

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

EMERGENCY RULE MAKING

Educational Stability of Foster Children, Transition Planning and Relative Involvement in Foster Care Cases

I.D. No. CFS-14-10-00002-E

Filing No. 310

Filing Date: 2010-03-19

Effective Date: 2010-03-21

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

Action taken: Amendment of sections 421.24, 428.3, 428.5, 430.11 and 430.12 of Title 18 NYCRR.

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

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

Specific reasons underlying the finding of necessity: The regulations must be filed on an emergency basis to prevent the loss of federal funding that supports the health, safety and welfare of the children in foster care, children receiving adoption assistance and families receiving child welfare services.

Subject: Educational stability of foster children, transition planning and relative involvement in foster care cases.

Purpose: The regulations implement the federal Foster Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351).

Text of emergency rule: Paragraph (19) of subdivision (c) of section 421.24 is amended to read as follows:

(19) The social services official on *an annual* [a biennial] basis in a *written notification* must remind the adoptive parents of their obligation to support the adopted child and to notify the social services official if the adoptive parents are no longer providing any support or are no longer legally responsible for the support of the child. *Where the adopted child is school age under the laws of the state in which the child resides, such notification must include a requirement that the adoptive parents must certify that the adopted child is a full-time elementary or secondary student or has completed secondary education. For the purposes of this paragraph, an elementary or secondary school student means an adopted child who is: (i) enrolled, or in the process of enrolling, in a school which provides elementary or secondary education, in accordance with the laws where the school is located; (ii) instructed in elementary or secondary education at home, in accordance with the laws in which the adopted child's home is located; (iii) in an independent study elementary or secondary education program, in accordance with the laws in which the adopted child's education program is located, which is administered by the local school or school district; or (iv) incapable of attending school on a full-time basis due to the adopted child's medical condition, which incapacity is supported by annual information submitted by the adoptive parents as part of this certification.*

Subparagraphs (iii) and (iv) of paragraph (2) of subdivision (b) of section 428.3 are amended and a new subparagraph (v) is added to read as follows:

(iii) educational and/or vocational training reports or evaluations indicating the educational goals and needs of each foster child, including school reports and Committee on Special Education evaluations and/or recommendations; [and]

(iv) if the child has been placed in foster care outside of the state, a report prepared every six months by a caseworker employed by either the authorized agency with case management and/or case planning responsibility for the child, the state in which the placement home or facility is located, or a private agency under contract with either the authorized agency or other state, documenting the caseworker's visit(s) with the child at his or her placement home or facility within the six-month period; *and*

(v) *the child's transition plan prepared in accordance with the standards set forth in section 430.12(j) of this Title.*

Paragraph (6) of subdivision (c) of section 428.5 is amended to read as follows:

(6) description of contacts with educational/vocational personnel on behalf of the child, *including, but not limited to, contacts made with school personnel in accordance with sections 430.11(c)(1)(i) and 430.12(c)(4) of this Title;*

Subparagraph (viii) of paragraph (10) of subdivision (c) of section 428.5 is amended to read as follows:

(viii) any information acquired about an absent or non-respondent parent that is in addition to information recorded pursuant to section 428.4(c)(1) of this Part, [and] the results of an investigation into the location of any relatives, including grandparents of a child subject to article 10 of the Family Court Act or section 384-a of the Social Services Law, *and the efforts to identify and provide notification to grandparents and other adult relatives in accordance with the requirements of section 430.11(c)(4) of this Title;*

Subparagraph (i) of paragraph (1) of subdivision (c) of section 430.11 is amended to read as follows:

(1)(i) Standard. Whenever possible, a child shall be placed in a foster care setting which permits the child to retain contact with the persons, groups and institutions with which the child was involved while living with his or her parents, or to which the child will be discharged. It shall be deemed inappropriate to place a child in a setting which conforms with this standard only if the child's service needs can only be met in another available setting at the same or lesser level of care. *The placement of the child into foster care must take into account the appropriateness of the child's existing educational setting and the proximity of such setting to the child's placement location. When is it in the best interests of the foster*

child to continue to be enrolled in the same school in which the child was enrolled when placed into foster care, the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities to ensure that the child remains in such school. When it is not in the best interests of the foster child to continue to be enrolled in the same school in which the child was enrolled when placed into foster care, the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities where the foster child is placed in order that the foster child is provided with immediate and appropriate enrollment in a new school; and the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities where the foster child previously attended in order that all of the applicable school records of the child are provided to the new school.

Subparagraph (viii) of paragraph (2) of subdivision (c) of section 430.11 is amended, subparagraph (ix) is renumbered as subparagraph (x) and a new subparagraph (ix) is added to read as follows:

(viii) if the child has been placed in a foster care placement a substantial distance from the home of the parents of the child or in a state different from the state in which the parent's home is located, the uniform case record must contain documentation why such placement is in the best interests of the child; [and]

(ix) show in the uniform case record that efforts were made to keep the child in his or her current school, or where distance was a factor or the educational setting was inappropriate, that efforts were made to seek immediate enrollment in a new school and to arrange for timely transfer of school records; and

(x) if the child has been placed in foster care outside of the state in which the home of the parents of the child is located, the uniform case record must contain a report prepared every six months by a caseworker employed by the authorized agency with case management and/or case planning responsibility over the child, the state in which the home is or facility is located, or a private agency under contract with either the authorized agency or other state documenting the caseworker's visit to the child's placement within the six-month period.

Paragraph (4) of subdivision (c) of section 430.11 is added to read as follows:

(4) Within 30 days after the removal of a child from the custody of the child's parent or parents, or earlier where directed by the court, or as required by section 384-a of the Social Services Law, the social services district must exercise due diligence in identifying all of the child's grandparents and other adult relatives, including adult relatives suggested by the child's parent or parents and, with the exception of grandparents and/or other identified relatives with a history of family or domestic violence. The social services district must provide the child's grandparents and other identified relatives with notification that the child has been or is being removed from the child's parents and which explains the options under which the grandparents or other relatives may provide care of the child, either through foster care or direct legal custody or guardianship, and any options that may be lost by the failure to respond to such notification in a timely manner. The identification and notification efforts made in accordance with the paragraph must be recorded in the child's uniform case record as required by section 428.5(c)(10)(viii) of this Title.

Paragraph (4) of subdivision (c) of section 430.12 is amended and renumbered paragraph (5) and a new paragraph (4) is added to read as follows:

(4) Education. (i) Standard. The social services district with care and custody or guardianship and custody of a foster child who has attained the minimum age for compulsory education under the Education Law is responsible for assuring that the foster child is a full-time elementary or secondary school student or has completed secondary education. For the purpose of this paragraph, an elementary or secondary school student means a child who is: (a) enrolled, or in the process of enrolling, in a school which provides elementary or secondary education, in accordance with the laws where the school is located; (b) instructed in elementary or secondary education at home, in accordance with the laws in which the foster child's home is located; (c) in an independent study elementary or secondary education program, in accordance with the laws in which the foster child's education program is located, which is administered by the local school or school district; or (d) incapable of attending school on a full-time basis due to the foster child's medical condition, which incapability is supported by regularly updated information in the child's uniform case record.

(ii) Documentation. The progress notes for each school age child in foster care must reflect either the education program in which the foster child is presently enrolled or is enrolling; or the date the foster child completed his or her compulsory education; or where the child is not capable of attending school on a full-time basis, what the medical condi-

tion is and why such condition prevents full-time attendance. The social services district must update the progress notes on an annual basis to reflect why such medical condition continues to prevent the foster child's full-time attendance in an education program. On an annual basis, by the first day of each October, the education module in CONNECTIONS must be updated with education information about each school age foster child in the form and manner as required by the Office.

(5) [(4)] Discharge planning. (i) Standard. For any child age 18 or under who is discharged from foster care, the district [shall] must consider the need to provide preventive services to the child and his or her family subsequent to [his] the child's discharge.

(ii) Documentation. The uniform case record form to be completed upon discharge of the child [shall] must show either the recommended type of preventive services and the district's attempts to provide or arrange for these services, or the reasons why these services are deemed unnecessary.

Subdivision (j) of section 430.12 is added to read as follows:

(j) Transition plan. Whenever a child will remain in foster care on or after the child's eighteenth birthday, the agency with case management, case planning or casework responsibility for the foster child must begin developing a transition plan with the child 180 days prior to the child's eighteenth birthday or 180 days prior to the child's scheduled discharge date where the child is consenting to remain in foster care after the child's eighteenth birthday. The transition plan must be completed 90 days prior to the scheduled discharge. Such plan must be personalized at the direction of the child. The transition plan must include specific options on housing, health insurance, education, local opportunities for mentors and continuing support services, and work force supports and employment services. The transition plan must be as detailed as the foster child may elect.

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 June 16, 2010.

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, New York 12144, (518) 473-7793

Regulatory Impact Statement

1. Statutory authority

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

Section 34(3) (f) of the SSL requires the Commissioner of OCFS to promulgate regulations for the administration of public assistance and care within the state.

2. Legislative objectives

The regulations implement standards required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) that went into effect on October 7, 2008.

3. Needs and benefits

The regulations will reduce disruption experienced by a child when removed from the child's home and placed into foster care and will enhance continuity in the child's environment.

Regarding the relationship of the child with his or her relatives, the regulations require that within 30 days of the removal of a foster child from his or her home, the social services district must exercise due diligence in identifying and notifying relatives of the child, including all grandparents and other relatives identified by the child's parents, that the child was removed, the options available to relatives to become the child's foster parent or to otherwise care for the child and any options that may be lost by the failure of the relative to respond to such notification in a timely manner. The regulations take into consideration the safety of the child by excluding the need to notify any relative who has a history of family or domestic violence.

The regulations address the need to minimize disruption by requiring the social services district to assess the proximity of the foster care placement to the school the child attended before placement into foster care and the appropriateness of the child remaining in that school upon entry into foster care. Where it is not in the best interests of the child to attend such school, the regulations require the social services district to work with the appropriate local school officials to see that the child is immediately enrolled in a new school.

The regulations also support the preparation of the foster child to transition out of foster care. One of the fundamental needs of any child is his or her education. The regulations clarify that each foster child of school age must either be enrolled in an appropriate educational setting, unless the child is incapable of attending school, or has completed his or her secondary education. The regulations impose a similar requirement in regard to a child who is in receipt of an adoption subsidy and is of school age.

The regulations support the transition of older foster children out of foster care by requiring the authorized agency with case management responsibility to develop a transition plan for a foster child who is aging out of foster care. This plan must be developed to meet the needs of the particular foster child, with such child's input. Development of the transition plan must commence 180 days prior to the scheduled discharge date of the foster child, with the completion of the plan 90 days prior to the scheduled discharge. Such plan must address such basic post discharge issues as housing, health insurance, education, supports services and employment.

4. Costs

The regulatory amendments are required by the federal Fostering Connections to Success and Increasing Adoption Act of 2008. There is no fiscal impact associated with implementing the regulations because current OCFS regulations require social services districts to carry out similar functions as those prescribed in these regulations. With the exception of the regulatory amendment associated with the transition plan, the regulatory changes are federally mandated under Title IV-E of the Social Security Act. Currently, New York must demonstrate that it has implemented these requirements in order to have a compliant Title IV-E State Plan. This is a condition for continuing to receive federal funds for foster care, adoption assistance and the administration of these programs.

The regulatory change regarding the transition plan for children who are aging out of foster care is a federal mandate under Title IV-B, Subpart 1 of the Social Security Act. In order to have a compliant Title IV-B State Plan and to continue to receive federal Child Welfare Services funding, New York State must demonstrate that it has implemented such standard.

There is no fiscal impact associated with the regulatory amendment to 18 NYCRR 421.19(c)(19). Currently, the New York City Administration for Children's Services notifies adoptive parents to verify that they are continuing to support their adoptive children and continue to be legally responsible for the support of their adoptive children. Acceptable documentation includes proof of school attendance. Documentation provided by the adoptive parent can be maintained in the social services district in the adoption subsidy case file. The regulatory amendments do not require any modification to CONNECTIONS. The requirements associated with documenting information in the child's uniform case record progress notes can be supported by CONNECTIONS.

5. Local government mandates

The regulations require social services districts to carry out functions similar to those they already have been obligated by State statute and OCFS regulations to perform. Current OCFS regulation 18 NYCRR 430.11(c) requires the social services district placing a child into foster care, whenever possible, to place the child in a foster care setting that permits the child to retain contact with the persons, groups and institutions with which the child was involved while living with his or her parents. OCFS regulation 18 NYCRR 430.10(b) currently requires the social services district that is contemplating the placement of a child into foster care to attempt, prior to placement, to locate adequate alternative living arrangements with a relative or family friend which would enable the child to avoid placement into foster care. Section 1017 of the Family Court Act and section 384-a of the SSL currently provide that when a child is to be removed from his or her home, the social services district must identify and discuss with such relative, including grandparents, available options to function as the child's foster parent or to assume direct legal custody of the child. The social services district must also notify the relative that the child may be adopted by foster parents if attempts at reunification with the birth parent are not required or are unsuccessful.

Social services districts are obligated pursuant to section 409-e of the SSL and OCFS regulations 18 NYCRR Part 428 and 430.12 to develop for each foster child a family assessment and service plan that addresses the needs of the child, including those related to education and the preparation of the child for discharge from foster care. These standards also presently require that foster children over the age of 10 be invited to participate in such planning.

6. Paperwork

The regulations require the recording of the actions taken by the social services district or voluntary authorized agency with case management responsibility in meeting the standards referenced above. Such documentation will be recorded in New York State's statewide automated child welfare information system, CONNECTIONS.

7. Duplication

The regulations do not duplicate other state or federal requirements. The regulations build on related existing requirements.

8. Alternative approaches

Given the mandates imposed by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) and the adverse financial consequences for non-compliance, there is no viable alternative to implementing the regulations.

9. Federal standards

Each of the regulatory amendments reflects requirements imposed by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. The regulatory changes relating to relatives and education are federally mandated under Title IV-E of the Social Security Act. New York State must demonstrate that it has implemented such standards in order to have a compliant Title IV-E State Plan which is a condition for New York to continue to receive federal funding for foster care and adoption assistance. The regulatory change relating to the transition plan for aging out foster children is federally mandated under Title IV-B, Subpart 1 of the Social Security Act. New York must demonstrate that it has implemented such standard in order to have a compliant Title IV-B State Plan which is a condition for New York to continue to receive federal child welfare services funding.

10. Compliance schedule

Compliance with the regulations would take effect upon adoption.

Regulatory Flexibility Analysis

1. Effect on Small Businesses and Local Governments

Social service districts, the St. Regis Mohawk Tribe and voluntary authorized agencies that have contracts with social service districts to provide foster care, will be affected by the regulations. There are 58 social service districts and approximately 160 voluntary authorized agencies.

2. Compliance Requirements

The regulations implement standards required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) that went into effect on October 7, 2008. Implementation of the regulations is necessary for the State of New York to maintain compliant Title IV-B and Title IV-E State Plans which are required for New York to continue to receive federal funding under Title IV-B and Title IV-E of the Social Security Act for foster care, adoption assistance, child welfare services and the administration of those programs.

The regulations require that within 30 days of the removal of a foster child from his or her home, the social services district must exercise due diligence in identifying and notifying relatives of the child, including all grandparents and other relatives identified by the child's parents, that the child was removed, the options available to the relatives to become the child's foster parent or to otherwise care for the child and any option that may be lost by the failure of the relatives to respond to such notification in a timely manner. Notification must be made earlier than 30 days of removal if directed by the court. Notification is not required in regard to relatives who have a history of family or domestic violence.

The regulations require the authorized agency with case management responsibility to develop a transition plan for a foster child who is aging out of foster care. Such plan must be personalized to the particular foster child and developed with the involvement of such child. Development of the transition plan must commence 180 days prior to the scheduled discharge date of the foster child, with the completion of the plan 90 days prior to the scheduled discharge. The transition plan must address housing, health insurance, education, local opportunities or mentors and continuing support services, and work force supports and employment services.

The regulations set forth standards social services districts must satisfy in relation to the educational stability of children when they are removed from their homes and placed into foster care. The regulations address the need to assess the proximity of foster care placements to the school the child attended at the time of removal and the appropriateness of the child remaining in that same school after entering foster care. Where the foster child can not remain in the same school, the agency with case management responsibility must coordinate with local school officials in order that the foster child will be provided with immediate and appropriate enrollment in a new school.

The regulations require that foster children of school age must either be enrolled in an appropriate educational setting, unless incapable of attending school or have completed secondary education. The regulations impose a similar requirement post discharge from foster care for a child who is school age and is in receipt of an adoption subsidy.

3. Professional Services

It is anticipated that the requirements imposed by the regulations will be implemented by existing case work staff.

4. Compliance Costs

The regulatory amendments are required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. There is no fiscal impact associated with implementing the regulations because current OCFS regulations require social services districts to carry out similar functions as those prescribed in these regulations. With the exception of the regulatory amendment associated with the transition plan, the regulatory changes are federally mandated under Title IV-E of the Social Security Act. Currently, New York must demonstrate that it has implemented these requirements in order to have a compliant Title IV-E State Plan. This is a condition for continuing to receive federal funds for foster care, adoption assistance and the administration of these programs.

The regulatory change regarding the transition plan for children who are aging out of foster care is a federal mandate under Title IV-B, Subpart 1 of the Social Security Act. In order to have a compliant Title IV-B State Plan and to continue to receive federal Child Welfare Services funding, New York State must demonstrate that it has implemented such standard.

There is no fiscal impact with the regulatory amendment to 18 NYCRR 421.24(c)(19). Currently, the New York City Administration for Children's Services notifies adoptive parents to verify that they are continuing to support their adopted children and continue to be legally responsible for the support of their adoptive children. Acceptable documentation includes proof of school attendance. Documentation provided by the adoptive parent can be maintained by the social services district in the adoption subsidy case file. The regulatory amendments do not require any modification to CONNECTIONS. The requirements associated with documenting information in the child's uniform case record progress notes can be supported by CONNECTIONS.

5. Economic and Technological Feasibility

The regulations require the recording of the actions taken to comply with the regulatory standards noted above. Such information will be recorded in New York State's statewide automated child welfare information system, CONNECTIONS.

6. Minimizing Adverse Impact

The standards set forth in the regulations reflect mandates imposed on the states by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. Implementation is necessary for New York to continue to be eligible to receive federal funding for foster care, adoption assistance child welfare services and the administration thereof, as required by Title IV-B and title IV-E of the Social Security Act. The regulations do not go beyond the scope of the federal mandates.

