

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 for the Aging

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Expanded In-Home Services for the Elderly Program (EISEP) Consumer Directed In-Home Services

I.D. No. AGE-43-10-00017-P

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

Proposed Action: Amendment of sections 6654.15, 6654.16 and 6654.17 of Title 9 NYCRR.

Statutory authority: Elder Law, sections 201(3) and 214

Subject: Expanded In-Home Services for the Elderly Program (EISEP) Consumer Directed In-Home Services.

Purpose: The purpose of the proposed rule is to incorporate the Consumer Directed In-Home Services delivery model into EISEP.

Substance of proposed rule (Full text is posted at the following State website: www.aging.ny.gov/News/Index.cfm): The purpose of this rule is to allow consumers the opportunity to manage their own in-home services under the Expanded In-home Service for the Elderly Program (EISEP). The proposed amendments to 9 NYCRR sections 6654.15, 6654.16 and 6654.17 incorporate a consumer directed in-home services delivery model into EISEP.

The amendments to § 6654.15 add consumer directed in-home services eligibility criteria and definitions. Specifically, the amendments address the requirements an individual or their representative must meet in order to participate in the consumer directed in-home services delivery model. In addition, several terms have been defined in order to provide the regulated parties with clear direction as to what is meant when each of the defined terms are used in the regulations. Some of these terms are new to

EISEP (e.g., Consumer, Consumer Representative, Consumer Directed In-home Services and Fiscal Intermediary) and others are not, though they had not been defined previously (e.g., In-home Services, In-home Services Agency and In-home Services Worker).

Section 6654.16 of the regulations was amended so that the consumer directed in-home services delivery model could be incorporated into the EISEP regulations. Specifically, NYSOFA clearly delineated those tasks that are the responsibility of the case manager in traditional EISEP but which is the responsibility of the consumer or the consumer representative under consumer directed in-home services. This section of the regulations also articulates that while case managers will work with and assist consumers and/or consumer representatives who receive services under the consumer directed in-home services model, responsibility for the interviewing, selecting, scheduling, training, supervising and dismissing the in-home services worker lays with the consumer or the consumer representative and not the case manager. NYSOFA also made several technical amendments in this section that brought the regulations up to date with current practice.

NYSOFA also amended § 6654.17 of the regulations to incorporate the consumer directed in-home services model into EISEP. Again, the major focus of the changes in this section of the regulations was to identify the tasks and responsibilities of the consumer and/or consumer representative under consumer direction, including those that are the responsibility of the agency that is providing home care in the traditional services delivery model. NYSOFA also clearly establishes training responsibilities for all parties involved in consumer directed in-home services. The amendments to this section also establish the role and responsibilities of the fiscal intermediary, an entity responsible for many of the administrative tasks including financial transactions. NYSOFA clarified when a criminal background check is required and the type of criminal background check that is required. NYSOFA also made some technical amendments to this section to bring the regulations in line with current practice and enhance the consistency with the New York State Department of Health's (DOH) regulations for the Medicaid funded Personal Care Program and regulations for licensed home care services agencies were also updated to reflect current practice. Among the amendments in this category are the changes to the guidelines regarding the qualifications needed to be a supervisor under EISEP. Section 6654.17 provides guidance as to the type and content of records that must be maintained by the fiscal intermediary that is providing services in a consumer directed program. The amendments also incorporate by reference the DOH's regulations regarding criminal background checks, health status and training of in-home services workers. NYSOFA's regulations have always mirrored the DOH's requirements regarding these three subjects and incorporating the DOH's requirements into the EISEP regulations by reference will facilitate regulatory compliance for regulated parties.

Text of proposed rule and any required statements and analyses may be obtained from: Stephen Syzdek, New York State Office for the Aging, Two Empire State Plaza, Albany, NY 12223-1251, (518) 474-5041, email: stephen.syzdek@ofa.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory Authority – Section 201(3) of the New York State Elder Law allows the Director of the New York State Office for the Aging with the advice of the advisory committee for the aging to promulgate, adopt, amend or rescind rules and regulations necessary to carry out the provisions of Article II of the Elder Law.

New York State Elder Law Section 214 governs the administration of the Expanded In-home Services for the Elderly Program (EISEP).

2. Legislative Objectives – The legislative objectives of the statute that created EISEP are to increase the availability of in-home support services to non-Medicaid eligible elderly persons in need of assistance and improve

access to and management of appropriate care through the use of comprehensive case management. In addition, the legislative intent of EISEP is to foster the use of non-medical supports to avoid the inappropriate use of more costly forms of care at home and in institutional settings; improve the targeting of aging network resources to those most in need and make optimal use of informal caregivers; and assist elderly clients to remain in their homes and communities. One of the ten main objectives found in the Older Americans Act (OAA) is to enable older people to secure equal opportunity to the full and free enjoyment of the following: freedom, independence and the free exercise of individual initiative in planning and managing their own lives, full participation in the planning and operation of community-based services and programs provided for their benefit, and protection against abuse, neglect and exploitation (Subsection 10 of Section 101 of the OAA).

3. Needs and Benefits – The purpose of this rule is to allow consumers the opportunity to manage their own in-home services under EISEP.

Consumer direction is a service delivery model that provides consumers with more control and choice in the delivery of the care that they receive than the traditional models of care. Consumer direction has many variations and the scope of what is included within the construct of consumer direction varies from program to program. However, all consumer directed programs stem from the idea that individuals with needs should be empowered to make decisions about their care. Depending on the parameters established by a program, consumers select, train, schedule, supervise and dismiss their in-home services workers; decide what services and goods to spend their budget on and which providers or workers (other than for in-home services) to hire and when work will be performed.

Consumer direction is the service delivery model that is strongly encouraged by both the Administration on Aging (AoA) and the Centers for Medicare and Medicaid Services. By allowing consumers to direct their own care, consumers are more satisfied, have better outcomes and tend to stay out of nursing homes for a longer period of time. By staying out of nursing homes, consumers can age in the least restrictive setting and protect their assets by not having to spend down to Medicaid in order to be able to afford institutional care. Furthermore, the State of New York saves money as consumers either delay or avoid relying on Medicaid to pay for their long term care. While not mandating that states implement consumer directed care into their programs, the AoA is strongly encouraging it in the OAA. In addition, to further encourage states to develop consumer directed service delivery models, the AoA is offering several federal grant programs that expect states to continue to provide consumer directed services after the federal grant money ends. New York State is participating in two such grant programs.

EISEP services are provided to seniors through the Area Agencies on Aging (AAA's). Under the traditional EISEP model, case managers use the assessment and care planning process to determine the type, amount and the delivery method for the services to be provided. In-home services are provided by an agency, which is usually either a licensed home care services agency or a certified home health agency. Under the traditional model of providing home care services, EISEP consumers have the opportunity to provide input and voice their desires regarding their care and services.

Under the consumer directed in-home services delivery model, consumers will have much more control, authority and decision-making capacity regarding the home care services that they receive. They will determine who will provide their home care, how the care will be provided and when it will be provided. They will establish the worker's schedule, deciding when each task will be performed. The consumer will do so within the context of the assessment and care plan that is developed by the case manager with the consumer. However, the participation of the consumer in this process will be stronger and their role enhanced as a strength based and person centered approach is adopted.

