drugs. Pharmacies will be required to post notice that they are part of a designated network and a listing of carriers that utilize the pharmacy within the network. This section also specifies the requirement of a carrier or self-insured employer to respond to a bill within 45 days of receipt. If a response is not given within the time frame, the carrier or self-insured employer is deemed to have waived any objection and must pay the bill. This section sets forth the requirement of carriers to certify to the Board that designated pharmacies within a network meet compliance requirements for inclusion in the network. This section sets forth that employers

must post notification of a designated pharmacy or network in the workplace and the procedures for utilizing the designated pharmacy or network. This section also sets forth how the Chair will enforce compliance with the rule by seeking documents pursuant to his authority under WCL § 111 and impose penalties for non-compliance.

Section 7 states that there is no duplication of rules or regulations.

Section 8 describes the alternatives explored by the Board in creating the proposed regulation. This section lists the entities contacted in regard to soliciting comments on the regulation and the entities that were included in the development process. The Board studied fee schedules from other states and the applicability of reimbursement rates to New York State. Alternatives included the Medicaid fee schedule, average wholesale price minus 15% for brand and generic drugs, the Medicare fee schedule and straight average wholesale price.

Section 9 states that there are no applicable Federal Standards to the proposed regulation.

Section 10 provides the compliance schedule for the proposed regulation. It states that compliance is mandatory and that the proposed regulation takes effect upon adoption.

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. As part of the overall rule, these self-insured local governments will be required to file objections to prescription drug bills if they object to any such bills. This process is required by WCL § 13(i)(1) - (2). This rule affects members of self-insured trusts, some of which are small businesses. Typically a self-insured trust utilizes a third party administrator or group administrator to process workers' compensation claims. A third party administrator or group administrator is an entity which must comply with the new rule. These entities will be subject to the new rule in the same manner as any other carrier or employer subject to the rule. Under the rule, objections to a prescription bill must be filed within 45 days of the date of receipt of the bill or the objection is deemed waived and the carrier, third party administrator, or self-insured employer is responsible for payment of the bill. Additionally, affected entities must provide notification to the claimant if they choose to designate a pharmacy network, as well as the procedures necessary to fill prescriptions at the network pharmacy. If a network pharmacy is designated, a certification must be filed with the Board on an annual basis to certify that the all pharmacies in a network comply with the new rule. The new rule will provide savings to small businesses and local governments by reducing the cost of prescription drugs by utilization of a pharmacy fee schedule instead of retail pricing. Litigation costs associated with reimbursement rates for prescription drugs will be substantially reduced or eliminated because the rule sets the price for reimbursement. Additional savings will be realized by utilization of a network pharmacy and a negotiated fee schedule for network prices for prescription drugs.

2. Compliance requirements:

Self-insured municipal employers and self-insured non-municipal employers are required by statute to file objections to prescription drug bills within a forty five day time period if they object to bills; otherwise they will be liable to pay the bills if the objection is not timely filed. If the carrier or self-insured employer decides to require the use of a pharmacy network, notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Certification by carriers and self-insured employers must be filed on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule. Failure to comply with the provisions of the rule will result in requests for information pursuant to the Chair's existing statutory authority and the imposition of penalties.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will impose minimal compliance costs on small business or local governments which will be more than offset by the savings afforded by the fee schedule. There are filing and notification requirements that must be met by small business and local governments as well as any other entity that chooses to utilize a pharmacy network. Notices are required to be posted in the workplace informing workers of a designated network pharmacy. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule.

5. Economic and technological feasibility:

There are no additional implementation or technology costs to comply with this rule. The small businesses and local governments are already familiar with average wholesale price and regularly used that information prior to the adoption of the Medicaid fee schedule. Further, some of the reimbursement levels on the Medicaid fee schedule were determined by using the Medicaid discounts off of the average wholesale price. The Red Book is the source for average whole sale prices and it can be obtained for less than $100.00. Since the Board stores its claim files electronically, it has provided access to case files through its eCase program to parties of interest in workers' compensation claims. Most insurance carriers, self-insured employers and third party administrators have computers and internet access in order to take advantage of the ability to review claim files from their offices.