7. Small Business and Local Government Participation

By letter dated, December 5, 2008, OCFS informed the commissioner of each of the local department of social services in the State of New York of the amendments to OCFS regulations that are necessitated by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. The letter included a brief summary of the new regulatory requirements. In addition, it informed local commissioners of the requirements enacted by the federal legislation that are already in effect in New York and that will not require any further regulatory amendments. OCFS advised the local commissioners that OCFS will provide any clarification received from the federal Department of Health and Human Services on these requirements. A copy of the OCFS regulations was provided along with a contact person if the local commissioners or their staff had any questions.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas

Social services districts, the St. Regis Mohawk Tribe and voluntary authorized agencies that have contracts with social services districts to provide foster care will be affected by the regulations. There are 44 social services districts and the St. Regis Mohawk Tribe that are in rural areas. Currently, there are also approximately 100 voluntary authorized agencies in rural areas of New York State.

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

The regulations implement standards required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) that went into effect on October 7, 2008. Implementation of the regulations is necessary for the State of New York to maintain compliant Title IV-B and Title IV-E State Plans which are required for New York to continue to receive federal funding under Title IV-B and Title IV-E of the Social Security Act for foster care, adoption assistance, child welfare services and the administration of those programs.

The regulations require that within 30 days of the removal of a foster child from his or her home, the social services district must exercise due diligence in identifying and notifying relatives of the child, including all grandparents and other relatives identified by the child's parents, that the child was removed, the option available to the relative to become the child's foster parent or to otherwise care for the child and any options that may be lost by the failure of the relative to respond to such notification in a timely manner. Notification must be made earlier than 30 days of removal if directed by the court. Notification is not required in regard to relatives with a history of family or domestic violence.

The regulations require the authorized agency with case management responsibility to develop a transition plan for a foster child who is aging out of foster care. Such plan must be personalized to the particular foster child and developed with the involvement of such child. Development of the transition plan must commence 180 days prior to the scheduled discharge date of the foster child, with the completion of the plan 90 days prior to the scheduled discharge. The transition plan must address housing, health insurance, education, local opportunities for mentors and continuing support services and work force supports and employment services.

The regulations set forth standards social services districts must satisfy in relation to the educational stability of children when they are removed from their homes and placed into foster care. The regulations address the need to assess the proximity of foster care placements to the school the child attended at the time of removal and the appropriateness of the child remaining in that school after entering foster care. Where the foster child can not remain in the same school, the agency with case management responsibility must coordinate with local school officials in order that the foster child be provided with immediate and appropriate enrollment in a new school.

The regulations require that foster children of school age must either be enrolled in an appropriate educational setting, unless incapable of attending school, or have completed secondary education. The proposed regulations would impose a similar requirement post discharge from foster care in regard to a school age child who is in receipt of an adoption subsidy.

3. Costs

Each of the regulatory amendments is required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. There is no fiscal impact associated with implementing the regulations because current OCFS regulations require social services districts to carry out similar functions as those prescribed in these amendments. With the exception of the regulatory amendment associated with the transition plan, the regulatory changes are federally mandated under Title IV-E of the Social Security Act. Currently, New York must demonstrate that it has implemented these requirements in order to have a compliant Title IV-E State Plan. This is a condition for continuing to receive federal funds for foster care, adoption assistance and the administration of these programs.

The regulatory change regarding the transition plan for children who are aging out of foster care is a federal mandate under Title IV-B, Subpart 1 of the Social Security Act. In order to have a compliant Title IV-B State Plan, and to continue to receive federal Child Welfare Services funding, New York State must demonstrate that it has implemented such standard.

There is no fiscal impact associated with the regulatory amendment to 18 NYCRR 421.24(c)(19). Currently, the New York City Administration for Children's Services notifies adoptive parents to verify that they are continuing to support their adoptive children and continue to be legally responsible for the support of their adoptive children. Acceptable documentation includes proof of school attendance. Documentation provided by the adoptive parent can be maintained by the social services district in the adoption subsidy case file. The regulatory amendments do not require any modification to CONNECTIONS. The requirements associated with documenting information in the child's uniform case record progress notes can be supported in CONNECTIONS.

4. Minimizing adverse impact

The regulations require the recording of the actions taken to comply with the regulatory standards noted above. Such information will be recorded in New York State's statewide automated child welfare information system, CONNECTIONS.

5. Rural area participation

By letter dated, December 5, 2008, OCFS informed the commissioner of each local department of social services in the State of New York of the amendments to OCFS regulations necessitated by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. The letter included a brief summary of the new regulatory requirements. In addition, it informed local commissioners of the requirements enacted by the federal legislation that are already in effect in New York and that will not require any further regulatory amendments. OCFS advised the local commissioners that OCFS will provide any clarification received from the federal Department of Health and Human Services on these requirements. A copy of the regulations was provided along with a contact person if the local commissioners or their staff had any questions.

Job Impact Statement

A full job impact statement has not been prepared for the regulations. The amendments will not result in the loss or creation of any jobs.

Department of Correctional Services

NOTICE OF ADOPTION

Designation and Classification of Correctional Facilities

I.D. No. COR-01-10-00001-A

Filing No. 281

Filing Date: 2010-03-17

Effective Date: 2010-04-07

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

Action taken: Repeal of section 100.126 and addition of section 100.99 to Title 7 NYCRR.

Statutory authority: Correction Law, section 70

Subject: Designation and classification of Correctional Facilities.

Purpose: To classify and designate an established correctional facility and to repeal a regulation that is no longer necessary.

Text or summary was published in the January 6, 2010 issue of the Register, I.D. No. COR-01-10-00001-P.

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

Text of rule and any required statements and analyses may be obtained from: Maureen E. Boll, Deputy Commissioner and Counsel, New York State Department of Correctional Services, 1220 Washington Avenue - State Campus - Building 2, Albany, NY 12226-2050, (518) 457-4951, email: Maureen.Boll@DOCS.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Edgecombe Correctional Facility

I.D. No. COR-01-10-00011-A

Filing No. 278

Filing Date: 2010-03-17

Effective Date: 2010-04-07

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

Action taken: Amendment of section 100.96 of Title 7 NYCRR.

Statutory authority: Correction Law, section 70

Subject: Edgecombe Correctional Facility.

Purpose: To remove the work release function and to update the facility name.

Text or summary was published in the January 6, 2010 issue of the Register, I.D. No. COR-01-10-00011-P.

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

Text of rule and any required statements and analyses may be obtained from: Maureen E. Boll, Deputy Commissioner and Counsel, New York State Department of Correctional Services, 1220 Washington Avenue - State Campus - Building 2, Albany, NY 12226-2050, (518) 457-4951, email: Maureen.Boll@DOCS.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Queensboro Correctional Facility

I.D. No. COR-02-10-00010-A

Filing No. 280

Filing Date: 2010-03-17

Effective Date: 2010-04-07

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

Action taken: Repeal of section 100.83(c)(2) and (3) of Title 7 NYCRR.

Statutory authority: Correction Law, section 70

Subject: Queensboro Correctional Facility.

Purpose: To remove the work release and residential treatment descriptions since they are no longer functions of the facility.

Text or summary was published in the January 13, 2010 issue of the Register, I.D. No. COR-02-10-00010-P.

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

Text of rule and any required statements and analyses may be obtained from: Maureen E. Boll, Deputy Commissioner and Counsel, New York State Department of Correctional Services, 1220 Washington Avenue - State Campus - Building 2, Albany, NY 12226-2050, (518) 457-4951, email: Maureen.Boll@DOCS.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Department of Health

EMERGENCY RULE MAKING

Ocean Surf Bathing Beaches and Automated External Defibrillators (AEDs)

I.D. No. HLT-02-10-00003-E

Filing No. 315

Filing Date: 2010-03-22

Effective Date: 2010-03-22

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 and provide and 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 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. HLT-02-10-00003-P, Issue of January 13, 2010. The emergency rule will expire May 20, 2010.

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:

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:

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 record keeping 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 record keeping 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.

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, 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.

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.

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 Participation 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.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Expedited Partner Therapy to Treat Chlamydia Trachomatis

I.D. No. HLT-14-10-00005-P

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

Proposed Action: Addition of section 23.4 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 2312

Subject: Expedited Partner Therapy to Treat Chlamydia Trachomatis.

Purpose: Use of expedited partner therapy to treat the partner of persons infected with Chlamydia Trachomatis.

Text of proposed rule: Pursuant to the authority vested in the Commissioner of Health by Section 2312 of the Public Health Law, Part 23 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby amended, by adding a new Section 23.4, to read as follows:

Section 23.4 *Expedited Partner Therapy for Chlamydia trachomatis Infection*

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

(1) "Expedited Partner Therapy" or "EPT" means a practice whereby a health care practitioner chooses to provide a patient with either antibiotics intended for the patient's sexual partner or partners or a written prescription for antibiotics for the sexual partner or partners to be delivered by the patient to the sexual partner or partners for treatment of exposure to *Chlamydia trachomatis*.

(2) "Health care practitioner" means a physician, midwife, nurse practitioner, physician assistant, or other person who is authorized under Title 8 of the Education Law to diagnose and prescribe drugs for *Chlamydia trachomatis*, acting within his or her lawful scope of practice.

(b) *Liability. A health care practitioner who reasonably and in good faith renders expedited partner therapy in accordance with section 2312 of the Public Health Law and this section, and a pharmacist who reasonably and in good faith dispenses drugs pursuant to a prescription written in accordance with section 2312 of the Public Health Law and this section, shall not be subject to civil or criminal liability or be deemed to have engaged in unprofessional conduct.*

(c) *Eligibility criteria for EPT. EPT shall:*

(1) be provided only for the partner or partners of a patient diagnosed with *Chlamydia trachomatis* infection; and

(2) not be provided for any partner or partners, when the patient with *Chlamydia trachomatis* infection seen by the health care practitioner is found to be concurrently infected with gonorrhea or syphilis.

(d) *Educational material requirements for patients provided with EPT. Each patient provided with antibiotics or a prescription in accordance with this section must be given informational materials for the patient to give to his or her sexual partner or partners. Each patient shall be counseled by his or her health care practitioner to inform his or her partner or partners that it is important to read the information contained in the materials prior to the partner or partners taking the medication.*

The materials shall:

(1) encourage the partner to consult a health care practitioner for a complete sexually transmitted infection evaluation as a preferred alternative to EPT and regardless of whether they take the medication;

(2) disclose the risk of potential adverse drug reactions, including allergic reactions, and the possibility of dangerous interactions between the patient-delivered therapy and other medications that the partner may be taking;

(3) inform the partner that he or she may be affected by other sexually transmitted infections that may be left untreated by the delivered medicine;

(4) inform the partner that if symptoms of a more serious infection are present (such as abdominal, pelvic, or testicular pain, fever, nausea or vomiting) he or she should seek medical care as soon as possible;

(5) recommend that a partner who is or could be pregnant should consult a health care practitioner as soon as possible;

(6) instruct the patient and the partner to abstain from sexual activity for at least seven days after treatment of both the patient and the partner in order to decrease the risk of recurrent infection;

(7) inform a partner who is at high risk of co-morbidity with HIV infection that he or she should consult a health care practitioner for a complete medical evaluation including testing for HIV and other sexually transmitted infections; and

(8) inform the patient and the partner how to prevent repeated chlamydia infection.

(e) *Prescription format. Whenever a health care practitioner provides EPT through the use of a prescription:*

(1) the designation "EPT" must be written in the body of the prescription form above the name of the medication and dosage for all prescriptions issued;

(2) if the name, address, and date of birth of the sexual partner are available, this should be written in the designated area of the prescription form; and

(3) if the sexual partner's name, address, and date of birth are not available, the written designation "EPT" shall be sufficient for the pharmacist to fill the prescription.

(f) *Reporting of cases of Chlamydia trachomatis by health care providers.*

(1) *This section shall not affect the obligation to report individual cases and suspected cases of Chlamydia trachomatis imposed by Part 2 of this Chapter.*

(2) *Reports of cases of Chlamydia trachomatis who are provided with EPT shall include the added designation of "EPT" plus the number of sexual partners for whom a prescription or medication was provided.*

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

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

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

Regulatory Impact Statement

Statutory Authority:

Section 2312 of the Public Health Law (PHL) requires the Commissioner to promulgate rules and regulations concerning the implementation of the statute. The proposed regulation represents a consensus of interested parties and reflects the recommendations of the Centers for Disease Control and Prevention (CDC) regarding strategies to control *Chlamydia trachomatis*.

Legislative Objectives:

The proposed regulation meets the legislative objective of putting into effect rules and regulations concerning the implementation of PHL section 2312, which permits the use of expedited partner therapy (EPT) to treat the partners of persons infected with *Chlamydia trachomatis*. The regulation defines EPT and provides that practitioners who use EPT for their patients' sexual contacts, and pharmacists who fill EPT prescriptions, in good faith and consistent with section 2312 and the regulation would not be subject to criminal or civil liability. In addition, the regulation provides a detailed outline of the educational steps that are required of health care practitioners employing EPT, describes the permissible manner of writing a prescription for EPT when partner identifying information is not known, and clarifies provider reporting requirements when EPT is used. The proposed regulation provides the guidance and clarity necessary to fulfill the legislative intent, which is to make EPT an available intervention to control the spread and reduce the complications of *Chlamydia trachomatis*.

Needs and Benefits:

The proposed addition of section 23.4 to 10 NYCRR Part 23 will provide an intervention option to health care providers and local health departments for responding to the increasing number of chlamydia cases being reported in New York State. In 2001 there were 46,391 cases of chlamydia reported in New York State, and by 2006, 68,725 cases were reported, nearly a 50 percent increase. Data from 2008 indicate that over 88,000 cases of chlamydia were reported. This increase has strained existing resources for controlling sexually transmitted diseases and has prompted consideration of alternative methods for addressing highly prevalent infections such as *Chlamydia trachomatis*.

The most recent sexually transmitted disease treatment guidelines for chlamydia issued by the CDC in 2006 states that "delivery of antibiotic therapy (either a prescription or medication) by heterosexual male or female patients to their partners might be an option." Based on the evidence from three published randomly controlled trials of EPT, the CDC found that the practice has the potential for preventing re-infection of the index case and providing a slightly higher likelihood of partner treatment as compared with unassisted patient self-referral of partners. EPT provides a relatively safe and simple way to address the high chlamydia morbidity burden at a time when existing infrastructure is inadequate to provide services for exposed partners. The CDC recommendation for use of EPT has been actively supported by organizations such as the American College of Obstetrics and Gynecology, Family Planning Advocates, and the American Academy of Pediatrics.

Patients who are co-infected with chlamydia and either gonorrhea or syphilis are deemed ineligible for EPT because one gram of azithromycin provided as treatment for chlamydia could result in partial treatment of gonorrhea or syphilis, if present in the partner. Partial treatment of these infections could lead to later development of complications from inadequate initial treatment or of drug resistance.

To date, 16 states have adopted EPT as a strategy for controlling the spread of *Chlamydia trachomatis* and its associated complications. However, since reporting is not required in the states that have implemented the practice in the Western United States, no data is available to predict how often providers will utilize EPT in New York State. Proposed 10 NYCRR section 23.4 will require providers to indicate use of EPT when reporting cases of *Chlamydia trachomatis*, which may allow the Department of Health to track its use prospectively.

Costs:

Costs to Regulated Parties:

There is no mandated requirement that health care providers use EPT. There may be an increased cost to health care providers who choose to use EPT by directly providing the index case with medication to give their partners. The cost to treat uncomplicated Chlamydia trachomatis using the recommended dosage of Azithromycin (one gram single oral dose) ranges from approximately \$12.00 (public health price) to \$25.00 (retail pharmacy cost). This regulation also permits the use of a prescription for EPT, an option which, if chosen, would remove any cost to providers.

If the index case or his or her partner or partners do not have health insurance, they will be personally responsible for the cost of the drugs prescribed for EPT. Medicaid also places limitations on the use of EPT, as current rules do not allow prescribing medications for persons other than the patient seen by the provider.

Cost to Local and State Government:

There may be an increased cost incurred by local health departments by adding the proposed section 23.4 to 10 NYCRR Part 23; if local sexually transmitted disease care facilities voluntarily decided to provide the index case with medication to give their partners they will incur an increased cost. However, since this regulation permits the use of a prescription for EPT, any cost to local government can be avoided. Again, there is no mandate that local governments must utilize EPT.

Cost to the Department of Health:

There would be no increase in costs to the Department of Health as a result of this regulatory change, since the Department does not offer clinical care for Chlamydia trachomatis. The cost of developing the educational materials referred to in the proposed regulation will be absorbed into the operating budget of the Department's Bureau of STD Control. These materials will then be posted on the Department's website so that providers can download them as needed for distribution to patients when EPT is used.

Paperwork:

There will be no new paperwork associated with these changes, except for the writing of "EPT" on relevant prescriptions and case report forms.

Local Government Mandates:

There are no new mandates associated with this regulatory change. The use of EPT is optional.

Duplication:

There is no duplication of these regulatory changes in existing state or federal law.

Alternatives:

There is no alternative to adding this regulation as the change in PHL section 2312 requires the promulgation of this regulation.

Federal Standards:

The proposed regulations are consistent with federal guidelines promulgated by the CDC.

Compliance Schedule:

Compliance with these revisions of the Sanitary Code will be mandated upon filing of a Notice of Adoption of this regulation in the New York State Register.

Regulatory Flexibility Analysis**Effect of Rule:**

The regulatory changes apply to the treatment of partners to persons infected with Chlamydia trachomatis. There will be no effect on small business or local governments since the proposed regulation is permissive and does not require the use of EPT.

Compliance Requirements:

There are no new compliance requirements or mandates associated with these proposed changes.

Professional Services:

No additional professional services will be required.

Compliance Costs:

No additional costs will be incurred by this revision to the Sanitary Code.

Minimizing Adverse Impact:

There will be no adverse impact to any of the parties affected by this regulatory change. PHL section 2312 specifically provides that providers who use EPT in good faith and in a manner consistent with the proposed regulation will not be subject to criminal or civil liability.

Economic and Technological Feasibility:

There will be no increased workload associated with these revisions.