By creating the consumer directed in-home services delivery model under EISEP, New York State continues to move toward the AoA's objective that states incorporate consumer directed models of service delivery into their programs. Moving in this direction allows for innovative, creative, flexible and cost saving options to meet the needs of older New Yorkers.

AAA's will not be mandated to implement consumer directed in-home services under EISEP. Each AAA will decide if, when and how to implement consumer direction. However, it is anticipated that over time all of New York State's AAA's will choose to implement the consumer directed model. It should also be noted that the traditional home care services delivery model remains the same and unchanged by these regulations. AAA's and clients will be free to continue to provide and receive traditional home care services.

NYSOFA conducted extensive outreach when developing these regulatory amendments. An internal workgroup was established to work on incorporating consumer direction into the EISEP regulations. The

proposed rulemaking was presented to all of New York State's AAA Directors at the NYS4A's Leadership Institute held October 2009 at which time feedback was solicited from the AAA Directors and their staffs. NYSOFA also established a stake holders group that consisted of several agencies and associations whose primary focus is the delivery of in-home services and consumer directed in-home services. In addition, this stake holders group included AAA Directors, directors of EISEP Case Management agencies, Advocacy Groups and members of the Governor's Advisory Committee. This workgroup worked in conjunction with NYSOFA's internal workgroup to develop this proposed rule making. NYSOFA presented two separate drafts to the stake holders group for review and comment. The first draft also was discussed in a meeting with the stake holders prior to their initial review. NYSOFA next presented the proposed rulemaking to the Governor's Advisory Committee and NYSOFA's Advisory Committee for the Aging. The advisory committee indicated that it fully supports the proposed changes to the EISEP regulations.

This rule making amends three sections (9 NYCRR § 6654.15, 6654.16 and 6654.17) of the EISEP regulations to accommodate consumer direction.

The amendments to § 6654.15 add consumer directed in-home services eligibility criteria and definitions. As a result of extensive outreach to interested parties, NYSOFA learned that the eligibility criteria and terms needed to be expanded and clarified. As a result, NYSOFA clearly lays out who is eligible to participate in consumer directed in-home services and defines key terms so that regulated parties can better understand the regulations.

Section 6654.16 of the regulations was amended so that the consumer directed in-home services delivery model could be incorporated into the case management regulations. Specifically, NYSOFA clearly delineated those tasks that are the responsibility of the case managers in traditional EISEP but which are the responsibility of the consumer or the consumer representative under consumer directed in-home services. NYSOFA also made several technical amendments in this section that made the regulations more reflective of the way that EISEP is currently administered.

NYSOFA also amended § 6654.17 to incorporate the consumer directed in-home services model into the in-home services regulations. Again, the major focus of these changes was to identify the tasks and responsibilities of the consumer and/or consumer representative under consumer direction, including those that are usually the responsibility of the agency that is providing home care in the traditional services delivery model. NYSOFA also clearly establishes training responsibilities for all parties involved in consumer directed in-home services. These amendments also establish the role and responsibilities of the fiscal intermediary, an entity responsible for many of the administrative tasks including financial transactions. NYSOFA has also made some technical amendments to this section to more accurately reflect the current administration of EISEP. The amendments also incorporate by reference the New York State Department of Health's (DOH) regulations regarding criminal background checks, health status and training of in-home services workers. NYSOFA's regulations have always mirrored the DOH's requirements regarding these three subjects and NYSOFA has decided that incorporating the DOH's requirements into the EISEP regulations will facilitate regulatory compliance for regulated parties.

4. Costs – This proposed rule imposes no additional costs to the regulated parties, NYSOFA or state and local governments to implement and to continue to comply with this proposed rule. It should be noted that as mandated by the new 9 NYCRR section 6654.19(d), EISEP continues to be the payer of last resort and any services that are able to be provided through another source or program may not be provided through EISEP.

5. Paperwork – The proposed rule does not change any of the reporting requirements, forms or other paperwork from what is already required of the AAAs administering the program. However, for those AAA's that do decide to undertake consumer directed in-home services there will be some additional paperwork such as authorizations and releases that will need to be completed.

6. Local Government Mandates – The proposed rule does not impose any program, service, duty or responsibility upon any city, county, town, village, school district or other special district other than what is already required of the AAAs administering the program.

7. Duplication – There are no laws, rules or other legal requirements that duplicate, overlap or conflict with this proposed rule.

8. Alternatives – NYSOFA's internal workgroup discussed several significant programmatic alternatives during the development of this proposal. Some in the community of aging services providers believe that older adults will not have their needs met and be at greater risk of fraud and abuse under the consumer direction service model. NYSOFA rejected these notions as studies continue to demonstrate that older adults who manage their own care are more satisfied with the services that they receive, effective managers, less likely to be subjected to fraud and/or abuse at the hands of their caregivers and remain out of long term care fa-

cilities for a longer period of time. As a result, NYSOFA made the decision to allow for consumer directed in home services to be provided under EISEP. NYSOFA also considered limiting who could participate in the consumer directed in-home services program. Again, some are of the opinion that older adults with physical or mental disabilities should not be allowed to direct their own care. After discussing this concern with advocacy groups and other state units on aging that have implemented consumer directed care, NYSOFA believes that as long as the AAA delivering services is able to confirm that the consumer or the consumer's representative is able to assume responsibility for managing the consumer's care, these individuals should be given an opportunity to attempt to do so. Additionally, there were suggestions that the regulations place too much responsibility on the fiscal intermediary. NYSOFA, in drafting these amendments, discovered that there are varying degrees to which fiscal intermediaries involve themselves in the administrative duties and/or the support they provide to consumers who direct their own care. As a result, NYSOFA has rejected suggestions that limit the role of the fiscal intermediary and has decided that the level of involvement of the fiscal intermediary will be determined by the AAA and particular fiscal intermediary involved in the consumer's care plan.

9. Federal Standards – This rule does not exceed Federal standards.

10. Compliance Schedule – AAAs will be able to comply with this proposed rule immediately after promulgation.

Regulatory Flexibility Analysis

This proposed rule will not have an adverse economic impact on small businesses or local governments nor will it impose reporting, recordkeeping or compliance requirements above those already required under EISEP on small businesses or local governments. This proposed rule simply changes the way in which EISEP is administered. The proposed rule only affects the AAA's, in-home services providers and the clients served by EISEP by allowing consumers or their representatives to direct and manage the in-home services portion of their own care plans.

Rural Area Flexibility Analysis

This proposed rule will not have an adverse economic impact on public or private entities in rural areas nor will it impose reporting, recordkeeping or compliance requirements above those already required under EISEP on public or private entities in rural areas. This proposed rule simply changes the way in which EISEP is administered. The proposed rule only affects the AAA's, in-home services providers and the clients served by EISEP by allowing consumers or their representatives to direct and manage the in-home services portion of their own care plans.

Job Impact Statement

The New York State Office for the Aging has determined that this proposed rule will not have a substantial adverse impact on jobs. This proposed rule simply changes the way in which EISEP is administered. The proposed rule only affects the AAA's, in-home services providers and the clients served by EISEP by allowing consumers or their representatives to direct and manage the in-home services portion of their own care plans.