6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts to all insurance carriers, employers, self-insured employers and claimants. The rule provides a process for reimbursement of prescription drugs as mandated by WCL section 13(i). Further, the notice requirements are to ensure a claimant uses a network pharmacy to maximize savings for the employer as any savings for the carrier can be passed on to the employer. The costs for compliance are minimal and are offset by the savings from the fee schedule. The rule sets the fee schedule as average wholesale price (AWP) minus twelve percent for brand name drugs and AWP minus twenty percent for generic drugs. As of July 1, 2008, the reimbursement for brand name drugs on the Medicaid Fee Schedule was reduced from AWP minus fourteen percent to AWP minus sixteen and a quarter percent. Even before the reduction in reimbursement some pharmacies, especially small ones, were refusing to fill brand name prescriptions because the reimbursement did not cover the cost to the pharmacy to purchase the medication. In addition the Medicaid fee schedule did not cover all drugs, include a number that are commonly prescribed for workers' compensation claims. This presented a problem because WCL § 13-o provides that only drugs on the fee schedule can be reimbursed unless approved by the Chair. The fee schedule adopted by this regulation eliminates this problem. Finally, some pharmacy benefit managers were no longer doing business in New York because the reimbursement level was so low they could not cover costs. Pharmacy benefit managers help to create networks, assist claimants in obtaining first fills without out of pocket costs and provide utilization review. Amending the fee schedule will ensure pharmacy benefit managers can stay in New York and help to ensure access for claimants without out of pocket cost.

7. Small business and local government participation:

The Assembly and Senate as well as the Business Council of New York State and the AFL-CIO provided input on the proposed rule.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all carriers, employers, self-insured employers, third party administrators and pharmacies in rural areas. This includes all municipalities in rural areas.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file objections to prescription drug bills within a forty five day time period or will be liable for payment of a bill. If regulated parties fail to comply with the provisions of Part 440 penalties will be imposed and the Chair will request documentation from them to enforce the provision regarding the pharmacy fee schedule. The new requirement is solely to expedite processing of prescription drug bills or durable medical bills under the existing obligation under Section 13 of the WCL. Notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Carriers and self-insured employers must file a certification on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule.

3. Costs:

This proposal will impose minimal compliance costs on carriers and employers across the State, including rural areas, which will be more than offset by the savings afforded by the fee schedule. There are filing and notification requirements that must be met by all entities subject to this rule. Notices are required to be posted and distributed in the workplace informing workers of a designated network pharmacy and objections to prescription drug bills must be filed within 45 days or the objection to the bill is deemed waived and must be paid without regard to liability for the bill. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule. The rule provides a reimbursement standard for an existing administrative process.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government from imposition of new fee schedules and payment procedures. This rule provides a benefit to small businesses and local governments by providing a uniform pricing standard, thereby providing cost savings reducing disputes involving the proper amount of reimbursement or payment for prescription drugs or durable medical equipment. The rule mitigates the negative impact from the reduction in

the Medicaid fee schedule effective July 1, 2008, by setting the fee schedule at Average Wholesale Price (AWP) minus twelve percent for brand name prescription drugs and AWP minus twenty percent for generic prescription drugs. In addition, the Medicaid fee schedule did not cover many drugs that are commonly prescribed for workers' compensation claimants. This fee schedule covers all drugs and addresses the potential issue of repackagers who might try to increase reimbursements.

5. Rural area participation:

Comments were received from the Assembly and the Senate, as well as the Business Council of New York State and the AFL-CIO regarding the impact on rural areas.

Job Impact Statement

The proposed amendment will not have an adverse impact on jobs. This amendment is intended to provide a standard for reimbursement of pharmacy and durable medical equipment bills.