Small Business and Local Government Participation:

The Department consulted with multiple stakeholders when crafting this regulation, including:

American Academy of Pediatrics;
Academy of Family Practitioners;
Medical Society of New York State;
Office of the Professions, State Education Department;
Association of Nurse Midwives;
Family Planning Advocates;

American College of Obstetricians and Gynecologists;
Association of Independent Pharmacies;
Association of Chain Pharmacies;
New York City Department of Health and Mental Hygiene;
Dutchess County Department of Health;
Erie County Department of Health; and
New York State Association of County Health Officials.

Suggestions were incorporated regarding eligibility and education/counseling messages. While the State Sanitary Code requires reporting of "suspect" cases of communicable diseases, some advocates resisted including a reporting requirement of partners receiving EPT with names and demographic information as suspect Chlamydia trachomatis cases. Negotiations resulted in a compromise for providers to indicate the use of EPT when reporting cases along with the numbers of partners provided medication or prescriptions.

Rural Area Flexibility Analysis**Effect in Rural Areas:**

The proposed regulation will apply statewide. The proposed regulation is permissive, not mandatory, and therefore will not have any undue effect on rural local health departments.

Compliance Requirements:

There are no compliance requirements associated with this proposed regulation.

Professional Services:

No additional professional services will be required.

Compliance Costs:

No additional costs will be incurred as a result of this addition to the Sanitary Code.

Minimizing Adverse Impact:

No adverse impacts are expected as a result of adding this proposed regulation to the Sanitary Code.

Economic and Technological Feasibility:

There will be no increased workload with these revisions.

Rural Area Participation:

The Department consulted with multiple stakeholders when crafting this regulation, including:

American Academy of Pediatrics;
Academy of Family Practitioners;
Medical Society of New York State;
Office of the Professions, State Education Department;
Association of Nurse Midwives;
Family Planning Advocate;
American College of Obstetricians and Gynecologists;
Association of Independent Pharmacies;
Association of Chain Pharmacies;
New York City Department of Health and Mental Hygiene;
Dutchess County Department of Health;
Erie County Department of Health; and
New York State Association of County Health Officials.

Suggestions were incorporated regarding eligibility and education/counseling messages. While the State Sanitary Code requires reporting of "suspect" cases of communicable diseases, some advocates resisted including a reporting requirement of partners receiving EPT with names and demographic information as suspect Chlamydia trachomatis cases. Negotiations resulted in a compromise for providers to indicate the use of EPT when reporting cases along with the numbers of partners provided medication or prescriptions.

Job Impact Statement

The proposed regulatory change will not increase demands on existing staff or increase the need to hire additional staff for providers or local health departments, and therefore will not have an adverse impact on jobs and employment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Sexually Transmitted Disease (STD) Reporting and Treatment Requirements

I.D. No. HLT-14-10-00006-P

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

Proposed Action: Amendment of section 2.10 and Part 23 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 206(1), 225 and 2311

Subject: Sexually Transmitted Disease (STD) Reporting and Treatment Requirements.

Purpose: Reporting of cases or suspected cases or outbreaks of communicable disease by physicians, list and reporting of STDs.

Text of proposed rule: Section 2.10 is amended as follows:

Section 2.10 Reporting cases or suspected cases or outbreaks of communicable disease by physicians.

It shall be the duty of every physician to report to the city, county or district health officer, within whose jurisdiction such patient is, the full name, age and address of every person with a suspected or confirmed case of a communicable disease, any outbreak of communicable disease, any unusual disease or unusual disease outbreak and as otherwise authorized in section 2.1 of this Part, together with the name of the disease if known, and any additional information requested by the health officer in the course of an investigation pursuant to this Part, within 24 hours from the time the case is first seen by him, and such report shall be by telephone, facsimile transmission or other electronic communication if indicated, and shall also be made in writing, except that the written notice may be omitted with the approval of the State Commissioner of Health. [(a) Cases in State institutions and facilities licensed under article 28 of the Public Health Law.] When a case which is required to be reported under section 2.1 of this Part occurs in a State institution or a facility licensed under Article 28 of the Public Health Law, the person in charge of the institution or facility shall report the case to the State Department of Health and to the city, county or district health officer, in whose jurisdiction such institution is located.

[(b) Cases of sexually transmitted diseases. Provided further that cases of gonorrhea, chlamydia trachomatis infection and syphilis shall be reported in writing, and that the patient's initials may be given in lieu of the patient's name. The physician shall keep a record of each case reported by initials and the corresponding name of the patient together with his address. The name and address of the patient shall be reported to the local or State health official to whom the attending physician is required to report such case, upon the special request of such official.]

Section 23.1 is amended as follows:

Section 23.1 List of sexually transmissible diseases.

The following [is a list] *are groups* of sexually transmissible diseases [(STD)] (*STDs*) and shall constitute the definition of sexually transmissible diseases for the purposes of this Part:

[Chlamydia trachomatis infection*
Gonorrhea*
Syphilis*
Non-gonococcal Urethritis (NGU)*
Non-gonococcal (mucopurulent) Cervicitis*
Trichomoniasis*
Genital Herpes Simplex*
PID Gonococcal/Non-gonococcal
Lymphogranuloma Venereum*
Chancroid*
Ano-genital warts
Granuloma Inguinale*
Yeast Vaginitis
Gardnerella Vaginitis
Pediulosis Pubis
Scabies

Treatment facilities referred to in section 23.2 of this part must provide diagnosis and treatment for those STD designated by.]

Group A

Treatment facilities referred to in section 23.2 of this part must provide diagnosis and treatment free of charge as provided in subdivision (c) of section 23.2 of this part for the following STDs:

Chlamydia trachomatis infection
Gonorrhea
Syphilis
Non-gonococcal Urethritis (NGU)
Non-gonococcal (mucopurulent) Cervicitis

Trichomoniasis

Lymphogranuloma Venereum

Chancroid

Granuloma Inguinale

Group B

Treatment facilities referred to in section 23.2 of this part must provide diagnosis free of charge and must provide treatment as provided in subdivision (d) of section 23.2 of this part for the following STDs:

Ano-genital warts

Human Papilloma Virus (HPV)

Genital Herpes Simplex

Group C

Treatment facilities referred to in section 23.2 of this part must provide diagnosis free of charge and must provide treatment as provided in subdivision (e) of section 23.2 of this part for the following STD:

Pelvic Inflammatory Disease (PID) Gonococcal/Non-gonococcal

Group D

Treatment facilities referred to in section 23.2 of this part must provide diagnosis free of charge and must provide treatment as provided in subdivision (f) of section 23.2 of this part for the following STDs:

Yeast (Candida) Vaginitis

Bacterial Vaginosis

Pediulosis Pubis

Scabies

Group E

Free diagnosis and treatment are not required. Treatment facilities referred to in section 23.2 of this part may bill for laboratory diagnosis and must assure treatment as provided in subdivision (g) of section 23.2 of this part for the following STD:

Hepatitis B Virus (HBV)

Section 23.2 is amended as follows:

23.2 Treatment facilities.

Each health district shall provide adequate facilities[, without charge,] for the diagnosis and treatment of persons living within its jurisdiction who are infected or are suspected of being infected with STD as specified in section 23.1.

(a) Such persons shall be examined and shall have appropriate laboratory specimens taken and laboratory tests performed for those diseases designated in this Part as [sexually transmissible diseases] *STDs* for which such person exhibits symptoms or is otherwise suspected of being infected.

(b) The examinations and laboratory tests shall be conducted in accordance with accepted medical procedures as described in the most recent STD clinical guidelines and laboratory guidelines distributed by the New York State Department of Health.

(c) Any persons diagnosed as having [syphilis or gonorrhea, or those who have been exposed to syphilis or gonorrhea,] *any of the STDs in Group A in section 23.1 of this Part* shall be treated with appropriate medication in accordance with accepted medical procedures as described in the most recent treatment schedule guidelines distributed by the department [of health].

[(d) Because antiviral therapy is rapidly evolving, the choice of therapy for persons having herpes (hominis) infection shall be in accordance with established medical procedure as described in the STD clinical guidelines distributed by the New York State Department of Health.

(e) Any person diagnosed as having the other sexually transmissible diseases (Non-gonococcal Urethritis, Non-gonococcal (mucopurulent) Cervicitis, Trichomoniasis, Lymphogranuloma Venereum, Chancroid, and Granuloma Inguinale) designated for the purposes of this section shall be treated by means of a written prescription issued in accordance with accepted medical procedure as described in the STD clinic guidelines distributed by the New York State Department of Health.]

(d) Any persons diagnosed as having any of the STDs in Group B in section 23.1 of this part must be provided treatment through a written prescription or referral.

(e) Any person diagnosed as having the STD in Group C in section 23.1 of this part may be managed by immediate referral. If outpatient treatment is appropriate as indicated by accepted clinical guidelines and is provided directly, it must be provided free of charge.

(f) Any person diagnosed as having any of the STDs in Group D in section 23.1 of this part may be provided treatment directly within the clinic or through a written prescription.

(g) Any person diagnosed as having the STD in Group E in section 23.1 of this part shall be managed by prompt referral.

Section 23.3 is deleted:

[23.3 STD reporting.

(a) The reporting obligations of this section shall not affect the obligation to report individual cases of syphilis and gonorrhea imposed by section 2.10(b) of this Chapter.

(b) Cases of STD diagnosed in public health clinics operated by, and for, a health district must be reported by mail to the New York State Department of Health, Empire State Plaza, Tower Building, Albany, N.Y. 12237, by the 15th of the month following the month in which the case is diagnosed. Such reports shall be made on a standard form provided by the Department of Health.

(c) Cases of STD diagnosed by health providers other than those specified in subdivision (b) of this section may be tabulated and reported as described in that subdivision.]

Section 23.4 is renumbered as section 23.3, and a new Section 23.3 is added as follows:

[23.4] 23.3 *Cases treated by other providers.*

(a) Every physician, licensed midwife or nurse practitioner providing (as authorized by their scope of practice) gynecological, obstetrical, genito-urological, contraceptive, sterilization, or termination of pregnancy services or treatment, shall offer to administer to every patient treated by such physician, licensed midwife or nurse practitioner, appropriate examinations or tests for STD as defined in this Part.

(b) The administrative officer or other person in charge of a clinic or other facility providing gynecological, obstetrical, genito-urological, contraceptive, sterilization or termination of pregnancy services or treatment shall require the staff of such clinic or facility to offer to administer to every resident of the State of New York coming to such clinic or facility for such services or treatment, appropriate examinations or tests for the detection of sexually transmissible diseases.

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

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

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

Regulatory Impact Statement

Statutory Authority:

Sections 225(4) and 225(5) (a), (h), and (i) of the Public Health Law (PHL) authorize the Public Health Council to establish and amend State Sanitary Code provisions relating to the designation of communicable diseases dangerous to public health, and the nature of information required to be furnished by physicians in each case of communicable disease. PHL Section 206(1) (d) authorizes the commissioner to “investigate the causes of disease, epidemics, the sources of mortality, and the effect of localities, employments and other conditions, upon the public health.” PHL Section 206(1) (e) permits the commissioner to “obtain, collect and preserve such information relating to marriage, birth, mortality, disease and health as may be useful in the discharge of his duties or may contribute to the promotion of health or the security of life in the state. . .”

Article 23 of the PHL provides the authority for the control of sexually transmissible diseases (STDs) by local health officers. Section

2304 outlines the responsibility of each board of health of a health district “to provide adequate facilities for the free diagnosis and treatment of persons living within its jurisdiction who are suspected of being infected or are infected with” an STD; that the health officer “shall administer these facilities and shall promptly examine or arrange for the examination of persons suspected of being infected. . .”; and that these facilities “shall comply with the requirements of the commissioner” of the New York State Department of Health (NYSDOH).

Section 2.10 of the State Sanitary Code codified in Title 10 (Health) of the Codes, Rules, and Regulations of the State of New York requires the reporting of cases or suspected cases or outbreaks of communicable disease, including chancroid, chlamydia, gonorrhea, lymphogranuloma venereum, hepatitis B virus and syphilis, as outlined in Section 2.1, by physicians.

The part of the State Sanitary Code codified in Sections 23.1 through 23.4 of Title 10 outlines the list of STDs, the rules for the examination by the health department of persons infected or suspected of being infected with STD; the reporting obligations for STD, and the requirement that either physicians or clinics providing gynecological, obstetrical, genito-urinary, contraceptive, sterilization, or termination of pregnancy shall offer every patient appropriate examination or tests for STD.

Legislative Objectives:

The following are proposed changes to Sections 2.10, 23.1, 23.2, 23.3 and 23.4 that deal with the reporting of cases or suspected cases or outbreaks of communicable disease by physicians, list of sexually transmitted diseases, treatment facilities, and STD reporting. These regulations meet the legislative objective of protecting the public health by removing archaic language, which requires the filing of written reports. In addition, language allowing reporting using patient’s initials is equally archaic and is being removed. HIPAA regulations (45 CFR Parts 160 and 164) as well as other confidentiality protections currently make reporting by initials unnecessary. Further, the proposed legislation updates the list and the terminology used for conditions in Section 23.1 designated as requiring free diagnosis and treatment in Section 23.2 (c): specifically chlamydia, gonorrhea, syphilis, non-gonococcal urethritis, mucopurulent cervicitis, trichomoniasis, lymphogranuloma venereum, chancroid and granuloma Inguinale.

Hepatitis B virus is being added to the list for reporting purposes. However, there is no requirement for free diagnosis and treatment. The syndromal condition, pelvic inflammatory disease (PID) is being added to the list and will require free diagnosis but not free treatment. The NYSDOH will promulgate diagnostic criteria for PID. Outpatient treatment may be offered by local health department STD clinics or a managed referral to another health care provider must take place. Local health departments must be able to confirm the follow-up of PID patients if requested by the NYSDOH. Facilities described in Part 23.2 (local health department clinics) must provide treatment for genital herpes simplex, ano-genital warts, and human papilloma virus by means of a written prescription or by referral to another provider. Yeast (candida) vaginitis, bacterial vaginosis, pediculosis pubis and scabies may be treated on site by the Part 23.2 facility or by means of a written prescription.

The proposed changes are consistent with the current guidance from the Centers for Disease Control and Prevention (CDC) as to what conditions constitute sexually transmitted diseases. The changes also clarify disease reporting requirements for medical providers and medical management requirements for local health departments.

Needs and Benefits:

A. Background

Proposed changes to Section 23.1 clarify and update the official reportable STDs in NYS including NYC based on current medical technology and understanding. Proposed changes to 23.1 and 23.2 also clarify and simplify local health department service responsibilities relating to STD control.

The CDC’s Program Operations Guidelines for STD Prevention states “Medical services at the public STD clinic should be low or no cost, confidential, and convenient to avoid creation of barriers between the patient and the accessibility of services.” Recommenda-

tions regarding the range of services include at a minimum that clinics should have the capacity to: accurately diagnose and treat bacterial STDs and to distribute medications for diseases diagnosed in the clinic. Medications “must be available for locally prevalent STDs, with prescriptions available for diagnosed diseases not prevalent in the community.” The proposed regulations are consistent with these federal guidelines.

Modification of the treatment requirements for pelvic inflammatory disease in Section 23.2(e) will permit the local health department to either treat the patient on site free of charge OR immediately refer the individual for out-patient management to another medical facility. If the local health department selects the referral option, they are absolved of the cost for treatment.

The list of conditions in Sections 23.2 (d) and 23.2 (f) designated as requiring free diagnosis, but which may be treated with either prescription or referral includes: genital herpes, ano-genital warts/human papilloma virus, yeast (candida) vaginitis, bacterial vaginosis, pediculosis pubis, and scabies. For genital herpes, free diagnosis would not include a requirement for providing antibody serologic testing as this is not considered a diagnostic test for acute or recurrent infection, but rather a screening test for past exposure that is useful for counseling purposes. Language relating to therapy for herpes infection is being updated since the preferred therapy is now firmly established. Part 23.2 facilities will have a choice of providing on-site treatment for herpes or providing a prescription.

In addition, for the purpose of these regulations, the cervical Papanicolaou (Pap) test, while an indirect indicator of human papilloma virus infection, is a screening test for cervical cancer rather than an STD. Thus, local health departments would not be required to offer cervical Pap tests free of charge. These changes are recommended based on the positive fiscal impact they will have on the local health department’s provision of STD clinical services.

While Hepatitis B virus (HBV) may be transmitted by other routes, it is highly transmissible through sexual intercourse. Currently, approximately half of cases are acquired through sexual contact. As chronic/persistent HBV infection is an important cause of cirrhosis and hepatocellular carcinoma, it is important to provide some level of screening and prophylactic vaccination services to high-risk clients in public health STD clinics.

Section 23.3 has been eliminated since it is inconsistent with the reporting requirements of communicable diseases as written in Section 2.10. In addition, laboratories currently report test results electronically to the health departments. The counties are required to complete a case investigation and report morbidity to the state using the Communicable Disease Electronic Surveillance System (CDESS).

COSTS:

Costs to Regulated Parties:

The deletion of Sections 2.10(b) and 23.3 updates the Sanitary Code to reflect accepted practice, reporting by name only. There will be no increased costs to physicians as a result of this change.

Costs to Local and State Governments:

There would be no increased costs incurred from the changes to Part 23 to local health department facilities. Changes in the official list of STDs will have minimal cost impact on local health departments as most have already adopted the updated STD nomenclature. Clearly identifying those STDs that must be diagnosed and treated on site at local health departments, diseases diagnosed and referred for treatment, and diseases treated by prescription, will clarify vagaries of the regulations as currently written. These clarifications have been requested by local health department officials.

Local health departments are already required to provide free diagnosis of all the listed STD conditions. In fact, the proposed changes would actually serve to lessen the burden of costs to local health departments associated with the treatment of some selected conditions by permitting either referral or use of a written prescription. In addition, the local health departments may realize some increased revenues by having the ability to bill third parties for selected screening services which are considered “non-diagnostic” tests for the purposes of this section (i.e., herpes simplex antibody serology, and cervical Pap

smears), a practice which is currently permitted for HIV antibody serologic testing.

Increased costs for services under Public Health Law section 602(3)(b) - disease control and 10 NYCRR sections 40-2.80 and 2.81 are expected to be negligible, in the \$25,000 - \$50,000 annual range statewide, as county health departments already have the diagnostic capability required in the proposed changes. Treatment costs are expected to remain stable since the medications recommended are inexpensive and more conditions can now be treated through prescription. In addition, clarifying which STDs can be treated by prescription or by referral may reduce overall costs thereby potentially lessening Article 6 costs to the state.