Office of Alcoholism and Substance Abuse Services

EMERGENCY RULE MAKING

Incident Reporting in Chemical Dependency and Problem Gambling Treatment Provider Services

I.D. No. ASA-43-10-00002-E

Filing No. 1042

Filing Date: 2010-10-06

Effective Date: 2010-10-06

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

Action taken: Repeal of Part 306 and addition of Part 836 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.07, 19.09, 19.21, 19.40, 22.07, 32.01, 32.02, 32.07, 33.16, 33.23 and 33.25; L. 2008, ch. 323, section 323

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

Specific reasons underlying the finding of necessity: Pursuant to changes in the Social Services Law and Mental Hygiene Law, the agency is required to promulgate rules to establish reporting requirements; section 19 of Chapter 323 of the Laws of 2008 authorizes emergency adoption.

Subject: Incident reporting in chemical dependency and problem gambling treatment provider services.

Purpose: Is to ensure compliance with state and federal laws regarding reporting of incidents.

Substance of emergency rule: The proposed new regulation for "Incident Reporting in OASAS Certified or Funded Services" replaces the current regulation. Statutory amendments to the Mental Hygiene Law (Chapter 24 of the Laws of 2007, known as "Jonathan's law") and to the Social Services Law relating to reporting cases of patient abuse or child abuse and neglect are incorporated into the new regulation. The intent of the regulation is to establish and clarify minimum standards for incident management policies required of any chemical dependence or problem gambling service provider certified, licensed, funded or operated by the Office of Alcoholism and Substance Abuse Services (OASAS or "Office").

The regulation establishes guidelines for providers' amendment and implementation of required incident reporting policies developed based on each provider's treatment modality, community location, and client age. Each provider's policy must include an incident management plan to include establishing an incident review committee, provisions for periodic staff training about procedures when an incident occurs, reporting and recording requirements.

Incident management plans are intended to prevent the recurrence of incidents involving and affecting OASAS service providers in order to enhance the quality of care and provide every individual receiving services with humane treatment and a safe environment. The new regulation establishes parameters for a record keeping and reporting process. The regulation identifies "serious incidents" that occur within a facility and must be reported to the Office and to other regulatory entities as required by law such as the Commission on Quality of Care and Advocacy for Persons with Disabilities (CQC), the Statewide Central Register of Child Abuse and Maltreatment (Statewide Central Register), as distinguished from incidents which may be recorded internally by the service provider and made available for review by the Office on request. In this context, the new regulation also clarifies the relationship between federal confidentiality law (42 CFR Part 2) and other state reporting requirements.

The regulation identifies serious incidents as those which are or appear to be a crime under state law. The new regulation incorporates specific provisions responsive to recent changes in the Mental Hygiene Law and the Social Service Law that establish procedures consistent with those laws in the area of child abuse, neglect, missing patients, and patient abuse. The regulation address all incident reports in addition to those listed. The regulation outlines an internal incident reporting process, an external incident reporting process, establishing a special review committee, recordkeeping, and the duty to cooperate with inspections by the Statewide Central Register and the CQC to the extent permitted by federal law.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 3, 2011.

Text of rule and any required statements and analyses may be obtained from: Patricia Flaherty, OASAS, 1450 Western Ave., Albany, New York 12203, (518) 485-2317, email: patriciaflaherty@oasas.state.ny.us

Regulatory Impact Statement

14 NYCRR Part 306, Incidents at Facilities for Alcoholism and Alcohol Abuse, will be repealed and a new Part 836 will replace it. The new Part 836 is submitted for public review and comment. Part 836 will require all providers to amend policies and procedures by which each provider will record and/or report to required authorities all incidents as defined in the regulation and responsive to most recent applicable state and federal laws.

Amendments to the Mental Hygiene Law ("Jonathan's Law, Chapter 24 of the laws of 2007) and the Social Service Law required the Office to promulgate regulations that establish procedures consistent with those laws in the area of child abuse, neglect, missing

patients, and patient abuse. The regulation provides guidance for an internal incident reporting process and requirements for an external review committee; recordkeeping; and to the extent permitted and required by law, compliance with federal confidentiality laws (42 CFR Part 2) protecting drug and alcohol treatment patients and state laws requiring reporting of certain incidents of abuse to the NY Statewide Central Register of Child Abuse and Maltreatment (“Statewide Central Register”), and cooperation with inspections by the Office and the Commission on Quality of Care and Advocacy for Persons with Disabilities (CQC).

1. Statutory Authority:

(a) Section 19.07(c) of the Mental Hygiene Law charges the Office with the responsibility for seeing that persons in need of treatment for chemical dependence receive high quality care and treatment, and that the personal and civil rights of persons receiving care, treatment and rehabilitation are adequately protected.

(b) Section 19.07(e) of the Mental Hygiene Law authorizes the Commissioner (“Commissioner”) of the Office to adopt standards including necessary rules and regulations pertaining to chemical dependence services.

(c) Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

(d) Section 19.21(b) of the Mental Hygiene Law requires the Commissioner to establish and enforce certification, inspection, licensing and treatment standards for alcoholism, substance abuse and chemical dependence facilities and staff.

(e) Section 19.40 of the Mental Hygiene Law authorizes the Commissioner to issue operating certificates for the provision of chemical dependence services.

(f) Section 22.07(c) of the Mental Hygiene Law authorizes the Commissioner to promulgate rules and regulations to ensure that the rights of individuals who have received, and are receiving, chemical dependence services are protected.

(g) Section 32.01 of the Mental Hygiene Law authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32 of the Mental Hygiene Law.

(h) Section 32.02 of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary to ensure quality services to those suffering from problem gambling.

(i) Section 32.07(a) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations to effectuate the provisions and purposes of Article 32 of the Mental Hygiene Law.

(j) Section 33.16(a)(6) and 33.16(b)(4) of the Mental Hygiene Law defines a “qualified person” as an individual receiving services, his or her legal guardian, or a parent, spouse or adult child who has authority to provide consent for care and treatment.

(k) Section 33.23 of the Mental Hygiene Law requires directors of facilities certified by OASAS to provide telephone notification to a “qualified person” of an incident involving a client within 24 hours of the initial report.

(l) Section 33.25 of the Mental Hygiene Law requires facilities to release records to “qualified persons”, upon request, relating to allegations and investigations of client abuse or mistreatment.

(m) Section 412-a of the Social Services Law defines “abused child in residential care” and “neglected child in residential care” and includes, within the definition of “residential care” care provided to a child in an inpatient or residential setting certified by OASAS and specifically designated by such Office as serving youth.

(n) Section 45.19 of the Mental Hygiene Law requires reporting of deaths and allegations of abuse or mistreatment to the Commission on Quality of Care and Advocacy for Persons with Disabilities (hereinafter, “CQC”).

(o) Article 6, Title 6 of the Social Services Law requires the reporting of suspected abuse or maltreatment of persons under 18 years of age to the New York Statewide Central Register of Child Abuse and Maltreatment (hereinafter, “Statewide Central Register”).

(p) Section 413 of the Social Services Law identifies persons required to report cases of suspected child abuse or maltreatment to the Statewide Central Register.

(q) Section 415 of the Social Services Law requires suspected child abuse or maltreatment to be reported immediately by telephone and to be followed by a written report on a form supplied by the commissioner of the office of children and family services, and further describes procedures for reporting.

The relevant sections of the Mental Hygiene Law cited above authorize the Commissioner of OASAS to regulate the provision of services to patients, how such chemical dependency services are delivered, and to establish standards for the provision of such services and qualifications of staff. Sections of the Mental Hygiene Law known as “Jonathan’s Law” also require recordkeeping and reporting of certain incidents of abuse to qualified persons. Provisions of the Social Services law comprise reporting requirements relative to alleged abuse of children in residential care. The proposed regulation will affect the administration of services by requiring each provider to establish updated policies and procedures regarding incident reporting that reflect the requirements of “Jonathans Law” and the reporting of child abuse and neglect in residential care.

Establishing policy and procedures with regard to incident reporting will establish a standard for all facilities which is in the best interest of the client providing better health care and a stronger basis of recovery from addiction.

2. Legislative Objectives:

Chapter 558 of the Laws of 1999 (Mental Hygiene Law Article 32) requires the promulgation of rules and regulations to regulate and assure the consistent high quality of services provided within the state to persons suffering from chemical abuse or dependence, their families and significant others, as well as those who are at risk of becoming chemical abusers. Section 19 of Chapter 323 of the laws of 2008 relating to abused children in residential care, permits the Office to promulgate and adopt rules and regulations on an emergency basis for the purpose of implementing the provisions of such act. Establishing a rule requiring treatment providers to create a policy and procedure for incident reporting and clearly identifying the responsibilities of each provider is a best clinical practice which will enhance the treatment experience and is in the best interest of the clients and their families.

3. Needs and Benefits:

The proposed amendments are necessary to enable clinical staff to provide a safe environment where incidents are addressed uniformly and consistentl with a clear delineation of reporting responsibilities. Such a policy reflects a best clinical practice for providers of chemical dependency services. Incident reporting is already required of treatment providers pursuant to 14 NYCRR Part 306. However, in addition to requirements to comply with recent statutory amendments, uniformity and consistency may be lacking in the current regulation. The proposed new regulation will require all providers of chemical dependency services to become compliant with the statutory requirements for the reporting of a crime, child abuse or neglect, sexual misconduct and abuse. The purpose of the regulation is to establish guidelines for providers to create a policy setting out all of the responsibilities of providers, compilation of information relevant to reporting an incident, and external reporting procedures such as reporting to the Statewide Central Register, the Office, and the CQC. Each facility/provider shall establish an incident reporting policy consistent with this regulation and consistent with state and federal law.

4. Costs:

a. Costs to regulated parties: Providers are regulated parties. Costs incurred by providers will be minimal, consisting of additional paper and printing materials, and staff time necessary to comply with amendments to state law. Because treatment providers already have an incident reporting policy and are informed of requirements of statutory changes, existing policies will only need to be updated pursuant to this regulation.

b. Costs to the agency, state and local governments: There will be no additional costs to counties, cities, towns or local districts.

5. Local Government Mandates:

There are no new mandates or administrative requirements placed on local governments. However, where local governments operate programs, they may incur minimal costs as indicated in #4 above.

6. Paperwork:

Part 836 will require some additional paperwork for certified and/or funded providers in order to ensure that utilization review requirements are met. However, since utilization control is presently required and providers are already familiar with utilization control record keeping, it is not expected that new record keeping requirements will be excessive.

7. Duplications:

There is no duplication of other state or federal requirements.

8. Alternatives:

An alternative of establishing a uniform policy and procedure at the agency level required of all providers was explored and it was decided that each provider is in a unique situation and should establish policies and procedure aligned with the special needs and environment of their patients and location. The Alcoholism and Substance Abuse Providers (ASAP) of NYS distributed this proposed regulation to all of its members and requested comment. The comments received were addressed and some changes were made. Additionally, these regulations were also sent to the Council of Local Mental Hygiene Directors, Greater New York Hospital Association (GNYHA), the Committee on Methadone Program Administrators, Inc, and Outreach Development Corp., for comment. The GNYHA commented that these regulations might be duplicative with the Department of Health requirements for Article 28 providers. OASAS responded that we incorporated a clause allowing for an addendum in these cases for anything required by the Office that is not currently required by the Department of Health. This regulation has also been reviewed and commented on by CQC and OTDA. Recommendations from both agencies regarding reporting of alleged child abuse and neglect have been incorporated into the proposed regulation.

9. Federal Standards:

42 CFR Part 2 applies to this regulation in that it specifies the confidentiality rules applicable in chemical dependency services which have to be considered for external incident reporting. Most reporting requirements in state law are preempted by the federal statute, with the exception of deaths and initial reports of alleged child abuse and neglect.

10. Compliance Schedule:

Providers are expected to be in compliance with this regulation upon its emergency adoption.

Regulatory Flexibility Analysis

Types / Numbers:

The proposed new Part 836 will impact all approximately 1550 providers of chemical dependence or problem gambling services certified, licensed, funded or operated by the Office of Alcoholism and Substance Abuse Services (OASAS or "Office").

Reporting / Recordkeeping, Professional Services:

Regardless of type of program, location (rural, urban or suburban), or operation by local governments or small businesses, it is anticipated that there will be minimal impact on reporting and recordkeeping and no need for engagement of professional services because providers are already required to maintain an incident reporting policy and comply with current utilization reviews that include such policies.

Costs:

Regardless of type of program, location or size of business (rural, urban or suburban), or operation by local governments or small businesses, providers may incur minimal costs for paper and staff time in developing amended policies and procedures and becoming accustomed to new procedures. There will be no impact on costs of local governments beyond what may be incurred if a local government is also a provider of services.

Economic / Technological Feasibility:

Regardless of type, size and location of business (rural, urban or suburban), or operation by local governments or small businesses, the proposed amendments require no new equipment or technological improvements.

Minimizing Adverse Economic Impacts:

The proposed amendments were presented to the OASAS Executive Team and Advisory Council and then distributed for comment to members of the provider/stakeholder community. Comments from all, including speculation about economic impact, have been addressed and incorporated into the final regulation wherever necessary.

Participation of Affected Parties:

In anticipation of an emergency promulgation, the proposed amendments were presented to the OASAS Executive Team and Advisory Council and then distributed for comment to members of the provider/stakeholder community and to other state regulatory agencies. The Alcoholism and Substance Abuse Providers (ASAP) of NYS distributed this proposed regulation to all of its members and requested comment; the comments received were addressed and some changes were made. Additionally, these regulations were also sent to the Council of Local Mental Hygiene Directors, Greater New York Hospital Association (GNYHA), the Committee on Methadone Program Administrators, Inc, and Outreach Development Corp., for comment. The GNYHA commented that these regulations might be duplicative with the Department of Health requirements for Article 28 providers. OASAS responded that we incorporated a clause allowing for an addendum in these cases for anything required by the Office that is not currently required by the Department of Health. This regulation has also been reviewed and commented on by CQC and OCFS. OASAS worked with counsel from both agencies to incorporate their recommendations regarding definitions and reporting of alleged child abuse and neglect and children in residential facilities have been incorporated into the proposed regulation.

Rural Area Flexibility Analysis

Types / Numbers:

The proposed new Part 836 will impact all (currently 1550) providers of chemical dependence or problem gambling services certified, licensed, funded or operated by the Office of Alcoholism and Substance Abuse Services (OASAS or "Office"). Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Reporting / Recordkeeping, Professional Services:

Regardless of type of program, location (rural, urban or suburban), or operation by local governments or small businesses, it is anticipated that there will be minimal impact on reporting and recordkeeping and

no need for engagement of professional services because providers are already required to maintain an incident reporting policy and comply with current utilization reviews that include such policies.