Costs to the Department of Health:

There would be no increased costs to the Department of Health as a result of these regulatory changes. The infrastructure of the state DOH to manage the proposed changes is in place. Medicaid costs for STDs are typically associated with care for complications of untreated disease. The proposed changes should decrease Medicaid costs by encouraging patients to visit local health departments for free diagnosis and treatment, thereby reducing complications which would normally require hospitalization. The Department of Health will maintain its commitment to assist counties with disease intervention activities including interviewing patients and partner notification.

Paperwork:

There will be no new paperwork associated with these changes. The proposed changes will result in decreased paperwork since written reporting is no longer required.

Local Government Mandates:

There are no new mandates associated with these regulatory changes. Current mandates are clarified, simplified, and worded in such a way as to eliminate additional financial burden on local governments.

Duplication:

There is no duplication of these regulatory changes in existing State or federal law.

Alternatives:

The Department considered no action to update these regulations, but determined that the proposed revisions would be more prudent.

The deletion of Section 2.10(b) and Section 23.3 removes archaic language in order to make the regulations consistent with current reporting practices.

The proposed changes to Part 23 clarify existing responsibilities of the local health department in providing diagnostic and treatment services for STD. Variations in the nomenclature of STDs and the diagnosis and treatment requirements reflect the most recent Program Operations Guidelines promulgated by CDC. For the most part, these changes are in place in local health departments and clarify vague language that has previously existed.

Federal Standards:

The proposed regulations are consistent with federal guidelines. The regulatory changes recommended are consistent with federal standards as promulgated in the CDC Program Operations Guidelines.

Compliance Schedule:

Compliance with these revisions of the Sanitary Code will be mandated upon filing of a Notice of Adoption of this regulation in the New York State Register.

Regulatory Flexibility Analysis

Effect of Rule:

The regulatory changes apply to reporting of STD by health care providers and to the responsibilities of local health departments in providing clinical services for the diagnosis and treatment of persons with STD or suspected STD infection within their jurisdiction. There will be no effect on small businesses since the reporting language changes are designed to reflect what is currently existing practice. Local governments with health departments that directly provide or contract for the provision of STD clinical services have always been required to provide free diagnosis and treatment of STDs. The proposed revisions clarify what constitutes a sexually transmitted dis-

ease and when alternatives to treatment such as referral and prescription can be used. This may result in a decrease of treatment costs for several STDs. These recommended changes will affect local health departments.

Compliance Requirements:

There are no new compliance requirements associated with these proposed changes.

Professional Services:

No additional professional services will be required. One hundred per cent of the local health departments are currently reporting using the Communicable Disease Electronic Surveillance System (CDESS). Any additional needed training (i.e. CDESS updates) will be offered by the New York State Department of Health.

Compliance Costs:

No additional costs will be incurred as a result of these revisions to the Sanitary Code. Due to rising costs and decreased revenues, local health departments are struggling to maintain services as required by the Public Health Law and Sanitary Code. These proposed revisions should actually lessen the burden of costs associated with treatment for some conditions by allowing the use of prescriptions to meet the "treatment" requirement.

Minimizing Adverse Impact:

There will be no adverse impacts on reporting or clinical services as a result of these changes. The changes will likely enhance screening and have the potential for actually enhancing the scope of services for county residents who receive STD care through local health departments.

Economic and Technological Feasibility:

There will be no increased workload associated with these revisions.

Small Business and Local Government Participation:

Local governments have been consulted in the process through communication with local health departments and the New York State Association of County Health Officers. Individually and collectively, local health departments support all of these changes and many have provided letters to the Department attesting to their support.

Rural Area Flexibility Analysis

Effect on Rural Areas:

The proposed regulatory changes will apply statewide and will affect reporting of STD by health care providers in the same manner across the state. The effect on rural health departments in the provision of services for the diagnosis and treatment of persons with STD or suspected STD infection within their jurisdiction will also be similar to the rest of the state. Analysis of STD data statewide shows that rural areas do not have a disproportionate number of STD cases.

Compliance Requirements:

There are no new compliance requirements associated with these proposed changes.

Professional Services:

No additional professional services will be required. Any additional needed training on reporting will be provided by the New York State Department of Health in multi-county meetings or on an individual basis as necessary or as requested. Clinical training will be made available by the Montefiore Medical Center STD Center for Excellence, a contractor for the Bureau of STD Control.

Compliance Costs:

No additional costs will be incurred as a result of these revisions to the Sanitary Code.

Due to rising costs and decreased revenues, local health departments are struggling to maintain services as required by the Public Health Law and Sanitary Code. These proposed revisions should actually lessen the burden of costs associated with treatment for some conditions by allowing the use of prescriptions to meet the "treatment" requirement.

Minimizing Adverse Impact:

There will be no adverse impacts on reporting or clinical services as a result of these changes. The changes will likely enhance screening and have the potential for actually enhancing the scope of services for

county residents who receive STD care through the local health department.

Economic and Technological Feasibility:

There will be no increased workload associated with these revisions.

Rural Area Participation:

Local governments have been consulted in the process through communication with local health departments and the New York State Association of County Health Officers.

Job Impact Statement

The proposed regulatory change will not increase demands on existing staff nor increase the need to hire additional staff for providers or local health departments. The NYSDOH has determined that this regulatory change will not have a substantial adverse impact on jobs and employment.

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

Early Intervention Program

I.D. No. HLT-01-10-00023-RP

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

Proposed Action: Amendment of Subpart 69-4 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2540 - 2559-b

Subject: Early Intervention Program.

Purpose: To make several changes to the standards for the provision of services in the Early Intervention Program.

Substance of revised rule: A new subdivision (2)(iii) is added to section 69-4.1(l) creating a definition of "applied behavioral analysis." Subdivision (l) of section 69-4.1 is repealed and a new section is created and re-numbered to be (m) to clarify several aspects of the duration of eligibility for children potentially eligible for the preschool special education program to conform with modifications to Public Health Law and Education Law enacted in 2003. This section is amended to clarify that "eligible child" also includes any infant or toddler with a disability who is an Indian child residing on a reservation located in the State; a homeless child or a ward of the State. These changes are needed to conform with modifications enacted as part of the reauthorization of the federal Individuals with Disabilities Education Act of 2004. Section 69-4.1(ak) is amended to revise the list of qualified personnel to reflect changes that have been made to teacher certifications and professional licenses. Optometrists and vision rehabilitation therapist are added to the list of qualified personnel.

Subdivision 69-4.3(b)(1) is amended to add that race and ethnicity can be included in a referral without parent consent to conform with federal requirements. Subdivision 69-4.3(c) is amended to add facsimile and secure web transmission to the list of ways referrals can be made. Subdivision 69-4.3(f) is amended to clarify certain items on the list of criteria that define children to be at risk of having a disability, including adding the presence of a genetic syndrome, modifying the definition of elevated blood levels, and adding indicated cases of child maltreatment.

A new section 69-4.3a is created establishing initial and continuing eligibility criteria for the program. For children with a delay only in the communication domain, the criteria are a score of 2.0 standard deviations below the mean in the area of communication. If no test is appropriate for the child, a delay in the area of communication is determined by qualitative criteria in clinical practice guidelines issued by the Department. Subdivision (b) of section 69-4.3a allows early intervention officials to require a determination be made of the child's continuing eligibility if there is an observable change in the child's developmental status. Continuing eligibility is established by a multidisciplinary evaluation and can include a delay consistent with the criteria for initial eligibility, a delay in one or more domains such that the child is not within the normal range expected for his or her age, a score of 1.0 standard deviation below the mean in one or more domain; or the continuing presence of a diagnosed condition with a high probability of delay.

Section 69-4.5 is repealed and a new section 69-4.5 is created to establish enhanced standards for the approval of providers, including a requirement that agencies enroll as Medicaid providers and that they submit consolidated fiscal reports to the Department. For individual

providers who are able to deliver services as independent contractors in the program, a minimum amount of past experience is required serving children under five years of age. Agency providers are required to submit a quality assurance plan for each service offered; employ a program director and a minimum of two qualified personnel; and employ professionals to oversee the quality assurance plan. The Commissioner would be authorized to require approved agencies and individuals to seek reapproval no sooner than five years after approval. Subsection 69-4.5(b) establishes criteria for the approval of agencies allowed to provide ABA intervention programs using paraprofessional aides. Subdivision 69-4.5(c) requires that an agency's approval in the program shall terminate upon the transfer of ten percent or more of an interest in the agency within the last five years. The new agency is required to apply for approval at least ninety days prior if it wishes to provide services in the program after such transfer. Subdivision 69-4.5(d) requires providers to communicate with parents and other service providers. Subdivision 69-4.5(e) requires providers to comply with marketing standards issued by the Department. Subdivision 69-4.5(f) requires approved individuals to notify the Department within two business days if his or her license is suspended, revoked, limited or annulled and subdivision (g) requires providers to comply with State and Federal non-discrimination provisions. Subdivision 69-4.5(l) requires providers who intend to cease providing services to submit written notice and a plan for transition of children not less than 90 days prior, and to collaborate to ensure a smooth transition of eligible children.

A new section 69-4.5a is added relating to proceedings involving the approval of providers. Subdivision (a) provides that a provider's approval may be revoked, suspended, limited or annulled if the provider no longer meets one of the criteria for approval or reapproval; does not have current licensure, registration or certification; falsely represented or omits material in an application; has been excluded or suspended from any medical insurance program; has been the subject of actions taken against the provider by another State agency; has been convicted in an administrative or criminal proceeding; fails to provide access to facilities, child records, or other documents; fails to submit corrective action plans; fails to pay recoupment due, or implement any actions required on the basis of an audit; fails to pay fines or penalties assessed by the Department; has placed children, parents, or staff in danger; or has submitted improper or fraudulent claims.

Subdivision (b) of section 69-4.5a gives providers the right to be heard prior to actions being taken by the Department. Subdivision (c) provides that the Department may take a summary action prior to granting an opportunity to be heard for one hundred twenty days following a finding that the health or safety of a child, parents or staff of the agency or municipality is in imminent risk of danger. The provider is then granted an opportunity to be heard to contest the Department's findings.

A new subdivision (d) is added to section 69-4.6 requiring parents to provide information for claiming to third party payors in conformance with modifications enacted to Public Health Law in 2003.

Subdivision (a)(6)(i) of section 69-4.8 is repealed and replaced with a new subdivision that requires evaluators to use standardized instruments from a list of preferred tools developed by the Department. Evaluators are required to provide written justification if an instrument is used that is not on the list.

Section 69-4.9 is repealed and replaced with a new section 69-4.9. Subdivisions (c) and (d) clarify that municipalities and providers are required to comply with Department health and safety standards. Subdivision (g) requires providers to notify parents in a reasonable period of time prior to any inability to deliver a service due to illness, emergencies, hazardous weather, or other circumstances. Providers also are required to notify parents and service coordinator five days prior to any scheduled absences due to vacation, professional activities, or other circumstances, and notify parents, service coordinator and early intervention official at least thirty days prior to the date on which the provider intends to cease providing services to a child altogether. Subdivision (i) prohibits the use of aversives in the program, a definition of aversive interventions is included, and it is clarified that behavior management techniques are allowed to prevent a child from seriously injuring him/herself or others.

A new section 69-4.9a is added that creates standards for the use of paraprofessional aides in the delivery of Applied Behavioral Analysis (ABA) in the program. Subdivision (a)(1) requires agencies approved to deliver ABA services to coordinate all services in a child's IFSP. Subdivision (a)(2) requires agencies to assign each child to a team consisting of a supervisor, ABA aides and other qualified personnel. Subdivision (a)(3) requires ABA agencies to employ supervisory personnel and aides to implement ABA plans, and subdivision (a)(4) allows them to either employ or contract with other qualified personnel to participate in delivery of ABA plans or deliver other services in a child's IFSP. Subdivision (a)(5) requires the use of systematic measurement and data collection to monitor child progress. Subdivision (a)(6) requires ABA agencies to maintain and implement policies and procedures for the delivery of ABA services. Subdivision (a)(7) requires ABA agencies to ensure the training of supervisory personnel and ABA aides. Subdivisions (b), (c) and (d) establish the minimum requirements and responsibilities for supervisors of ABA aides, respectively. The supervision of ABA behavior aides must include a minimum of six hours per month in the first three months of employment, and a minimum of four hours per month thereafter, of direct on-site observation; and a minimum of two hours per month of indirect supervision. Supervisors are required to convene a minimum of two team meetings per month with all personnel delivering services to the child. Subdivision (e) and (f) establishes the minimum qualifications and allowable activities for ABA aides. Subdivision (g) establishes the requirements for other employed or contracted qualified personnel providing other services in a child's IFSP as part of a ABA services.

A new subdivision (a)(2)(ii)(a) is added to section 69-4.11 to allow early intervention officials to participate in IFSP meetings by phone. A new subdivision (a)(5)(i) is added to require that notice to parents of an IFSP meeting include that parents furnish social security numbers to facilitate claiming to third party payors. A new subdivision (a)(6)(i) is added to clarify that if parents refuse to provide social security numbers, services must still be provided. Subdivision (a)(10)(v) is amended to clarify the intent for frequency, intensity, length, duration, location and the method of delivering services. Subdivision (a)(10)(vi) is amended to clarify the requirements for the IFSP when services will not be provided in a natural environment. Subdivision (a)(10)(xiii) is amended to modify the requirements for the IFSP for transition of children out of the program who are potentially eligible for preschool special education. Subdivision (b) is amended to allow six month IFSP reviews to occur via conference call or record review; and to allow early intervention officials to require an additional evaluation be performed to assess the need for an increase in the frequency or duration of services.

Subdivision (a)(1)(i) of section 69-4.12 is amended and a new subdivision (a)(4)(x) is created to add verification of correction of non-compliance to the list of monitoring procedures consistent with new federal requirements.

Subdivisions (i)(4), and (i)(6) through (i)(10) of section 69-4.17 are repealed. Subdivision (i)(5) is renumbered to be (i)(4) and a new subdivision (i)(5) is added to clarify the requirements for complaint investigations performed by the Department.

A new section 69-4.17a is added clarifying the requirements for the content and retention of child records consistent with a guidance document previously issued by the Department. Subdivision (a) and (b) establish the requirements for municipalities and providers, respectively. Subdivision (c) establishes requirements for maintaining original signed and dated session notes.

Subdivision (b) of section 69-4.20 is amended to drop a requirement that parent's consent to notification and instead provide parents the opportunity to "opt-out" by providing their objection. This modification is needed to comply with an opinion from the U.S. Department of Education that requiring parents to affirmatively consent is in conflict with federal regulations. This subdivision is further modified to clarify that parents may decline transition conferences.

Subdivision (c)(1) of section 69-4.30 is amended to delete the requirement that early intervention officials notify the Department of additional screenings provided. A new subdivision (c)(13) is added

establishing a price for services provided by an ABA intervention program aide to be billed in 60 minute increments.

Revised rule compared with proposed rule: Substantial revisions were made in sections 69-4.1(ak), 69-4.5(a), (b), (d), 69-4.9(b), (g), (i), 69-4.9a(b), (e) and 69-4.20(b).

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

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

Public comment will be received until: 30 days after publication of this notice.

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

Changes made to the last published rule do not necessitate revision to the previously published RIS, RFA or RAFA.

Revised Job Impact Statement

Nature of Impact:

Three aspects of the proposed revisions to Part 69 have the potential to have an impact on jobs and employment opportunities. The proposal to allow paraprofessionals to deliver Applied Behavioral Analysis (ABA) to children in the Early Intervention Program with an autism spectrum disorder (ASD) or other appropriate condition will likely create additional job opportunities across the state. The proposed expansion of the list of qualified personnel who can deliver services in the program also will likely create additional jobs. Finally, the proposed enhanced standards for providers in the program has the potential to change the way that agency and individual providers are approved in the program, but it is not likely to result in a substantive decrease in jobs or employment opportunities.

The Department proposes to establish standards for behavioral aides, approval of providers, and paraprofessional reimbursement rates for delivery of intensive behavioral intervention services to children with ASD. This change is in response to the growing population of children with ASD in New York State. The number of children in the program with ASD has increased to nearly 4,000 in the 2007-08 program year, double the number of five years ago. Evidence indicates that the earlier children are diagnosed with ASD and can begin intensive intervention services, the better their chances for minimizing the symptoms and their impact on their lives.

In 2007, \$100 million was expended for services to children with ASD in the program. The Department's evidence-based clinical practice guideline on ASD recommends ABA intervention programs for children with ASD at an average intensity of 20 hours per week (depending on the child's age, ability to tolerate the intervention, and other factors). Currently, these intervention programs are provided using licensed, registered, or certified professionals, when research shows these intervention programs can be successfully delivered using supervised and trained paraprofessional behavioral aides. In addition to cost savings, implementation of State standards for delivery of behavioral intervention programs will enhance the quality and availability of this intervention to children with ASD and other severe disabilities for which the treatment has been shown to be effective.

The list of qualified personnel in the program is proposed to expand to include optometrists and vision rehabilitation therapists to meet the need for services to children with vision impairments. These proposed changes will also have a positive impact on jobs and employment opportunities.

Finally, numerous additional enhanced standards are proposed for providers in the program, including new requirements that agencies enroll in the Medicaid program, and that individuals have a minimum number of hours of experience in the program before being able to be approved to serve as an independent contractor in the program. This last change is being made to assure that children receive services from professionals with an adequate level of experience serving young children. Individuals who lack the minimum level of experience are allowed to provide services to children in the program as employees of approved agencies rather than independent contractors, since this setting can better assure adequate oversight and mentoring while a new professional gains experience. These requirements may result in a shift in the relationship between agencies and some therapists to an

employment rather than contracting model, but it should not result in a decline in jobs or employment opportunities.

Categories and Numbers Affected:

Currently, there are 22,402 approved providers in the program with approximately 2,000 of these agencies and the rest individual therapists. The individuals impacted include, but are not limited to speech language pathologists, physical and occupational therapists, and special education teachers with various certifications. The type of business entities includes a mix of business corporations, professional corporations, professional limited liability corporations and not-for-profit organizations. The number of individuals providing services in the program will likely increase as a result of the expansion of qualified personnel described above.

Regions of Adverse Impact:

This proposal will not disproportionately impact any region of the state.

Minimizing Adverse Impact:

These proposed revisions will likely create additional jobs and employment opportunities in New York State.