Costs:

Regardless of type of program, location or size of business (rural, urban or suburban), or operation by local governments or small businesses, providers may incur minimal costs for paper and staff time in developing amended policies and procedures and becoming accustomed to new procedures. There will be no impact on costs of local governments beyond what may be incurred if a local government is also a provider of services.

Economic / Technological Feasibility:

Regardless of type, size and location of business (rural, urban or suburban), or operation by local governments or small businesses, the proposed amendments require no new equipment or technological improvements.

Minimizing Adverse Economic Impacts:

The proposed amendments were presented to the OASAS Executive Team and Advisory Council and then distributed for comment to members of the provider/stakeholder community. Comments from all, including speculation about economic impact, have been addressed and incorporated into the final regulation wherever necessary.

Participation of Affected Parties:

In anticipation of an emergency promulgation, the proposed amendments were presented to the OASAS Executive Team and Advisory Council and then distributed for comment to members of the provider/stakeholder community and to other state regulatory agencies. The Alcoholism and Substance Abuse Providers (ASAP) of NYS distributed this proposed regulation to all of its members and requested comment; the comments received were addressed and some changes were made. Additionally, these regulations were also sent to the Council of Local Mental Hygiene Directors, Greater New York Hospital Association (GNYHA), the Committee on Methadone Program Administrators, Inc, and Outreach Development Corp., for comment. The GNYHA commented that these regulations might be duplicative with the Department of Health requirements for Article 28 providers. OASAS responded that we incorporated a clause allowing for an addendum in these cases for anything required by the Office that is not currently required by the Department of Health. This regulation has also been reviewed and commented on by CQC and OCFs. OASAS worked with counsel from both agencies to incorporate their recommendations regarding definitions and reporting of alleged child abuse and neglect and children in residential facilities have been incorporated into the proposed regulation.

Job Impact Statement

No change in the number of jobs and employment opportunities is anticipated as a result of the proposed amendments because the amendments either clarify or streamline provider actions which will not be eliminated or supplemented. Treatment providers will not need to hire additional staff or reduce staff size; the proposed changes will not adversely impact jobs outside of the agency; the proposed changes will not result in the loss of any jobs within New York State.

Department of Audit and Control

NOTICE OF ADOPTION

Submission and Approval of State Authority Contracts to the Comptroller

I.D. No. AAC-09-10-00013-A

Filing No. 1058

Filing Date: 2010-10-12

Effective Date: 2010-10-27

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

Action taken: Addition of Part 206 to Title 2 NYCRR.

Statutory authority: NYS Constitution, section 5, art. X; State Finance Law, section 8(14); and Public Authorities Law, section 2879-a

Subject: Submission and approval of State Authority Contracts to the Comptroller.

Purpose: To set forth standards and procedures for submission and approval of State Authority contracts to the Comptroller.

Text of final rule: Part 206 is added to Title 2 of NYCRR as follows:

PART 206

Comptroller Approval of Contracts Made by State Authorities.

(Statutory Authority: N.Y. Const. Art. X, § 5; State Finance Law § 8 (14); and Public Authorities Law § 2879-a)

§ 206.1 Purpose. (a) The purpose of this Part is to set forth: (1) the standards for the Comptroller's determination of state authority contracts and contract amendments subject to the Comptroller's approval; (2) the criteria for the Comptroller's approval of such contracts and contract amendments; (3) the responsibilities of state authorities with respect to the filing of exempt contracts and exempt contract amendments, certain eligible contracts and certain eligible contract amendments as defined in this Part; and (4) the procedural requirements for overall compliance with section two thousand eight hundred seventy nine-a of the Public Authorities Law.

(b) Nothing contained in this Part shall diminish, or in any way adversely affect, the Comptroller's existing authority to approve state authority contracts where such approval is otherwise required, or provided for, by law or by resolution of a state authority, including, but not limited to, contracts made "for" the State by a state authority. A contract is made "for" the State by a state authority where the state authority is entering into a contract with a third party, but the primary role of the state authority is to act on behalf of the State or a state agency. Such third-party contracts are contracts for the State and are subject to the Comptroller's approval under section one hundred twelve of the State Finance Law notwithstanding any of the thresholds or criteria contained in this Part.

§ 206.2 Definitions. For purposes of this Part:

(a) *Competitive procurement* shall mean a procurement where a state authority has:

(1) (i) published notice of the contract opportunity consistent with any statutory publication requirement including, but not limited to, article four-c of the Economic Development Law, or, where there is no express statutory requirement for published notice, in the procurement opportunities newsletter or another newspaper, journal or periodical which is reasonably designed to give notice of the contract opportunity to all offerers capable of providing the requisite product, service or work to be performed; and further that such notice, wherever published, is reasonably designed to solicit bids, proposals or offers from all qualified offerers in response thereto; or

(ii) provided notice of the contract opportunity by soliciting bids, proposals or offers through some other method expressly authorized by statute, where such statute has deemed such other method to be competitive; and

(iii) awarded on the basis of a balanced and fair evaluation and selection method developed before the receipt of offers or bids; that is rational, objective and utilized a quantified scoring system, which evaluated all relevant factors such as cost (revenue), technical merits, or qualifications, and was applied equally to all qualified offerers.

(b) *Contract* shall mean any written agreement including, but not limited to: any agreement for the acquisition or sale of goods or services of any kind; public work, construction, alterations, or improvements to public facilities; grant contracts; employment contracts; revenue or concession contracts; the exchange of personal or real property; the exchange of services; or any combination thereof. For purposes of this Part, a purchase order shall be deemed to be a contract unless the purchase order is issued pursuant to:

(1) an existing state authority contract; or

(2) an Office of General Services centralized contract where neither the contract nor the relevant procurement guidelines require a mini-bid or similar competitive process.

(c) *Eligible contract* shall mean any contract executed by a state authority on or after March 1, 2010, other than an exempt contract, where the aggregate consideration proposed for exchange (including all reasonably anticipated renewals and amendments) may reasonably be valued in excess of one million dollars and such contract either: (1) shall be paid in whole or in part with monies appropriated by the State, either directly to a state authority or to a state agency which pays the money to a state authority; or (2) was or shall be awarded on a single source basis, a sole source basis or pursuant to any other method of procurement that is not a competitive procurement. For purposes of determining the value of a contract that has no term or is perpetual in nature, the contract shall be deemed to have a term of five years.

(d) *Eligible contract amendment* shall mean:

(1) any modification to an eligible contract; or

(2) any modification other than an exempt contract amendment to a contract executed by a state authority where such modification was executed on or after March 1, 2010, and where the aggregate consideration under the contract as amended may reasonably be valued in excess of one million dollars and:

(i) the contract as amended will be paid in whole or in part with monies appropriated by the State, either directly to a state authority or to a state agency which pays the money to a state authority; or

(ii) the contract was originally awarded on a noncompetitive basis; or

(iii) the contract was originally awarded on the basis of a competitive procurement, but the modification was neither contemplated nor provided for in the solicitation for such competitive procurement.

(e) *Executed or execution* shall mean that the contract or contract amendment has been signed as required by the contractor and the state authority.

(f) *Exempt contract* shall mean any contract or contract amendment, executed by a state authority on or after March 1, 2010, that would otherwise be an eligible contract or eligible contract amendment, but is exempt pursuant to subdivision three of section two thousand eight hundred seventy nine-a of the Public Authorities Law because it is:

(1) for the issuance of commercial paper or bonded indebtedness including, but not limited to: bond purchase agreements, standby bond purchase agreements, letters of credit, firm remarketing agreements, forward purchase agreements, revolving credit agreements and other similar liquidity facility agreements, broker-dealer agreements, remarketing agent agreements, auction agent agreements, interest rate swaps and other similar hedging agreements; provided, however, that this category of exempt contracts shall not include:

(i) contracts with the state providing for the payment of debt service subject to an appropriation;

(ii) professional or banking services agreements such as bond counsel agreements, financial advisor agreements and trustee agreements, and

(iii) custodial service agreements;

(2) entered into by an entity established under article ten-c of the Public Authorities Law and is for:

(i) projects approved by the Department of Health or the Public Health Council in accordance with article twenty-eight, thirty-six or forty of the Public Health Law or article seven of the Social Services Law;

(ii) projects approved by the Office of Mental Health, the Office for People with Disabilities, or the Office of Alcoholism and Substance Abuse Services in accordance with article sixteen, thirty-one or thirty-two of the Mental Hygiene Law;

(iii) services, affiliations or joint ventures for the provision or administration of health care services or scientific research;

(iv) payment for direct health care services or goods used in the provision of health care services; or

(v) participation in group purchasing arrangements;

(3) for the procurement of goods, services or both goods and services to meet emergencies arising from unforeseen causes or to effect

repairs to critical infrastructure that are necessary to avoid a delay in the delivery of critical services that could compromise the public welfare;

(4) for the purchase or sale of energy, electricity or ancillary services made by an authority on a recognized market for the goods, services or commodities in question in accordance with standard terms and conditions of purchase or sale at a market price;

(5) for the purchase, sale or delivery of power or energy, fuel, costs and services ancillary thereto, or financial products related thereto, with a term of less than five years; or

(6) for the sale or delivery of power or energy and costs and services ancillary thereto for economic development purposes pursuant to title one of article five of the Public Authorities Law or article six of the Economic Development Law.

(g) *Exempt Contract Amendment* shall mean a modification to any contract where such modification would otherwise be an eligible contract amendment, but is for an exempt purpose as defined in subparagraphs (1) through (6) of paragraph (f) of this section.

(h) *Monies appropriated by the state* shall mean:

(1) monies from the state treasury or any of its funds, or any of the funds under its management pursuant to law; or

(2) the proceeds of bonds, where such bonds shall be paid in whole or in part with monies from the state treasury or any of its funds, or any of the funds under its management pursuant to law.

(i) *Procurement record* shall mean documentation of the decisions made and the approach taken by the state authority in the procurement process.

(j) *Single source* shall mean a procurement in which although two or more offerers can supply the required goods or services, the state authority, upon written findings setting forth the material and substantial reasons therefore, may award a contract or amendment to a contract to one offerer over the other.

(k) *Sole source* shall mean a procurement in which only one offerer is capable of supplying the required goods or services.

(l) *State authority* shall mean a public authority or public benefit corporation created by or existing under any law of the state of New York, other than an interstate or international authority or public benefit corporation, including subsidiaries of such public authority or public benefit corporation, where one or more members serve by virtue of holding a civil office of the state, or where one or more members are appointed by the governor except where all such appointments by the governor occur specifically upon the recommendation of a local government official.

(m) *Subsidiary* shall mean a corporate body or company:

(1) having more than half of its voting shares owned or held by a state authority; or

(2) having a majority of its directors, trustees or members in common with the directors, trustees or members of a state authority or as designees of a state authority.

(n) *Written determination* shall mean notification provided in writing either in paper or electronic format of the Comptroller's approval or disapproval of any contract submitted for approval by a state authority.

(o) *Written notice* shall mean notification provided in writing either in paper or electronic format.

§ 206.3 Annual Reporting Requirement for Eligible Contracts and Eligible Contract Amendments.

(a) No later than 30 days before the end of the state authority's fiscal year, every state authority shall submit to the Office of the State Comptroller a report, in such form as prescribed by the Comptroller, which includes a description of every eligible contract and eligible contract amendment which the state authority reasonably anticipates entering into in the following fiscal year; provided, however, that the following eligible contract amendments shall not be included in such reports: (1) construction contract change orders that do not exceed \$100,000; and (2) agreements to extend the duration of a contract for which there is no change in contract amount.

(b) The description for each anticipated eligible contract or eligible

contract amendment specified in the report shall include, but not be limited to, the following elements: (1) the purpose of the eligible contract or eligible contract amendment; (2) the anticipated value of the eligible contract or eligible contract amendment; (3) whether it is anticipated that the contract will be awarded on a competitive basis, and, if not, the basis upon which the contract will be awarded; (4) the anticipated date for the release of the solicitation, if applicable, or execution of the eligible contract or eligible contract amendment; and (5) the source of funding for the eligible contract or eligible contract amendment.

(c) (1) The state authority shall provide written notice to the Office of the State Comptroller of:

(i) any eligible contract or eligible contract amendment not previously reported, together with all information required by paragraph (b) of this section;

(ii) any deletions from the list of eligible contracts or eligible contract amendments previously reported; or

(iii) any significant change in the information provided in the reports submitted by the state authority pursuant to this section. For purposes of this paragraph, a change shall be deemed significant if it affects the method of award of a contract or increases the anticipated value of a contract or contract amendment by more than 25 percent.

(2) Such written notice shall be submitted no later than thirty days after the state authority has identified the need for such addition or significant change. However, such notice must be given at least ten days prior to the release of a solicitation related to such addition or significant change in the event of a competitive procurement, or to the execution of a contract related to such addition or significant change in the event of a noncompetitive award.

(d) The Comptroller may waive the requirements of this section for any state authority that submits eligible contracts to the Comptroller for approval pursuant to an existing law or resolution.

§ 206.4 Determination of eligible contracts and eligible contract amendments subject to the Comptroller's approval.

(a) (1) The Comptroller shall periodically determine which eligible contracts and eligible contract amendments shall be subject to the Comptroller's approval.

(2) Once the Comptroller has determined that any eligible contract, eligible contract amendment, category of eligible contracts or category of eligible contract amendments shall be subject to approval by the Comptroller, the Comptroller shall provide written notice of such determination to the affected state authorities as soon as practicable.

(3) Such written notice shall include instructions for submitting any such contracts or contract amendments and the period of time during which the state authority is required to submit the contracts and/or contract amendments.

(4) Where a state authority that is subject to the publication requirements contained in article four-c of the Economic Development Law believes that an eligible contract, described in a written notice provided by the Comptroller pursuant to this section, is exempt from such requirements under paragraph (a) of subdivision one of section one hundred forty-four of the Economic Development Law, the state authority must obtain the Comptroller's approval for such exemption.