Assessment of Public Comment

Public comment was received from 129 commenters, including ten municipalities, ten parents, 109 providers, the Honorable Assemblywomen Glick and Russell, and the New York State Education Department (NYSED). To comply with federal requirements, the New York State Department of Health (Department) had a 60-day public comment period and convened public hearings in Albany, New York City and Rochester. The following is a summary of the assessment of public comment and response. The full text of the assessment of public comment is available at the following website: www.nyhealth.gov.

The New York State Association of Applied Behavior Analysts (NYSABA) and the NYSED commented on 69-4.1(k)(2)(iii), definition of ABA to the list of EI services. NYSABA recommended the definition be replaced. NYSED recommended an alternative definition to define ABA as an instructional method. As the definition of ABA proposed by NYSABA is widely recognized by behavior analysts, 69-4.1(k)(2)(iii) has been revised per NYSABA's recommendation.

NYSED expressed concern that 69-4.1(aj), defining "agency" and "individual" providers would authorize providers to provide a variety of professional services which may be inconsistent with Education Law. NYSED recommended that the definition of "individual" be revised to mean a person who is appropriately licensed by the State of New York in the area of professional practice.

No revisions have been made to this section. The Department approves applicants in accordance with applicable State laws and in a manner consistent with NYSED policies and practices. "Individual" means persons who hold a state approved or state-recognized certificate, license, or registration in the area in which they are providing services, ensuring that if such individual provides services in an area regulated by NYSED, the individual is required to obtain appropriate state credentials.

NYSED and Assemblywoman Glick opposed changes to 69-4.1(ak) to allow an individual to be qualified to deliver EI services when possessing only a credential issued by an entity other than NYSED. NYSED objected to 69-4.1(ak)(2) and (3), and (6)-(8) which would include as qualified personnel board certified behavior analysts and assistant analysts, and low vision specialists, orientation and mobility specialists, and vision rehabilitation therapists.

Section 69-4.1(ak) has been revised to respond to address these concerns. Two types of certifications have been removed from the list of qualified personnel; however, professionals who deliver vision services have been retained as they present no conflict with existing professional licensing, certification, or registration requirements and are used in other NYS service delivery systems.

Several commenters expressed concern about amendments to 69-4.3(f)(1)(xvii), to replace "suspected hearing impairment" with "failure of initial newborn infant hearing screening and the child is in need of follow-up screening". This provision has been broadened to include other risk factors for hearing loss. Children with suspected hearing

impairment must be referred for a multidisciplinary evaluation (MDE) under existing regulation at 69-4.3(d) and (e).

Some commenters opposed the criteria set forth in 69-4.3a(a)(2)(iv), which eliminated the 33% delay criteria for children who have a delay only in the communication domain, arguing that it would exclude children with feeding/swallowing disabilities. Some strongly supported the proposed definition with revisions. Among supporters, recommended revisions included elimination of a diagnosis of specific language impairment as criteria for eligibility and edits to clarify the meaning of the rule.

A rigorous definition of communication delay is needed to ensure that the program serves children with communication delays who will not achieve normal development without intervention. National experts have called for states to discontinue the use of “percent delay” as criteria for program eligibility, in favor of rigorous definitions of developmental delay supported by standardized testing and clinical criteria.

The definition of communication delay in 69-4.3a(a)(2)(iv) has been retained with clarifying revisions and to remove the diagnosis of specific language impairment. Specific language impairment is best addressed as a diagnosed condition with a high probability of resulting in developmental delay.

In response to concerns that the definition would eliminate children with oral-motor feeding and swallowing disorders from EIP eligibility, 69-4.3a(a)(2) has been revised to clarify that the physical domain of development includes these disorders.

Comments were received stating that the proposed language in 69-4.3a(b) provides expansive authority to early intervention officials to question children’s eligibility. This section has been revised to clarify that a determination of continuing eligibility can be required only if there is an observable change in the child’s development that indicates a change in eligibility.

Commenters expressed concern about the burden that would be imposed by 69-4.5(a)(1) and (2), which require EIP approved providers to enroll in the Medicaid program and submit financial reports to the Department, respectively. Some commenters supported 69-4.5(a)(2).

Sections 69-4.5(a)(1) and (2) have been retained. To ensure the quality and integrity of services provided under both programs, it is imperative that providers enroll in and are accountable to the Medicaid program. Under the proposed regulations, providers will be required to enroll in the Medicaid program, but will not be required to bill Medicaid. Submission of fiscal reports will assist the Department in establishing EI reimbursement rates which are equitable, adequate, and cost-effective.

Commenters opposed minimum experience requirements proposed for individual providers in 69-4.5(a)(4)(iv) arguing that the requirement will prevent newly licensed professionals or those who have limited caseloads from providing services, particularly in rural communities. Some commenters supported this section with more stringent experience requirements.

After careful consideration, the Department amended proposed 69-4.5(a)(4)(iv) in response to these concerns. Individuals with 1,600 clock hours of experience delivering services to children under five at any time in their professional career, at least some of which must include direct experience with children with disabilities, will now meet this requirement. Relevant professions licensed, registered, or certified by NYSED require a minimum of 1,600 clock hours of clinical experience as a prerequisite for credentialing, and therefore this is a reasonable minimum standard for qualified personnel seeking to deliver EIP services.

Commenters opposed proposed requirements in 69-4.5(a)(4)(vii)(a)-(c) which require agency providers to employ a full time program director and a minimum of two qualified personnel, each of whom provides evaluations, service coordination, or early intervention services for a minimum of twenty hours per week. Assemblywoman Russell and others commented that a small agency in a rural area would not be able to meet the minimum service hours requirements for two employees. Some commenters were concerned that the requirements imposed hardship for agencies which focus on

services to individuals with low-incidence disabilities, including vision impairment.

The Department has retained 69-4.5(a)(4)(vii)(a) as written. While the program director must be employed on a full-time basis, the program director may have duties within the agency associated with services other than EIP delivered by the agency.

Section 69-4.5(a)(4)(vii)(b) has been revised to allow agencies to count employment of service coordinators and credit delivery of services to any individual with disabilities toward the minimum twenty hour per week requirement.

NYSED commented that it does not support 69-4.5(a) which adds a requirement for reapproval of programs after five years, due to added responsibilities to NYSED for the reapproval of providers that also provide services under Education Law. Section 2550 of Public Health Law authorizes the Department to periodically reapprove providers. The vast majority of providers apply to the Department for approval and reapproval. To ensure the quality and safety of early intervention services, the requirement is retained, but revised to provide for approval for a minimum of five years and to require providers to apply for reapproval upon receipt of notice from the Department.

NYSED also objects to DOH approval of “ABA Intervention Programs”, as in their view ABA is an instructional method. Many comments were received expressing concern that ABA services would no longer be able to be delivered by qualified personnel.

The proposed rule was not meant to establish a new ABA intervention program, or require that children in need of ABA services only receive services from agencies employing paraprofessionals. Qualified personnel may and are expected to continue to deliver ABA services under their current EI approval. The Department’s intent is to enhance the capacity to provide ABA services by establishing rigorous standards for employment, supervision, and training of paraprofessionals. References to “ABA intervention program” have been revised to “ABA services” and “ABA intervention program aide” has been revised to “ABA aides”.

Some commenters opposed 69-4.8(a)(6)(i), which requires evaluators, in conjunction with informed clinical opinion, to use standardized instruments on a list developed by the Department when conducting MDEs. Municipalities strongly supported this provision. The provision has been retained to ensure quality and consistency of MDEs. Requirements in regulation which require the use of non-discriminatory procedures in the conduct of MDEs, remain in effect.

Comments were received concerning notification requirements in 69-4.9(f)(2). Commenters opposed 69-4.9(f)(2)(i) requiring that parents be notified at least 24 hours prior to a scheduled service visit of any temporary inability to deliver services, because such circumstances are difficult to anticipate in advance. The Department has revised 69-4.9(f)(2)(i) to require notice within a reasonable period.

Providers and municipalities opposed the requirement in 69-4.9(f)(2)(ii) that providers notify the parent, service coordinator, and early intervention official, of planned absences, as notification of the parent and service coordinator is sufficient. Section 69-4.9(f)(2)(ii) has been modified accordingly.

NYSABA supported requirements in 69-4.9(h) prohibiting use of aversives during EIP service delivery; however, they expressed concern about the potential exclusion of planned restraint and contingent food programs under highly controlled conditions when necessary to prevent significant physical injury or harm to the child. Section 69-4.9(h)(9) has been revised based on NYSABA’s recommendations.

Municipalities supported the need for behavior management techniques within the context of a behavior management plan, but recommended that such plans be developed external to the child’s and family’s individualized family service plan (IFSP). The Department has revised 69-4.9(h)(9) in response to this concern.

NYSED recommended that 69-4.9a(1) be revised to prohibit ABA aides from providing services that are within the scope of any profession licensed, certified, or registered by the State. The Department agrees and has revised this section accordingly.

In response to concerns expressed by numerous providers, 69-

4.9a(b)(1) has been revised to include special education teachers among those professionals who may supervise ABA aides.

NYSED opposed board certified behavior analysts credentialed by the Behavior Analyst Certification Board as qualified to supervise ABA aides, unless such individuals are also credentialed by NYSED. NYSABA recommended adding speech language pathologists with appropriate training as potential supervisors. The Department concurs and has revised this provision accordingly.

NYSED recommended that the qualifications for ABA aides in 69-4.9a(d) mirror those of certified teaching assistants, arguing that ABA aides will be assisting in delivery of instructional services. The Department disagrees with NYSED's position that ABA aides will be assisting in instructional services. ABA aides will be assisting with EI services, which are designed to meet the developmental needs of the child and needs of the family in enhancing the child's development.

Some commenters were opposed to the amendment to 69-4.11(a)(2), which would allow the early intervention official to participate in IFSP meetings by conference call, arguing that IFSPs must be developed with all parties at the meeting, and service delivery will be delayed. The Department intends to monitor to ensure participation by telephone does not delay service delivery.

Many commenters opposed proposed amendments in 69-4.11(10)(xiii) and 69-4.20(b), which eliminate the requirement that parent consent be obtained prior to notification of the school districts when children are potentially eligible for preschool special education, and to instead allow parents to "opt out" of the federal notice requirement. Parents and advocates view this to be a diminution of parental rights. The Department has been notified by the U.S. Department of Education that New York must implement an "opt out" policy consistent with federal policies for continued receipt of funding. The proposed provisions are being retained.

NYSED and others opposed the elimination of required timeframes for notice to the school district's committee on preschool education of a child's the potential transition to preschool special education, as this would impede the smooth transition of children from EIP. The 120 day notice requirement has been retained.

Interest on Lawyer Account Fund

NOTICE OF ADOPTION

An IOLA Account Interest Rate Option

I.D. No. IOL-47-09-00011-A

Filing No. 279

Filing Date: 2010-03-12

Effective Date: 2010-04-07

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

Action taken: Amendment of section 7000.9(b)(1) of Title 21 NYCRR.

Statutory authority: State Finance Law, section 97-v(3)(d)

Subject: An IOLA account interest rate option.

Purpose: Revise an IOLA account interest rate option to ensure that the account yields highest income to the IOLA Fund.

Text or summary was published in the November 25, 2009 issue of the Register, I.D. No. IOL-47-09-00011-P.

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

Text of rule and any required statements and analyses may be obtained from: Stephen G. Brooks, IOLA Fund of the State of New York, 11 East 44th Street, New York, NY 10017, (646) 865-1541, email: sgbrooks@iola.org

Assessment of Public Comment

Three written comments were received in letter form. All were entirely favorable.

The IOLA Fund's assessment of the comments is as follows:

1. In summary, each of the comments were brief and supported the

amendment without reservation; each noted the need for, and potential benefits that may result from, the amendment and two specifically noted the importance of the amendment in this time of an economic recession that results in more low-income people needing legal help.

2. No issues were raised or alternatives suggested.

3. Consequently, this constitutes an analysis of the comments and no alternatives have been considered or incorporated.

4. No changes have been made as a result of such comments.

One commentator stated:

We believe this amendment would provide institutions with a simpler administrative mechanism for setting interest rates on IOLA accounts, would provide a floor for the interest rate an institution would pay using the option in Section (b)(1) and would in some cases lead to higher rates paid on those accounts. Any such increase in income yielded by IOLA accounts would be valuable for the millions of New Yorkers who cannot afford a lawyer for basic legal needs that are essential to their safety and well being.

Another stated:

With the drastic decline in money available for distribution at a time when the need for legal assistance continues to grow as a result of the recession, low-income New Yorkers need the civil legal services funded by IOLA more than ever. We commend the IOLA Fund for taking an important step to ensure that revenue coming into the fund will be at the highest level possible.

Department of Labor

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Public Employees Occupational Safety and Health Standards

I.D. No. LAB-14-10-00007-P

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

Proposed Action: This is a consensus rule making to amend section 800.3 of Title 12 NYCRR.

Statutory authority: Labor Law, section 27-a(4)(a)

Subject: Public Employees Occupational Safety and Health Standards.

Purpose: To incorporate by reference updates to OSHA standards into the State Public Employee Occupational Safety and Health Standards.

Text of proposed rule: Regulation 12 NYCRR § 800.3 is amended to add the following subdivision:

(ds) *Revising Standards Referenced in the Acetylene Standard; Final Rule-74 FR 40442-40447, August 11, 2009.*

Text of proposed rule and any required statements and analyses may be obtained from: Michael Paglialonga, New York State Department of Labor, State Office Campus, Building 12, Room 509, Albany, NY 12240, (518) 457-1938, email: michael.paglialonga@labor.ny.gov

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

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

Consensus Rule Making Determination

This amendment is necessary because Section 27-a(4)(a) of the Labor Law directs the Commissioner to adopt by rule, for the protection of the safety and health of public employees, all safety and health standards promulgated under the U.S. Occupational Safety and Health Act of 1970, and to promulgate and repeal such rules and regulations as may be necessary to conform to the standards established pursuant to that Act. This insures that public employees will be afforded the same safeguards in their workplaces as are granted to employees in the private sector.

Job Impact Statement

As the proposed action does not affect jobs and employment opportunities but simply affords workplace safety and health guidelines to improve job performance and safety, a job impact statement is not submitted.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

KEDLI's Petition to Disburse Positive Funds from the Program's Balancing Account to Enhance Its Existing Program

I.D. No. PSC-14-10-00009-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 a petition from KeySpan Gas East Corporation d/b/a National Grid (KEDLI) for approval to enhance its current Low Income Discount Program (Program) utilizing positive funds from the Program's Balancing Account.

Statutory authority: Public Service Law, sections 65 and 66

Subject: KEDLI's petition to disburse positive funds from the Program's Balancing Account to enhance its existing Program.

Purpose: Consideration of KEDLI's proposed enhancements to its Program, funded by positive funds in the Program's Balancing Account.

Substance of proposed rule: The Public Service Commission (Commission) is considering a petition from KeySpan Gas East Corporation d/b/a National Grid (KEDLI) (Company) to enhance the Company's current Low Income Discount Program using positive funds in the Company's Low Income Discount Program Balancing Account (Balancing Account). As of December 31, 2009, \$7,494,569 has accumulated in the Company's Balancing Account. The Company's Gas Rates Joint Proposal, adopted by the Commission in Cases 06-G-1185 and 06-G-1186, states that, if the Balancing Account has a positive balance in excess of \$1 million at the end of Rate Year Two (2009), the Company or any other interested party may submit a proposal for disbursement of the funds. The Company proposes to utilize the funds in the Balancing Account to enhance the current Low Income Discount Program by: (1) on its own and in concert with third party organizations, engaging in an expanded Outreach and Education campaign to increase enrollment; (2) implementing a file matching program with Suffolk County Department of Social Services, Nassau County Department of Social Services and New York City Human Resources Administration to identify additional customers who may be eligible for the Low Income Discount Program; (3) suspending the customer service charge for Low Income Discount Program customers for Rate Years Three (2010) through Five (2012); (4) expanding the On-Track arrears forgiveness program; and (5) if funds allow, providing a lump sum payment to those customers enrolled in the Low Income Discount Program for each of Rate Years Two and Three. The Commission may grant, deny or modify, in whole or in part, the petition filed by the Company, and may also consider related matters.

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. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@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-1186SP7)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Petition for the Submetering of Electricity

I.D. No. PSC-14-10-00010-P

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

Proposed Action: The Public Service Commission is considering whether to grant, deny, or modify in part the petition of 61 Jane Street Owners Corporation to submeter Electricity at 61 Jane Street, Manhattan, NY.

Statutory authority: Public Service Law, sections 2, 4(1), 30, 32-48, 52, 53, 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of 61 Jane Street Owners Corporation to submeter Electricity at 61 Jane Street, Manhattan, NY.

Substance of proposed rule: By letter dated March 4, 2010, Bay City Metering, on behalf of the Board of Directors of 61 Jane Street, a Residential Cooperative located at 61 Jane Street, Manhattan, New York petitioned for approval to convert the building and the residential units at 61 Jane Street from direct Consolidated Edison Company of New York, Inc. metering to master metering and submetering. The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 61 Jane Street Owners Corporation.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: 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. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@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.

(10-E-0102SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection of the Networks between "Frontier" and Finger Lakes Technologies for Local Exchange Service and Exchange Access

I.D. No. PSC-14-10-00011-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 or reject a proposal filed by Frontier Communications of AuSable Valley, et al. ("Frontier") for approval of an Interconnection Agreement with Finger Lakes Technologies Group executed on February 5, 2010.

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

Subject: Interconnection of the networks between "Frontier" and Finger Lakes Technologies for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement between Frontier and Finger Lakes Technologies.

Substance of proposed rule: Frontier Communications of AuSable Valley, Inc., Frontier Communications of Sylvan Lake, Inc., Frontier Communications of New York, Inc., Frontier Communications of Seneca-Gorham, Inc. and Ogden Telephone Company ("Frontier") and Finger Lakes Technologies Group, Inc. have reached a negotiated agreement whereby "Frontier" and Finger Lakes Technologies Group, Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting for the term of an underlying agreement.

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. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@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. (10-00444SP1)

Department of State

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Document Destruction Contractors

I.D. No. DOS-14-10-00001-P

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

Proposed Action: Addition of Part 198 to Title 19 NYCRR.

Statutory authority: General Business Law, section 899-bbb(12)(a)

Subject: Document destruction contractors.

Purpose: To adopt implementing regulations for Article 39-G of the General Business Law.