(b) The Comptroller's determination of which eligible contracts or eligible contract amendments shall be subject to his or her approval may include, but shall not be limited to, consideration of one or more the following criteria:

(1) number and dollar value of contracts entered into, or anticipated to be entered into, by the state authority;

(2) past practices of the state authority with respect to its contracting or procurement process as identified by audits performed by regulating bodies including, but not limited to, the Office of the State Comptroller;

(3) the types of contracts entered into by the state authority;

(4) the presence or absence of competition in the procurement process;

(5) the level of financial risk posed by the state authority's contracts;

(6) any potential liability for the State posed by the state authority's contracts;

(7) the content and adequacy of the state authority's existing procurement guidelines; and

(8) the state authority's compliance with the provisions in section 206.7 regarding the filing of exempt contracts, exempt contract amendments, certain eligible contracts and certain eligible contract amendments.

§ 206.5 Submission of eligible contracts or eligible contract amendments subject to the Comptroller's approval.

(a) Every state authority shall, upon execution of any eligible contract or eligible contract amendment described in a written notice issued pursuant to paragraph (a) of section 206.4, promptly submit to the Comptroller for approval each such eligible contract or eligible contract amendment for the duration stated in the notice, including all attachments and documents incorporated by reference therein, except where the Comptroller has determined that a complete copy is unnecessary and has so notified the state authority, along with the complete procurement record. A copy of all such eligible contracts and eligible contract amendments shall be retained on file with the Office of the State Comptroller. Such submission should be made in such form and manner as may be prescribed by the Comptroller. The Comptroller also reserves the right to request submission of additional materials that are relevant to the Comptroller's review and approval.

(b) For each eligible contract or eligible contract amendment described in a written notice issued pursuant to paragraph (a) of section 206.4 of this Part, the state authority shall include a certification in the procurement record that it has undertaken an affirmative review of the responsibility of the contractor and significant subcontractors known at the time of the contract award. Such review shall be designed to provide reasonable assurances that the contractor and significant subcontractors are responsible and shall be documented in the procurement record. For purposes of this paragraph, a subcontractor shall be deemed to be significant if: (1) the subcontractor's qualifications are a material factor in the award; or (2) the value of the subcontract will equal or exceed an amount as the Comptroller may from time-to-time determine, to be reasonable.

(c) Where the Comptroller has provided written notice pursuant to paragraph (a) of section 206.4, the state authority shall include in each eligible contract or eligible contract amendment described in such notice a clause providing that the contract or contract amendment is subject to the Comptroller's approval before such contract or contract amendment may become valid and enforceable.

(d) The Comptroller shall have ninety days to issue a written determination with respect to the approval or disapproval of each eligible contract or eligible contract amendment submitted for approval. Such ninety day period shall begin upon receipt of the eligible contract or eligible contract amendment, including all required documentation, by the Office of the State Comptroller. No eligible contract or eligible contract amendment submitted to the Comptroller shall become valid and enforceable until such eligible contract or eligible contract amendment has been approved by the Comptroller; provided, however, that if the Comptroller has not issued a written determination within the ninety day period, such eligible contract or eligible contract amendment shall become valid and enforceable without approval by the Comptroller. In the event that the state authority resubmits an eligible contract or eligible contract amendment previously disapproved by the Comptroller, the Comptroller shall have ninety days from the receipt of such resubmitted eligible contract or eligible contract amendment to issue a written determination.

(e) The Comptroller reserves the right to require state authorities to transmit all or part of the procurement record electronically according to standards developed by the Comptroller.

§ 206.6 Criteria for approval of an eligible contract or eligible contract amendment.

The Comptroller's determination as to whether to approve an eligible contract or eligible contract amendment submitted for ap-

proval shall include, but not be limited to, consideration of the following criteria:

(a) for all eligible contracts and eligible contract amendments: (1) compliance with all applicable laws; (2) the responsibility of the proposed contractor; (3) the reasonableness of the state authority's procurement procedures and, if applicable, compliance with such procedures; (4) the reasonableness of the result; (5) whether the contract contains a description of the scope of services, a specified term with a commencement and end date (except in the case of properly executed purchase orders) and is otherwise reasonable and acceptable as to form; and (6) whether the terms of the agreement are reasonable and in the best interests of the authority;

(b) for single source and sole source contracts, or any eligible contract or eligible contract amendment awarded pursuant to any other method of procurement that is not a competitive procurement: (1) the justification for not utilizing a competitive procurement; and (2) the reasonableness of the selection of the contractor, the cost and the terms of the eligible contract or eligible contract amendment. The procurement record for such eligible contracts or eligible contract amendments shall include: the justification for not using a competitive procurement; the basis for selecting the contractor, including the alternatives considered; and the basis upon which the state authority determined the cost was reasonable; and

(c) for competitive procurements: (1) the adequacy of the efforts made to provide notice of the contract opportunity; (2) the reasonableness of the product specifications, requirements or work to be performed; (3) the reasonableness of the methodology for evaluating bids, proposals or other offers; and (4) the state authority's fair application of the established methodology for evaluating bids, proposals or other offers. The procurement record for competitive contracts shall demonstrate a competitive field by providing, at a minimum, a clear statement of the required specifications or work to be performed, a fair and equal opportunity for offerors to submit responsive offers and a balanced and fair method of evaluation and selection.

§ 206.7 Filing requirements for exempt contracts, exempt contract amendments, certain eligible contracts and certain eligible contract amendments.

(a)(1) A state authority shall file with the Office of the State Comptroller: (i) a copy of any exempt contract; (ii) a copy of any exempt contract amendment; and (iii) an explanation of why such contract or contract amendment is exempt from the Comptroller's approval.

(2) When an exempt contract or an exempt contract amendment is executed in order to meet an emergency, the state authority shall document in the explanation the nature of the emergency giving rise to the procurement.

(3) Copies of such exempt contracts, exempt contract amendments and the related explanation shall be filed within sixty day after the execution of such exempt contract or exempt contract amendment.

(b)(1) A state authority shall also file with the Office of the State Comptroller a copy of any eligible contract or eligible contract amendment entered into by the state authority for which the Comptroller has not provided notice pursuant to paragraph (a) of section 206.4.

(2) Copies of such eligible contracts or eligible contract amendments executed on or after the date of the adoption of this Part shall be filed within sixty days after such execution.

(c) The filing of any contracts or contract amendments pursuant to this section shall be made in such form and manner as may be prescribed by the Comptroller. In addition, where an eligible contract amendment or an exempt contract amendment filed pursuant to this section modifies a contract that was not previously filed with the Office of the State Comptroller, the state authority shall, at the Comptroller's request, provide a copy of the original contract and any prior amendments thereto. A state authority should file a complete copy of any contract or contract amendment pursuant to this section, including all attachments and documents incorporated by reference therein, except where the Comptroller has determined that a complete copy is unnecessary, is not legally required, and has so notified the state authority.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 206.2(a), (m), 206.5(a), (b) and 206.7(c).

Revised rule making(s) were previously published in the State Register on August 25, 2010.