Text of proposed rule: Part 198 is added to 19 NYCRR to be entitled and read as follows:

19 NYCRR PART 198 Document Destruction Contractors

Section 198.1 Fingerprinting: principals and officers

Fingerprints taken pursuant to General Business Law section 899-bbb shall be taken by a method prescribed by the Division of Criminal Justice Services.

Section 198.2 Investigation

Within five business days after receipt of an application for registration as a document destruction contractor, the Department of State shall transmit to the Division of Criminal Justice Services two sets of fingerprints and the fees required pursuant to subdivision eight-a of section eight hundred thirty-seven of the executive law for the cost of the Division's full search and retain procedures. The required fees shall be paid by the applicant upon submitting the completed application to the Department of State. The Division of Criminal Justice Services shall ascertain whether or not the applicant has been charged with or convicted of a crime and shall provide a criminal history report to the Department of State. The Department of State may cause to be conducted an investigation to verify the information contained in the criminal history report and the application for a document destruction contractor license. The Department, in consultation with the Division, may waive such background checks, investigations and fees if in its opinion, the applicant has been subject to previous background checks and investigation requirements which meet or exceed the requirements of this section.

Section 198.3 Supervisory responsibility

Each registered document destruction contractor shall supervise its employees and their business activities. Such supervision shall include but not be limited to regular, frequent and consistent personal guidance, instruction, oversight and superintendence by such contractor with respect to its general business and all matters relating thereto.

Section 198.4 Business and employee records

(a) Each registered document destruction contractor shall keep and maintain for a period of at least three years all records of each transaction it performs; provided, however, that with respect to any transaction which is the subject of litigation, upon the expiration of such three-year period, such records shall be continue to be retained for the duration of the litigation and any pending appeal. Litigation shall include investigation or administrative action by the Department of State, initiated by complaint from the general public or by the department.

(b) Each registered document destruction contractor shall maintain employee and business records at a central location within New York State. For purposes of this Part, business records shall include all company and personnel records pertaining exclusively to the conduct of business in New York State.

(c) Each registered document destruction contractor shall prepare and retain as a business record a statement of services and charges which have been agreed upon between such contractor and its customer, a copy of which shall be provided to such customer after it has been signed by both parties. The statement of services and charges shall also identify and name any employee who will be providing the consumer with document destruction services.

Section 198.5 Employee responsibility

Any person who is or has been an employee of a registered document destruction contractor shall not divulge to anyone other than his or her employer, except as may be required by law, any information acquired by him or her during such employment in respect to any of the work to which he or she shall have been assigned by such employer.

Section 198.6 Registration revocation and suspension

A document destruction contractor, or the principal of any document destruction firm, company, partnership, corporation or organization registered under Article 39-G of the General Business Law which has its registration revoked or suspended by the Department of State shall be ineligible to re-register as a document destruction contractor for the period of such revocation or suspension. A document destruction contractor whose license has been revoked or suspended shall be prohibited from acting as a principal of any document destruction contractor firm, company, partnership, corporation or organization or from employing other persons to conduct document destruction services for the period of the revocation or suspension.

Section 198.7 Notice of criminal conviction

A registered document destruction contractor who is convicted of a crime as defined in the Penal Law in this State or an offense which would constitute a crime if committed in New York in any other state or Federal or foreign jurisdiction, shall give notice of such conviction to the Department of State, Division of Licensing Services, at its Albany Office, by certified mail, return receipt requested, within 10 days from date of conviction.

Section 198.8 Statement of licensure

All documents or receipts issued by a registered document destruction contractor shall contain the unique identification number issued to such individual or business and the phrase "registered with the N.Y.S. Department of State."

Section 198.9 Enforcement

All principals and employees of registered document destruction contractors shall be subject to the enforcement provisions contained in Article 39-G of the General Business Law.

Text of proposed rule and any required statements and analyses may be obtained from: Whitney Clark, NYS Department of State, Division of Licensing Services, Alfred E. Smith Office Building, 80 South Swan Street, Albany, NY 12231, (518) 473-2728, email: whitney.clark@dos.state.ny.us

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

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

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

Regulatory Impact Statement

1. Statutory authority:

General Business Law Article 39-G, section 899-bbb (12)(a) authorizes the Secretary of State to promulgate such rules and regulations as are deemed necessary to effectuate the purposes of the article, which article contains new licensing/registration requirements for the discipline entitled "document destruction contractors".

2. Legislative objectives:

General Business Law, Article 39-G, requires the Department of State to register and regulate document destruction contractors. The proposed regulations complement the recently implemented federal Disposal Rule (16 CFR Part 682) and New York's Disposal Law (Chapter 65 of the Laws of 2006), which require businesses to take appropriate steps when disposing of personal information. The proposed rule would ensure that information required to be destroyed under these laws is disposed of properly by a contractor registered with the State of New York.

3. Needs and benefits:

The statutory intent behind Article 39-G is identity theft protection. Identity thieves have been known to sort through the trash of residences and businesses to collect Social Security numbers, financial account numbers and other personally identifiable information that could be used to commit identity theft. The proposed rule would limit the amount of sensitive documents subject to misappropriation by ensuring the availability of qualified document destruction contractors.

General Business Law Article 39-G § 899-bbb requires a document destruction contractor earning more than five hundred dollars in total contracts over a consecutive twelve month period to meet certain requirements to register with the Department of State. The proposed rule sets forth specific regulations concerning the application process, record keeping and procedures for registration revocation and suspension.

4. Costs:

a. Costs to regulated parties:

The costs to the regulated public for complying with the law include payment of an application fee for obtaining a registration as a document

destruction contractor in the amount of \$50.00 for each biennial registration, and a fee for obtaining the required fingerprinting and background search in the amount of \$75.00. If DCJS cannot read the fingerprint cards due to the quality of the prints, the cost for obtaining an additional set of fingerprint cards is \$75.00. The fee to renew an existing registration is \$50 and there is a change notice/request form processing fee of \$10 required for a change of personal name, residence or business address, or for a duplicate registration. The regulated public will likely incur costs associated with record retention for those registrants who do not possess sufficient on-site storage for records. The cost of storage facilities varies depending on various factors such as location and size. It is estimated that the starting price for an off-site storage unit is approximately \$40.00 per month. It is not anticipated that the regulated public will incur any other costs.

b. Costs to the Department of State:

The Department of State does not anticipate any additional costs to the agency to implement and continue to administer the rules' requirements. The Department of State currently licenses and regulates in excess of twenty-eight different occupations. The Department did not hire additional staff to assist with the implementation and administration of the new document destruction contractor licensing requirements. As a result, existing staff will absorb the functions necessary to support the program and the regulations established by this rulemaking.

5. Local government mandates:

The rules do not impose any program, service, duty or responsibility upon any county, city, town, village, school district or other special district.

6. Paperwork:

The rules clarify the already mandated statutory requirement that all applications for licensure be accompanied by two sets of fingerprint cards for all principals and officers; prospective registrants/licensees are already required to satisfactorily complete applications for registration, with accompanying documentation. The rule delineates and specifies the paperwork and record keeping requirements imposed on registrants by General Business Law Article 39-G. The statute mandates, in part, that document destruction contractors be subject to investigation and to supply documentation upon request, and this rule clarifies the requirements for document retention. The rule also requires that advertisements and certain business records contain the registration number and/or a statement that the registrant is registered with the Department of State.

7. Duplication:

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

8. Alternatives:

The Department of State considered not proposing any regulations; however, since subpart 12 of § 899-bbb requires that the Secretary of State shall promulgate such rules and regulations as are deemed necessary to effectuate the purposes of the legislation, it was deemed appropriate and necessary that the Department of State propose regulations to clarify the legislation. It was decided that not having any regulations would disadvantage both the regulated public and the Department of State insofar as certain vague statutory provisions would remain undefined and result in confusion and difficulties with enforcement. As a result, the Department of State is only proposing those regulations deemed necessary at this point in time, and has determined to hold in abeyance the possible need to file additional regulations to clarify and/or define other statutory issues.

9. Federal standards:

There are no federal standards regulating the registration of document destruction contractors, although there are federal standards regulating the disposal of personal information implemented in a federal Disposal Rule (16 CFR Part 682), and New York has a Disposal Law (Chapter 65 of the Laws of 2006), which comports with the federal requirements. The proposed rulemaking does not exceed any existing federal standard.

10. Compliance schedule:

The rule making will be effective as of the date of adoption. Prospective registrants/licensees are already required to register pursuant to the statutory provisions of Article 39-G on or before October 1, 2008, are on notice of the Secretary's power to enact regulations in concert therewith, and will therefore be able to comply with this rule as of its effective date.

Regulatory Flexibility Analysis

1. Effect of rule:

The proposed rulemaking create a framework for the successful process of businesses registering for approval to act as document destruction contractors, and to employ qualified workers to conduct services related thereto, as well as to allow for the continued qualifications for renewal of same, and the responsibilities of the companies for document preparation and retention, for ensuring the qualifications of workers, and for the standards by which such businesses shall operate.

The rule does not apply to local governments.

2. Compliance requirements:

The business of document destruction is now being regulated under the auspices of the Department of State (DOS), and any companies or persons meeting the criteria for registration must do so. The proposed rules are intended to amplify the legislation, and to clarify specifics as to the requirements for registration. Further, pursuant to the statute, the Department is required to publish and makes available a list of registered document destruction contractors who have properly qualified and registered with the Department. By statute, the list of registered document destruction contractors is to be made available to any interested parties by way of online viewing on the Department's website, and also by permitting an interested party to obtain a copy thereof, at a cost to be determined by the Department, which the rules now clarify to be a minimal amount. The proposed rules provide the mechanism for compliance.

3. Professional services:

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

4. Compliance costs:

Registrant licensees will not incur any significant compliance costs associated with these rules, although there will be compliance costs associated with obtaining the requisite fingerprints of the principals, officers and/or qualifiers for the registrant contractors, and for producing the proper identification cards. The rules do not mandate that any businesses will incur significant expense beyond the expenses made necessary in order to comply with the statutory requirements.

5. Economic and technological feasibility:

Small businesses will not incur any additional costs or require technical expertise as a result of the implementation of these rules, beyond the requirements already placed upon small businesses which are required to comply with the statute.

6. Minimizing adverse economic impact:

DOS did not identify any alternatives which would provide relief for registrant contractors, at the same time, be less restrictive and less burdensome on them in terms of compliance.

7. Small business and local government participation:

No comment has been received to the enacted legislation, and no comment has yet been received from the anticipated registrant pool, or the public. Simultaneously with the adopting of the rulemaking as an emergency adoption, the proposed rulemaking has been posted on the Department's website, in an attempt to alert any interested parties, and to seek public comment.

Rural Area Flexibility Analysis

These rules do not impose any adverse impact on rural areas. The rules complement the statutory adoption of the new licensing category of document destruction contractors, such that the procedures for obtaining and renewing registration in this area of business employment will be clear and readily apparent to the public. The Department of State has not received any objection to these procedures from approved providers.

Job Impact Statement

The proposed rule will not have a substantial adverse affect on jobs and employment opportunities for licensed document destruction contractors insofar as Article 39-G of the General Business Law already requires that such qualifying companies register with the Secretary of State. This rule making merely codifies the procedure to obtain Department of State approval to offer and provide services as a registered document destruction contractor.

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

Standards of Practice and Code of Ethics for Home Inspectors

I.D. No. DOS-14-10-00008-P

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

Proposed Action: Addition of Subparts 197-4 and 197-5 to Title 19 NYCRR.

Statutory authority: Real Property Law, section 444-c

Subject: Standards of Practice and Code of Ethics for home inspectors.

Purpose: To adopt Standards of Practice and a Code of Ethics for home inspectors.

Substance of proposed rule (full text is posted at the following State website: www.dos.state.ny.us): Subpart 198-4 Code of Ethics for Home Inspectors

Section 197-4.1 Fundamental Rules

Home inspectors are expected to exhibit honesty and integrity and adhere to the provisions of Article 12-B of the Real Property Law and all

regulations. Home inspectors are also required to cooperate with investigations by the Department of State.

Section 197-4.2 Written Contracts

Home inspectors are required to provide written, pre-inspection agreements that clearly and fully describe the scope and cost of services to be provided. This agreement must contain a specific statement advising that home inspectors are licensed by the Department of State and describing the scope of services permitted by statute.

Section 197-4.3 Non-Disclosure

Home inspectors may not disclose the contents of a report without the prior consent of the client.

Section 197-4.4 Unlicensed and Unlawful Activity

Home inspectors may not knowingly permit or aid and abet any activity that is a violation of Article 12-B of the Real Property Law. Home inspections shall not determine the property's market value, property boundary lines, easements, limitation of property use, or the property's compliance with law.

Section 197-4.5 Competency

Home inspections shall conduct home inspections in compliance with the Standards of Practice and shall ensure that home inspections are performed by persons with competence.

Section 197-4.6 Written Reports

Home inspectors shall provide written reports containing the results of the home inspection. Reports shall not contain false or misleading information and shall describe the services provided.

Section 197-4.7 Conflicts of Interests

Home inspectors shall avoid conflicts of interest.

Section 197-4.8 Fraud, Misrepresentation and Dishonesty

Home inspectors shall not engage in this type of behavior.

Section 197-4.9 Promotion and Advertising

Advertisements shall be truthful and shall not be false, misleading or deceptive. Inspectors shall maintain copies of advertisements for one year following the advertisement's last publication.

Subpart 197-5 Standards of Practice for Home Inspectors

Section 197-5.1 Definitions

This section defines the following terms: alarm systems, automatic safety controls, central air conditioning, component, cross connection, dangerous or adverse situation, decorative, dismantle, engineering, engineering study, functional drainage, functional flow, further evaluation, household appliances, inspect, installed, normal operating controls, observable, observe, onsite water supply quantity, operate, primary windows and doors, readily accessible, readily operable access panel, recreational facilities, report, representative number, roof drainage systems, safe access, safety glazing, shut down, solid fuel heating device, structural component, system, technically exhaustive, under floor crawl space, unsafe and water supply quality.

Section 197-5.2 Purpose and Scope

The Standards of Practice establish minimum standards for home inspectors. Home inspectors may observe and report upon other systems and components not required by the Standards. Home inspectors may also provide limited reports that do not meet the minimum requirements of the Standards so long as the home inspection report describes the scope of work and services provided.

Section 197-5.3 Minimum Requirements

Home inspectors shall observe and report on the systems and components set forth in the Standards of Practice including those that are deficient, not functioning properly and/or unsafe. If a particular system or component is not observed, the inspection report shall so indicate.

Section 197-5.4 Site Conditions

Home inspectors shall observe and report on the site conditions set forth in this section. They are not required to report on fences and privacy walls or the health/condition of trees, shrubs and other vegetation.

Section 197-5.5 Structural Systems

Home inspectors shall observe and report on the structural systems set forth in this section.

Section 197-5.6 Exterior

Home inspectors shall observe and report on the exterior components and systems set forth in this section. They are not required to observe and report on the exterior components and systems delineated.

Section 197-5.7 Roof Systems

The roofing systems and components which home inspectors are and are not required to observe and report upon are set forth in this section.

Section 197-5.8 Plumbing Systems

The plumbing systems and components which home inspectors are and are not required to observe and report upon are set forth in this section.

Section 197-5.9 Electrical System

The electrical systems and components which home inspectors are and are not required to observe and report upon are set forth in this section.

Section 197-5.10 Heating System

The heating systems and components which home inspectors are and are not required to observe and report upon are set forth in this section.

Section 197-5.11 Air Conditioning System

The air conditioning systems and components which home inspectors are and are not required to observe and report upon are set forth in this section.

Section 197-5.12 Interior

The interior systems and components which home inspectors are and are not required to observe and report upon are set forth in this section.

Section 197-5.13 Insulation and Ventilation

The insulation and ventilation systems and components which home inspectors are and are not required to observe and report upon are set forth in this section.

Section 197-5.14 Fireplaces

The fireplace systems and components which home inspectors are and are not required to observe and report upon are set forth in this section.

Section 197-5.15 Attics

The attic systems and components which home inspectors are and are not required to observe and report upon are set forth in this section.

Section 197-5.16 Limitations and Exclusions

The systems, components and conditions upon which home inspectors are not required to report are set forth in this section.

Text of proposed rule and any required statements and analyses may be obtained from: Whitney Clark, NYS Department of State, Division of Licensing Services, Alfred E Smith Office Building, 80 South Swan Street, Albany, NY 12231, (518) 473-2728, email: whitney.clark@dos.state.ny.us

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

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

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

Regulatory Impact Statement

1. Statutory authority:

Real Property Law section 444-l requires the Department of State, to establish rules and regulations necessary to implement the provisions of Article 12-B of the Real Property Law. Section 444-c(6) authorizes the Home Inspection Council to recommend regulations to the Secretary of State including a Code of Ethics and Standards of Practice. In accordance with this statutory authority, the Department of State is proposing this rule making.

2. Legislative objectives:

Real Property Law, Article 12-B, requires the Department of State to license and regulate home inspectors. The intent of the statute, as described in the supporting bill memorandum, is consumer protection. The rule advances the legislative objectives by prescribing ethical and professional standards for home inspectors.

3. Needs and benefits:

The rule will apply to licensed home inspectors. A new Article 12-B of the Real Property Law was recently enacted in Chapter 461 of the Laws of 2004 to require the Department of State to license and regulate home inspectors. In pertinent part, section 444-c(6) of the statute authorizes the Home Inspection Council to recommend regulations to the Secretary of State including a Code of Ethics and Standards of Practice for licensed home inspectors. The rule making seeks to adopt these statutorily permitted regulations.

The New York State Home Inspection Council is an advisory board established by Article 12-B of the Real Property Law. See section 444-c. The Council is composed of home inspection licensees and members of the public. It advises the Department of State on the administration and enforcement of the provisions of Article 12-B of the Real Property Law and recommends regulations to implement the provisions of Article 12-B, including a Code of Ethics and Standards of Practice. See section 444-c(6)(c). The Council has recommended this rule making and reported to the Secretary that the same is crucial for the protection of consumers and for meeting the legislative intent behind the enactment of the amendments to Article 12-B. In developing the proposed Code of Ethics and Standards of Practice, the Department considered existing industry documents and solicited comments from licensed home inspectors and the public. Once adopted, the Code of Ethics and Standards of Practice will establish uniform standards of conduct for home inspectors throughout the State, thereby protecting consumers and clarifying for licensees their duties in providing home inspection services to clients.

4. Costs:

a. Costs to regulated parties:

This rule will not impose any costs to regulated parties.

b. Costs to the Department of State:

The rule does not impose any costs to the agency, the State or local governments for the implementation and continuation of the rule.

5. Local government mandates:

The rule does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or other special district.

6. Paperwork:

The rule requires licensees to maintain certain standard business records for a reasonable period of time to aid the Department of State in enforcing the provisions of the statute and regulations. The new record-keeping requirements are minimal and reasonable. For example, the proposed Code of Ethics requires home inspectors to maintain, for a period of one year following last publication, copies of all advertisements. In developing this standard, the Department sought to impose a reasonable retention period so as to meet the Department's needs to ensure consumer protection and the licensee's needs to not maintain voluminous copies of paperwork for an extended duration of time.

7. Duplication:

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

8. Alternatives:

The New York State Home Inspection Council formed a subcommittee to prepare the proposed Code of Ethics and Standards of Practice. In developing the proposed Code of Ethics and Standards of Practice, the Department considered existing industry documents. After the proposed regulations were approved by the entire Council, they were published on the Department of State's web-site for public review and comment. Numerous comments were received and considered. These comments were discussed with the Council at two open meetings, at which additional comments were received and entertained.

One topic which generated numerous comments was the proposal to require a disclaimer to the home inspection statement of services. Many licensed home inspectors felt that the language that was initially proposed would unduly limit the services which they provide to clients and alter the scope of services which home inspectors have historically provided to the public. In considering these comments, the Department considered alternative language that was suggested and revised the proposed language so as to address the expressed concerns.

Another comment considered was a suggestion to make the proposed Code of Ethics and Standards of Practice more closely resemble existing industry documents. Because the proposed Code of Ethics and Standards of Practice will be implemented by regulation, this comment could not be followed. In drafting the proposed regulations, however, the Department sought, in consultation with the Council, to adhere to existing industry standards of practice.

After due consideration of all suggested alternatives, the proposed regulations were modified as necessary and recommended to the Department of State by the Council. During the public comment period of this proposed rule, the Department of State and the New York State Home Inspection Council will receive and consider any additional recommended alternatives.

9. Federal standards:

There are no federal standards regulating the registration of real estate licensees. Consequently, this rule does not exceed any existing federal standard.

10. Compliance schedule:

Prospective licensees will be required to comply with the rule upon publication of the Notice of Adoption.

Regulatory Flexibility Analysis

1. Effect of rule:

The rule will apply to licensed home inspectors. Recently, a new Article 12-B of the Real Property Law was enacted in Chapter 461 of the Laws of 2004 to require the Department of State to license and regulate home inspectors. In pertinent part, the statute requires the Department of State, in consultation with the New York State Home Inspection Council, to adopt a Code of Ethics and Standards of Practice for home inspectors. In preparing the proposed regulations, the Department of State published the same for public review and comment. These comments were considered by the Department of State and the Council and the proposed documents were modified as necessary. The rule making proposes to adopt the statutorily required Code of Ethics and Standards of Practice and will apply to all licensed home inspectors.

The rule does not apply to local governments.

2. Compliance requirements:

The compliance requirements proposed by the rule are requirements that are consistent with Article 12-B of the Real Property Law, sound ethical practices and industry standards of practice. In preparing the proposed Code of Ethics and Standards of practice, the Department considered existing industry documents and solicited comments from licensed home inspectors and consumers. The rule proposes ethical principles and prescribes minimum standards of practice to be followed by home inspectors in furtherance of the statutory intent of consumer protection.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

Home inspectors will not need to rely on any new professional services

in order to comply with the rule. The recordkeeping requirements proposed by the rule are minimal and require the retention of standard business records for a reasonable amount of time so as to aid the Department of State with enforcement of the statute and regulations. The Code of Ethics and Standards of Practice merely prescribe ethical standards to be followed by home inspectors. These ethical requirements and professional standards have been drafted in consultation with the Home Inspection Council and after consideration of public comment. No comments were received indicating that licensees would require professional services to comply with the proposed regulations.

The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

The proposed rule making merely prescribes ethical and professional standards for licensed home inspectors and will not result in any foreseeable compliance costs.

5. Economic and technological feasibility:

Since the rule making merely prescribes ethical and professional standards for licensed home inspectors it will be technologically feasible for licensees to comply with the rule.

6. Minimizing adverse impact:

The Department of State does not foresee that this rule will have any adverse economic impact.

7. Small business participation:

Prior to proposing the rule, the Department of State published the proposed regulations on its website and solicited comments from the public. Many comments were received, including many from small businesses. After receiving and considering the public comments, the Department of State discussed the comments with the Home Inspection Council at two public meetings, at which additional comments were received and considered. After considering all public comments, the proposed regulations were revised as necessary. The Notice of Proposed Rule Making will be published by the Department of State in the State Register. The publication of the rule in the State Register will provide additional notice to local governments and small businesses of the proposed rule making. Additional comments will be received and entertained.

Rural Area Flexibility Analysis

A rural flexibility analysis is not required because this rule does not impose any adverse economic impact on rural areas or any reporting, recordkeeping or other compliance requirements that will have an adverse effect on public or private entities in rural areas.

The compliance requirements provided by the rule making have been developed by the Department of State in consultation with the New York State Home Inspection Council. The Council consists of members of the home inspection profession, including members from rural areas of the State. The compliance requirements proposed by the rule are requirements that are consistent with the statute, sound ethical practices and industry standards of practice. The reporting and record-keeping requirements proposed by the rule either mirror requirements set forth in the statute or require the maintenance of standard business records for a reasonable amount of time so as to assist the Department of State with enforcement of the statute and regulations.

Prior to proposing the rule making, the Department of State published the proposed Code of Ethics and Standards of Practice for public review and comment. No comments were received indicating that the proposed regulations would impose adverse impacts on rural areas. Accordingly, the Department of State does not foresee the proposed rule making have any adverse economic impacts on rural areas or any reporting, recordkeeping or other compliance requirements that will have an adverse effect on public or private entities in rural areas.

Job Impact Statement

This rule will not have any substantial adverse impact on jobs or employment opportunities for licensed home inspectors. A new Article 12-B of the Real Property Law was recently adopted to require the Department of State to license and regulate home inspectors. In pertinent part, section 444-c of the statute requires the Department of State to adopt a Code of Ethics and Standards of Practice for licensed home inspectors. The rule making seeks to adopt these statutorily required regulations.

The proposed Code of Ethics sets forth ethical guidelines and practices for licensed home inspectors while the Standards of Practice prescribes minimum professional standards to be followed by home inspectors in preparing home inspection reports.

Prior to proposing the rule making, the Department of State published both documents for public review and comment. The public comments were reviewed and the documents revised to address public concerns, including that certain provisions would negatively impact upon jobs and employment opportunities for home inspectors. These provisions were either removed or revised in consideration of the public comments received. As drafted, the rule will not have any foreseeable substantial adverse impact on jobs or employment opportunities.

Workers' Compensation Board

EMERGENCY RULE MAKING

Independent Livery Driver Benefit Fund

I.D. No. WCB-14-10-00003-E

Filing No. 311

Filing Date: 2010-03-19

Effective Date: 2010-03-21

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

Action taken: Amendment of section 300.1(a)(9); and addition of Part 309 to Title 12 NYCRR.

Statutory authority: Executive Law, section 160-eee; and Workers' Compensation Law, sections 2(9), 18-c(2)(a) and 117

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

Specific reasons underlying the finding of necessity: Chapter 392 of the Laws of 2008 was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. If the livery base is not a member of, or ineligible to join, the Independent Livery Driver Benefit Fund (ILDBF), then the livery base is deemed the employer of the driver pursuant to WCL § 18-c (5). If the livery base is a member of the ILDBF, then the driver is an independent contractor and he or she is not covered by workers' compensation insurance for all injuries or illnesses while working. Instead the livery driver is covered by no-fault automobile insurance for most injuries and workers' compensation benefits are only awarded for deaths, injuries resulting from crimes and certain catastrophic injuries arising from covered services performed by independent livery drivers. To provide the workers' compensation benefits in the limited situations, the legislation created the ILDBF to purchase a workers' compensation insurance policy paid for through annual payments from the member livery bases.

Since Chapter 392 was enacted the Board has been working to find a carrier willing to write the policy for the ILDBF. Due to the fact that it is not clear what the liability will be it took almost 18 months to secure an insurance carrier willing to write the policy at an affordable price. During this time the Board reviewed claims of livery drivers that have been established to determine an appropriate presumptive wage as required by Workers Compensation Law § 2(9). The Board also worked with the livery industry and the Board of Directors of the ILDBF to develop appropriate criteria that livery bases must meet to be members of the ILDBF.

Workers' Compensation Law (WCL) § 18-c (5) provides that a livery base that is not a member of the ILDBF is deemed the employer of any livery driver it dispatches for purposes of the WCL. This means that a livery base that does not join the ILDBF must purchase and maintain a full workers' compensation insurance policy covering all drivers that it dispatches. The cost to a livery base for a full workers' compensation policy is approximately \$1,400.00 per car. A base that dispatches 25 cars will be required to pay approximately \$35,000 in premium for the drivers plus premium for any other employees.

In order to join the ILDBF, livery bases must submit an affirmation sworn under penalties of perjury that it meets the prescribed criteria. WCL § 18-c (2) directs the Chair to set by regulation the criteria the livery base must meet. If the Chair fails to act the statute provides default criteria which almost all bases cannot swear are true. For example, the statutory criteria provide that the livery base does not own any of the liveries dispatched. Almost all of the livery bases own one or more of the liveries. In addition, some of the criteria conflict with rules of the Taxi and Limousine Commission that licenses the livery bases and drivers.

The statute does not address the process for terminating membership in the ILDBF. The rule provides such process. It also sets the presumptive wage that will be the basis of the indemnity benefits injured livery drivers will receive.

This rule must be adopted on an emergency basis to ensure that livery bases can submit the required affirmation and join the ILDBF. Without this rule all livery bases would be required to obtain a full workers' compensation policy which most cannot afford.

Subject: Independent Livery Driver Benefit Fund.

Purpose: To set criteria for membership in Independent Livery Driver Benefit Fund, termination from the Fund and presumptive wage.

Substance of emergency rule: The proposed rule amends paragraph (9) of subdivision (a) of section 300.1 to modify the definition of "Prima Facie Medical Evidence" and adds new Part 309 to implement specific provisions regarding the Independent Livery Driver Benefit Fund (ILDBF).

Section 300.1(a) provides definitions of terms. The proposed rule modifies the definition of "Prima Facie Medical Evidence" in paragraph (9) to account for the special requirements for claims of independent livery drivers. Specifically, for independent livery drivers Prima Facie Medical Evidence means a medical report referencing an injury covered the ILDBF as provided in Executive Law § 160-ddd or, if the injury results from a crime, a medical report referencing an injury and a police report stating that a crime occurred.

A new Part 309 to govern the implementation of the ILDBF.

Section 309.1 provides definitions of terms used in Part 309. Among the definitions are "covered services," "crime," "dispatch," "governing Taxi and Limousine Commission," "independent livery base," "independent livery driver," "livery," "livery base," "livery driver," and "New York State Average Weekly Wage."

Section 309.2 provides rules for who may be members of the ILDBF and how membership is terminated. Subdivision (a) of this section states that only livery bases designated by the Workers' Compensation Board (Board) may join the ILDBF. Subdivision (b) of this section provides that a livery base will only be designated by the Board as an independent livery base if it submits the affirmation required by WCL § 18-c (2) attesting that the base meets the criteria set forth in subdivision (c) of § 309.2 and if it provides written notice in the stated time periods of any inaccuracies in or changes to the information in the affirmation. Subdivision (c) of this section requires a livery base to meet the following criteria:

(1) The livery base is not classified by the governing Taxi and Limousine Commission as a black car base or luxury limousine base and is not a member of the New York Black Car Operators' Injury Compensation Fund, Inc.;

(2) All livery drivers dispatched by the livery base provide and determine their own clothing;

(3) All livery drivers dispatched by the livery base set their own hours and days of work;

(4) All livery drivers choose which dispatches or fares to accept, and no livery driver suffers any consequence by the livery base for failing to respond to its dispatch, except that every livery driver must comply with all requirements of his or her governing taxi and limousine commission regarding acceptance of dispatches, fares, trips, passengers and destinations and a livery base may temporarily deny access to its dispatches for failing to respond to a dispatch in violation of local and state laws and governing taxi and limousine commission rules and regulations regarding refusing dispatches;

(5) All livery drivers may affiliate with one or more other livery bases, except if prohibited by rules or regulations of the governing taxi and limousine commission;

(6) Either the livery driver or livery base may terminate their affiliation at any time, except that a livery base must terminate its relationship with the livery driver in accordance with any rules and regulations of the governing taxi and limousine commission;

(7) The livery base is not, directly or indirectly, including through any director, shareholder, partner, member or officer, the owner or registrant of more than fifty (50) percent of the liveries dispatched by the livery base;

(8) The livery base is not, directly or indirectly, including through any director, shareholder, partner, member or officer, paying or participating in paying for the purchase, maintenance, repair, insurance, licensing, or fuel, of more than fifty (50) percent of the liveries dispatched by the livery base;

(9) No livery driver dispatched by the livery base receives an Internal Revenue Service form W-2 from such base, or is subject to the withholding of any federal income taxes by the livery base, except a livery base that is the owner or registrant of less than fifty (50) percent of the liveries dispatched by that livery base meets the criteria of paragraph (10) of this subdivision;

(10) If the livery base is the owner or registrant of less than fifty (50) percent of the liveries dispatched by that livery base and it issues an Internal Revenue Service form W-2 to a livery driver or livery drivers, or withholds any federal income taxes for a livery driver or livery drivers, such livery base provides workers' compensation coverage for that livery driver or those livery drivers that is separate from the Fund; and

(11) The livery base does not impose any fines or penalties or both on any livery drivers, except the livery base may impose fines or penalties or both on a livery driver for violating the rules and regulations of the governing taxi and limousine commission regarding the conduct of livery drivers while performing their duties as livery drivers and in order to recover the cost of any fines or penalties or both imposed on the livery base by the governing taxi and limousine commission due to the behavior of that livery driver that violated the rules and regulations of the governing taxi and limousine commission.

Subdivision (d) of § 309.2 sets forth the procedures to terminate the membership of a livery base in the ILDBF.

Subdivision (e) of § 309.2 sets forth that any livery base not designated as an independent livery base shall be deemed the employer of any driver it dispatches and will be responsible for providing workers' compensation coverage for such drivers.

Section 309.3 sets forth requirements for livery drivers. Subdivision (a) of this section states that an independent livery driver is a livery driver who is licensed to drive a livery by the appropriate governing taxi and limousine commission and is dispatched by an independent livery base with which he or she is affiliated. This subdivision provides an independent livery driver injured during a dispatch by an independent livery base may be entitled to benefits in accordance with Insurance Law Article 51 and is not entitled to workers' compensation benefits except as set forth in Workers' Compensation Law § 160-ddd and § 309.3(a)(3). Paragraph (3) of § 309.3(a) sets forth when an independent livery driver is entitled to workers' compensation benefits from the ILDBF. Paragraph (4) of this subdivision makes clear that an independent livery driver is not entitled to workers' compensation benefits from the ILDBF if he or she was not performing covered services or was in violation of the rules and regulations of the governing taxi and limousine commission regarding the solicitation or picking up of passengers at the time of death, crime or injury. Paragraph (5) of this subdivision requires independent livery drivers to file all claims in New York with the Board. Paragraph (6) requires an independent livery driver to provide written notice to the ILDBF in accordance with Workers' Compensation Law § 18. Finally, paragraph (7) sets the presumptive wage for independent livery drivers as \$13,000 annual wage for an average weekly wage of \$250. The presumptive wage may be rebutted by the submittal of competent evidence. Further the presumptive wage will increase each year on July 1st by the percentage increase in the New York State Average Weekly Wage.

Pursuant to subdivision (b) of § 309.3 a livery driver that is not an independent livery driver is the employee of the livery base with which he or she is affiliated.

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 June 16, 2010.

Text of rule and any required statements and analyses may be obtained from: Cheryl M Wood, NYS Workers' Compensation Board, 20 Park Street, Room 400, Albany, NY 12207, (518) 408-0469, email: regulations@wcb.state.ny.us

Summary of Regulatory Impact Statement

1. Statutory authority: Chapter 392 of the Laws of 2008 amended the Executive Law and WCL to establish clear rules for determining when livery drivers in New York City, Westchester County and Nas-

sau County are employees or independent contractors of livery bases. In addition, the law creates a fund to provide independent contractor livery drivers with workers' compensation benefits in certain circumstances where no fault automobile insurance fails to provide any or sufficient coverage.

Executive Law § 160-eee authorizes the Chair of the Workers' Compensation Board (Board) to adopt regulations necessary to effectuate the provisions of Executive Law Article 6-G.

Workers' Compensation Law (WCL) § 18-c (2) (a) directs the Chair to set by regulation the criteria livery bases must meet in order to be considered an independent livery based eligible to join the ILDBF.

The last paragraph of WCL § 2 (9) provides that the Chair shall set by regulation the amounts livery drivers are presumptively deemed to receive in annual wages.

WCL § 117 authorizes the Chair to make reasonable rules consistent with the WCL and Labor Law.

2. Legislative objectives: Chapter 392 of the Laws of 2008 was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. If the livery base is not a member of, or ineligible to join, the ILDBF, then the livery base is deemed the employer of the driver pursuant to WCL § 18-c (5). If the livery base is a member of the ILDBF, then the driver is an independent contractor and he or she is not covered by workers' compensation insurance for all injuries or illnesses while working. Instead the livery driver is covered by no-fault automobile insurance for most injuries and workers' compensation benefits are only awarded for deaths, injuries resulting from crimes and certain catastrophic injuries arising from covered services performed by independent livery drivers. The legislation created the ILDBF to purchase a workers' compensation insurance policy paid for through annual payments from the member livery bases.

3. Needs and benefits: The purpose of this rule is to implement specific provisions of Chapter 392. While Executive Law Article 6-G and the amendments to the WCL set forth a framework to govern the ILDBF and the benefits it will pay, the amendment to 12 NYCRR § 300.1 and the addition of Part 309 provide the detail and clarification necessary to actually implement the legislation by setting forth: 1) necessary definitions; 2) the criteria to determine which livery bases may join the ILDBF; 3) clarification on when and which benefits are payable from the ILDBF; and 4) the presumptive average weekly wage. Such detail and clarification is necessary to assist the insurance carrier writing the policy, the bases in determining if it is eligible to join the ILDBF, and the drivers in understanding what action they need to take to obtain benefits.

Currently § 300.1 defines "Prima Facie Medical Evidence" as "a medical report referencing an injury, which includes traumas and illness." This definition is too broad for claims by independent livery drivers as it encompasses all injuries and not just those listed in Executive Law § 160-ddd and or those caused by the commission of a crime. This rule amends the definition of "Prima Facie Medical Evidence" to encompass such provisions.

Executive Law § 160-aaa sets forth the statutory definitions relating to the ILDBF such as "independent livery driver," "covered services," "independent livery base," "livery," "livery driver," and "livery base." Section 309.1 sets forth necessary definitions to properly understand Part 309 and to clarify the implementation of Chapter 392.

In order to be designated as an independent livery base, WCL § 18-c(2) requires an officer or director of the base to submit an affirmation sworn under penalty of perjury attesting that the criteria set by the Chair in regulation are true with respect to the base. In the absence of regulations setting forth the criteria, the statute lists default criteria.

After consulting with the livery industry and the appropriate TLCs, it was determined that the livery bases cannot meet all of the statutory default criteria, in part due to the rules of the TLCs. In addition the statutory criteria does not comport with how the livery industry operates. The criteria in § 309.2(c) has been drafted to reflect how the livery industry operates. By prescribing the criteria livery bases must meet through regulation, it assures that there are owners of livery bases who can attest to the truth of such criteria and join the ILDBF.

In addition to setting forth the criteria that the livery base must attest to in the affirmation, § 309.2 requires livery bases to provide the Board and ILDBF with written notice of any inaccuracies in the information in the affirmation within 5 business days of discovery or knowledge of the inaccuracies and to provide written notice of any changes in the information in the affirmation within 10 business days of the changes. These requirements are necessary so the Board may take action to revoke a base's status as an independent livery base if it is violation of the criteria set forth in WCL § 18-c(2) and § 309.2(c) as required by WCL § 18-c(3).

Article 6-G fails to set forth the procedures and timeframes for termination of a livery base's membership in the ILDBF. Subdivision (d) of § 309.2 covers such termination by setting forth the process when the livery base fails to make the required payments to the ILDBF, when the livery base must leave the ILDBF because it is no longer designated as an independent livery base, and when a livery base decides to leave the ILDBF.

Section 309.3 provides necessary clarification and detail for livery drivers. For example, this section clarifies that a livery driver is an independent livery driver when he or she is appropriately licensed and dispatched by a livery base that is a member of the ILDBF. It also clarifies that the ILDBF only has jurisdiction over claims filed in New York with the Board and that written notice of an injury, illness or death must be provided to the ILDBF in accordance with WCL § 18.

As statutorily mandated § 309.3 sets forth the presumptive wages for livery drivers. After reviewing numerous cases in which a livery driver was found to be an employee and an average weekly wage was set, the Board determined that it was usually set at \$250 per week, unless tax returns or other records showed otherwise. Because this is the rate that is set in existing cases for livery drivers, the rule sets \$250 as the presumptive wage. To ensure the presumptive wage is current, the regulation also provides for yearly adjustments in accordance with the percentage increase in the New York State Average Weekly Wage.

4. Costs: The rule imposes minimal costs on regulated parties. Livery bases will incur minimal costs to complete and submit the affirmation form. However, this cost is actually imposed by statute. If a livery base needs to notify the Board and ILDBF of any inaccuracies in the information in the affirmation or any changes to such information, it will incur some cost in preparing a letter or email to the Board and ILDBF and will incur postage if the notice is sent through the United States Postal Service. A livery base will also incur minimal costs when sending written notice to the Chair, ILDBF and governing TLC that it is terminating its membership in the ILDBF. Livery bases that join the ILDBF will pay \$260 per car but if such bases do not join the ILDBF the cost of a full workers' compensation policy is approximately \$1,400 per car. Clearly the minimal costs imposed by this rule are more than offset by the savings from joining the ILDBF.

The ILDBF will incur minimal costs when it sends written notice to a livery base and the Chair that the base's membership will be terminated for non-payment or revocation of its designation as an independent livery base. The ILDBF will incur costs if it challenges the applicability of the presumptive wage for a particular driver.

Livery drivers will incur minimal costs when complying with this rule. If a livery driver is injured he or she must provide written notice to the ILDBF in accordance with WCL § 18. This section of the WCL requires injured or ill workers to submit written notice to their employer, in this case the ILDBF, within 30 days. Livery drivers who are injured may incur costs to file a claim for benefits with the Board. Livery drivers may incur some cost if they challenge that the presumptive wage is appropriate. In such cases the drivers will have to produce income tax and business records to support a higher wage.

This rule imposes no costs on local governments as the rule does not impose any requirements on them.

The Board will incur costs to approve the affirmations for membership in the ILDBF and provide written notice of the charges and conduct a hearing with regard to possible revocation of a livery base's designation as an independent livery base. These activities will be performed by existing staff and incorporated into existing procedures.

5. Local government mandates: This rule does not impose any mandates or requirements on local governments.

6. Paperwork: This rule reiterates the statutory requirement that livery bases must submit an affirmation sworn under penalties of perjury that the base meets the criteria to be designated an independent livery base and eligible to join the ILDBF. The rule also requires livery bases to submit written notice of any inaccuracies or changes in the information in the affirmation. If a livery base wants to leave the ILDBF it must submit written notice to the Chair, ILDBF and governing TLC.

The ILDBF is required to send written notice to a livery base when its membership in the ILDBF is terminated for failing to pay the annual payment or its designation as an independent livery base is revoked.

Livery drivers must provide written notice to the ILDBF of an injury or death. There is no set form for this notice and only needs to include limited detail. Livery drivers who seek to have their wages set higher than the presumptive wage must submit tax and business records proving such higher wages.

The Board is required to send written notice to a livery base of the charges which form the basis for its decision to seek the revocation of the base's designation as an independent livery base.

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

8. Alternatives: One alternative would be to modify the definition of "covered services" to require the independent livery base that dispatched the livery driver to provide documentation of the dispatch and sworn testimony and limit it to a reasonable time after the driver discharges a passenger. The definition would further define reasonable time to be twenty minutes. These modifications to the statutory definition were not incorporated into the rule as they improperly limit the term.

Another alternative would be to fail to clarify that claims for benefits from the ILDBF must be filed in New York. This alternative was rejected and the clarification included to ensure drivers know that their claims must be filed in New York. If drivers filed claims in other states, such states may award benefits other than as allowed in Executive Law § 160-ddd and § 309.3(a)(3).

A third alternative would be to eliminate all criteria to join the ILDBF so all bases could join. This alternative was rejected as the intent was to address those situations where the status of the driver is unclear. Some livery bases own all of the cars that the drivers operate. In such a case the base is the employer and it is inappropriate for such bases to be part of the ILDBF. However, there are livery bases that own some of the vehicles used by the drivers that should be able to join the ILDBF. Therefore, the regulation modifies the statutory provision in § 18-c (2) (i) to allow ownership up 50% of the vehicles.

9. Federal standards: There are no federal standards that apply.

10. Compliance schedule: The regulated parties can comply with these requirements upon adoption of the rule.

Regulatory Flexibility Analysis

1. Effect of rule: This rule only governs livery drivers, livery owners and livery bases in New York City (NYC), Westchester County and Nassau County. Therefore, this rule has no impact on small businesses or local governments outside these three areas. Further, the rule only governs livery drivers and bases so it does not impose any requirements or mandates on local governments in NYC, Westchester County or Nassau County. If the rule did govern local governments, it would only govern the NYC Taxi and Limousine Commission (TLC), the Westchester County TLC, the Nassau County TLC and the local governments in Nassau County that license livery bases, livery drivers and/or liveries. The rule will affect the approximately 800 livery bases in the three locations and the owners and drivers of the approximately 25,000 liveries. It is estimated that the majority of livery bases, drivers and livery owners are small businesses. Finally, the rule effects the Independent Livery Driver Benefit Fund (ILDBF) which is a statutorily created non-profit.

2. Compliance requirements: This rule imposes reporting and recordkeeping requirements on small businesses. First the rule reiterates the statutory requirement that livery bases must submit an affirmation sworn under penalties of perjury that the base meets the criteria

to be designated an independent livery base and eligible to join the ILDBF. The rule also requires livery bases to submit written notice of any inaccuracies or changes in the information in the affirmation. There is no specific form for the notice, but it does have to be filed within the specified time periods. These requirements are necessary so the Board may take action to revoke a base's status as an independent livery base if it is in violation of the criteria set forth in WCL § 18-c (2) and § 309.2(c). If a livery base that is a small business wants to leave the ILDBF it must submit written notice to the Chair, ILDBF and governing TLC. This notice is necessary to ensure that the ILDBF does not accept liability for any further claims; the Board is informed that the livery base is now required to have full workers' compensation coverage for all drivers, and the TLC ensures the base complies with its rules.

The ILDBF is required to send written notice to a livery base when its membership in the ILDBF is terminated for failing to pay the annual payment or its designation as an independent livery base is revoked. The notice mirrors the required notice when a workers' compensation insurance carrier cancels coverage of an employer.

Livery drivers or their dependents must provide written notice to the ILDBF of an injury or death. There is no set form for this notice and only needs to include limited detail. Livery drivers who are small businesses who seek to have their wages set higher than the presumptive wage must submit tax and business records proving such higher wages.

3. Professional services: Small businesses will not need any professional services to comply with this rule. The affirmation the livery bases must complete is a form created by the Board and does not require any professional services to complete. The same is true of the written notices the livery bases and livery drivers who are small businesses must submit.

4. Compliance costs: The proposed rule will impose minimal costs on small businesses. Livery bases will incur minimal costs to complete and submit the affirmation form. However, this cost is actually imposed by statute. WCL § 18-c (2) (a) requires livery bases, including those that are small businesses, to submit an affirmation sworn under penalty of perjury in order to be designated as an independent livery base. If a livery base needs to notify the Board and ILDBF of any inaccuracies in the information in the affirmation or any changes to such information, it will incur some cost in preparing a letter or email to the Board and ILDBF and will incur the cost of postage if the notice is sent through the U. S. Postal Service. A livery base will also incur minimal costs when sending written notice to the Chair, ILDBF and governing TLC that it is terminating its membership in the ILDBF. The cost will be for postage for the notice to the three entities. Livery bases that join the ILDBF will pay \$260 per car but if such bases do not join the ILDBF the cost of a full workers' compensation policy is approximately \$1,400 per car. Clearly the minimal costs imposed by this rule are more than offset by the savings from joining the ILDBF.

The ILDBF will incur minimal costs when it sends written notice to a livery base and the Chair that the base's membership will be terminated for non-payment or revocation of its designation as an independent livery base. The ILDBF will incur costs if it challenges the applicability of the presumptive wage for a particular driver. Such costs would include obtaining documentation as to the actual wage the driver earned.

Livery drivers, including those that are small businesses, will incur minimal costs when complying with this rule. If a livery driver is injured he or she must provide written notice to the ILDBF in accordance with WCL § 18. This section of the WCL requires injured or ill workers to submit written notice to their employer, in this case the ILDBF, within 30 days. However, the Board may excuse the lack of notice if there is sufficient reason that the notice could not be given, the employer had actual knowledge, or the employer is not prejudiced by the lack of notice. The notice can be hand delivered or mailed. The cost is mainly postage if mailed and is incurred by all workers injured on the job. Livery drivers who are injured may incur costs to file a claim for benefits with the Board. Injured workers may file claims by calling a toll free number and providing information over the telephone, by completing and submitting the form online, or by complet-

ing a paper form and mailing it to the Board. Only if the livery driver completes and mails the paper form will he or she incur costs. Livery drivers may incur some cost if they challenge that the presumptive wage is appropriate. In such cases the drivers will have to produce income tax and business records to support a higher wage. Livery drivers, who are small businesses, may hire a legal representative with respect to a claim for workers' compensation benefits. Such livery drivers will not incur any out of pocket costs as WCL § 24 requires legal representatives to be paid fees awarded by the Board and paid out of any indemnity benefits paid to the livery driver. The acceptance of a fee directly from a livery driver is a misdemeanor.

This rule imposes no costs on local governments as the rule does not impose any requirements on them.

5. Economic and technological feasibility: It is economically and technologically feasible for small businesses to comply with this rule. The affirmation is a form prescribed by the Board and is simple to complete. There are no required forms or formats for the written notices livery bases must submit. Livery drivers who are small businesses can provide the written notice and complete the claim form for benefits without any assistance. However, livery drivers may retain a legal representative with respect to their claim who may assist them when completing the claim form and seeking a higher wage than the presumptive wage. Pursuant to Executive Law § 160-ddd requires the ILDBF to purchase an insurance policy, which it has done. The insurance carrier will handle the claims and payment of benefits and bill and collect the annual payment from the livery bases.

6. Minimizing adverse impact: The rule was drafted to ensure that livery bases would be able to join the ILDBF and livery drivers could access benefits when injured or killed within the provisions of Executive Law § 160-ddd. To minimize adverse impact on both the livery bases and drivers the regulation does not modify the definition of "covered services." It was suggested that "covered services" be defined to require the independent livery base that dispatched the injured livery driver to provide documentation of the dispatch and sworn testimony and limit it to a reasonable time after the driver discharges a passenger. The definition would further define reasonable time to be twenty minutes. These modifications to the statutory definition were not incorporated into the rule as they improperly limit the term. The definition of "covered services" for the ILDBF is almost the same as the definition for that same term for the Black Car Fund. The Appellate Division, Third Department in *Aminov v. N.Y. Black Car Operators Injury Comp. Fund*, 2 A.D.3d 1007 (3d Dept. 2003) specifically found that the time waiting for a dispatch is covered. Therefore, modifying the definition as suggested would not be appropriate. Further defining "reasonable time" as twenty minutes has no reasonable basis.

To minimize adverse impacts the rule clarifies that claims for benefits from the ILDBF must be filed in New York. This clarification ensures livery drivers know that their claims must be filed in New York. If drivers filed claims in other states, such states may award benefits other than as allowed in Executive Law § 160-ddd and § 309.3(a)(3). For example, benefits could be awarded for injuries that do not meet the statutory requirements or set an average weekly wage above the presumptive wage without further evidence. When the insurance carrier writing the policy to cover these claims set the cost of the policy it was based on benefits only being paid as provided in statute and regulation. Any awards above the statutory or regulatory levels would cause the premium for the policy to increase, potentially beyond the means of the bases.

The rule sets criteria bases must meet to join the ILDBF to minimize the adverse impact of the default criteria provided in WCL § 18-c (2). Without the criteria in the rule livery bases that own any liveries would be unable to join the ILDBF. While it is inappropriate for the livery base to own all or a majority of the liveries, as such a base would clearly be the employer; there are livery bases that own some of the vehicles used by the drivers that should be able to join the ILDBF. Therefore, the regulation modifies the statutory provision in § 18-c (2) (i) to allow ownership up 50% of the vehicles.

The criteria in the rule account for the rules of the governing TLCs to eliminate adverse impacts from conflicts between the rules and the

criteria in the statute. The criteria in WCL § 18-c(2) (iv) provides that livery drivers choose which dispatches or fares to accept, however the governing TLCs have rules prohibiting drivers from refusing to accept certain fares. If this criterion was not modified in the rule, no base would be able to submit the affirmation sworn under penalties of perjury.

7. Small business and local government participation: The rule was drafted after discussions with groups representing the livery bases, the ILDBF Board of Directors, the NYC TLC and the Westchester County TLC. Drafts of the regulation were shared with representatives of livery bases, the ILDBF Board of Directors, the NYC TLC, Westchester County TLC and Nassau County TLC.

Rural Area Flexibility Analysis

This rule implements provisions of Chapter 392 of the Laws of 2008, which was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. In addition, the law creates a fund to provide independent contractor livery drivers with workers' compensation benefits in certain circumstances where no fault automobile insurance fails to provide any or sufficient coverage. The rule only applies to livery bases, livery drivers, livery owners and taxi and limousine commissions in New York City, Westchester County and Nassau County. The seven affected counties do not have populations less than 200,000 and therefore do not fall within the definition of a rural area as provided in Executive Law § 481(7). As the rule does not apply to any rural areas a Rural Area Flexibility Analysis is not required.

Job Impact Statement

The proposed rule will not have an adverse impact on jobs. This rule implements provisions of Chapter 392 of the Laws of 2008, which was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. In addition, the law creates the Independent Livery Driver Benefit Fund (ILDBF) to provide independent contractor livery drivers with workers' compensation benefits in certain circumstances where no fault automobile insurance fails to provide any or sufficient coverage. This rule ensures that livery bases are eligible and can afford to join the ILDBF so that the bases can continue to operate. This rule also implements Chapter 392 so that livery drivers who are killed, injured due to a crime or suffer a catastrophic injury as provided in Executive Law § 160-ddd can obtain workers' compensation benefits.

EMERGENCY RULE MAKING

Pharmacy and Durable Medical Equipment Fee Schedules and Requirements for Designated Pharmacies

I.D. No. WCB-14-10-00004-E

Filing No. 314

Filing Date: 2010-03-22

Effective Date: 2010-03-22

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 June 19, 2010.

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. All regulated parties will incur some cost to purchase the Red Book by Thomson Media. 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 use the Red Book by Thomson Media to determine the average wholesale price (AWP) in order to reimburse pharmacies, pharmacy benefit managers and third-party payers. In addition, self-insured local governments must 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 and a single source for the AWP. 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 will be required to use the most current version of the Red Book published by Thomson Media to determine the average wholesale price of a prescription. In addition they 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. The regulated parties will need to purchase the Red Book from Thomson Media, which is available in a book format from multiple sellers for approximately \$55.00 and can be purchased in an electronic format directly from Thomson. 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 approximately \$55.00. 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 use the most current version of the Red Book published by Thomson Media to determine the average wholesale price of a prescription. They will also need to file objections to prescription drug bills within a forty five day time period or they 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 certifica-

tion 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. The regulated parties will need to purchase the Red Book from Thomson Media, which is available in a book format from multiple sellers for approximately \$55.00 and can be purchased in an electronic format directly from Thomson. 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. By choosing one source for the AWP disputes about the correct AWP are greatly reduced.

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.