Text of rule and any required statements and analyses may be obtained from: Jamie Elacqua, Esq., Office of the State Comptroller, 110 State Street, Albany, New York 12236, (518) 473-4146, email: jelacqua@osc.state.ny.us

Revised Regulatory Impact Statement

No revision is necessary because there are no material changes to the rule. Non-substantive changes have been made whereby the definition, and references to, the "State Authority Contract Manual" has been deleted from the rule and the definition of "Competitive Procurement" was further clarified and explained. The State Authority Contract Manual does not have the force of law and will generally encompass directions as to format and interpretive and explanatory materials for State Authorities. Accordingly deletions of such definition and references are non-material and need not be addressed. The definition of "Competitive Procurement" was clarified to explicitly reference certain elements of a competitive procurement that OSC believes are inherent in such statutory term. The clarification does not impose or eliminate any obligations imposed by the rules and is therefore non-material in nature.

Revised Regulatory Flexibility Analysis

No revision is necessary because there will be no substantial changes, if any, upon small businesses and local governments relating to the effect of the rule, the compliance requirements, compliance costs, the economic and technological feasibility, and adverse impact that were previously identified in the first Regulatory Flexibility Analysis for Small Businesses and Local Governments. Non-substantive changes were made whereby the definition and references to the "State Authority Contract Manual" have been deleted from the rule and the definition of "Competitive Procurement" was further clarified and explained. Such Manual will not have the force of law and will generally encompass directions as to format and interpretive and explanatory materials for State Authorities. Accordingly such directions and materials are not required to be included in the regulations; and the deletions of such definitions and references are non-material and need not be addressed. The definition of "Competitive Procurement" was clarified to explicitly reference certain elements of a competitive procurement that OSC believes are inherent in such statutory term. The clarification does not impose or eliminate any obligations imposed by the rules and is therefore non-material in nature.

Revised Rural Area Flexibility Analysis

No revision is necessary because there are no substantial changes, if any, upon the types and number of rural areas affected, the compliance requirements, the costs associated with the rule, and adverse impact upon rural areas that were previously identified in the first proposed Rural Area Flexibility Analysis. Non-substantive changes were made whereby the definition and references to the "State Authority Contract Manual" have been deleted from the rule and the definition of "Competitive Procurement" was further clarified and explained. Such Manual will not have the force of law and will generally encompass directions as to format and interpretive and explanatory materials for State Authorities. Accordingly such directions and materials are not required to be included in the regulations; and the deletions of such definition and references are non-material and need not be addressed. The definition of "Competitive Procurement" was clarified to explicitly reference certain elements of a competitive procurement that OSC believes are inherent in such statutory term. The clarification does not impose or eliminate any obligations imposed by the rules and is therefore non-material in nature. The Comptroller has issued a press release relating to the adoption of these rules which shall insure rural participation.

Assessment of Public Comment

In response to the proposed revised rule making, OSC received comments from the Dormitory Authority of the State of New York, the New York Convention Center Operating Corporation, Battery Park City Authority, Assemblyman Richard L. Brodsky, Empire State Development Corporation, Metropolitan Transit Authority and New York Power Authority (hereinafter the "responders"). For the most part the responders simply reiterated their comments made when the rule was initially proposed. Such comments were previously addressed when the revised rule was submitted and therefore no response is included in this filing. New comments are addressed below.

206.2(a). One responder opined that insurance contracts should be considered competitive even if published notice is not given. The responder reasoned that insurance contracts are solicited through selected brokers (whom have been competitively selected) from insur-

ance carriers. The responder notes that such procedure is utilized in lieu of published solicitation because in the insurance industry only qualified brokers may approach insurance carriers for quotes. We note that the revised rules provide that the notice requirements of section 206.2(1) are satisfied where the authority provides notice by soliciting bids, proposals or offers through some other method expressly authorized by statute, where such statute has deemed this other method competitive. To list each potential statutory exemption or alternative publication scheme in the rules is not feasible and would require constant amendment in order to produce a comprehensive up-to-date list. As the rules prescribe, we would urge any state authority that believes such a statutory exemption or alternative method of publication exists to provide all information to the Comptroller's Office which will then provide guidance on a case by case basis or categorical basis. Accordingly, if the responder believes that such insurance procurements meet the criteria set forth in 206.2(a)(1)(ii), it should submit documentation to the Comptroller for further review.

Another responder felt that 206.2(a)(iii) portion of the definition of competitive procurement (that the contract was "awarded ... as result of a balanced and fair method of evaluation and selection developed before the receipt of offers or bids") was vague thus causing a large "loop hole" for state authorities to avoid the Comptroller's pre approval. We would disagree that such language creates a loop hole. The term competitive procurement has an inherent meaning based upon the Legislative intent of section 163 of the State Finance Law and the past and present practices of the Comptroller's Office. This term has a well understood meaning in the procurement world. Therefore OSC did not expressly state, or elaborate on, these inherent elements in the revised regulations. However, OSC agrees that it may be helpful to expressly reference these elements in the adopted regulations. Accordingly, OSC has provided a clearer description in order to insure greater ease of compliance; however, OSC stresses that this amendment is intended to simply clarify the existing language in the adopted regulation, consistent with the generally understood meaning of a competitive procurement. Specifically this paragraph will now provide expressly that to be a competitive procurement, a procurement must have been: "awarded on the basis of a balanced and fair evaluation and selection method developed before the receipt of offers or bids; that is rational, objective and utilizes a quantified scoring system, which evaluated all relevant factors such as cost (revenue), technical merits, or qualifications, and was applied equally to all qualified offerers..." As such amendment is merely clarifying and descriptive, it is a non substantial revision and does not require an additional comment period.

206.2(b). One responder noted the inclusion of employment contracts to the definition of contract. The responder ponders if an employment contract would include a consultant. We would note that the rules expressly state that the term "contract" includes "any agreement". Therefore, consulting contracts and employment contracts, as well as all other agreements are within the purview of these rules and any distinction is not relevant.

206.2(c). One responder questioned the insertion in the definition of "eligible contract" of the language "including all reasonably anticipated renewals and amendments" The responder thought this was ambiguous and difficult to apply. We disagree. This language was added in order to eliminate a loop hole whereby an entity may keep its contracts below the dollar threshold by bid splitting. This concept was extrapolated from various statutes and regulations. See: State Finance law section 163 (6-b), Printing and Public Document Law section 3(5); 9 NYCRR section 250.2(h).

206.2(d). Some responders felt that the definition of "eligible contract amendment" is too broad in that it included in the definition any modification to an eligible contract. The responders express fear that such inclusion could cause significant delays. OSC understands the State authorities' concerns that the rules will significantly impact their day-to-day operations, and these rules are not intended impede the contracting process. OSC would stress, while such amendments may be subject to OSC's pre-approval, it does not mean that OSC will exercise such discretion with respect to every eligible amendment. In response to the State authorities' initial comments regarding the term "eligible contract amendment" OSC attempted to further refine the

definition of "eligible contract amendment" but found that capturing every situation where review would be appropriate was nearly impossible, and would require definitions too complex to be easily understood. Accordingly, it was concluded that determinations of which specific amendments would be subject to Comptroller pre-approval would best be dealt with through the Written Notification process. OSC would note that in most instances, discretion would not be exercised for general house-keeping, non material amendments to eligible contracts. Finally, OSC emphasizes that our offices will continue to work in conjunction with State authorities to address workload issues while maximizing the transparency intended under the enabling statute.

206.4. Several responders took exception to the insertion of additional criteria for approval of eligible contracts, specifically "whether the terms of the agreement are reasonable and in the best interests of the authority." The responders assert that this language will provide for OSC to inappropriately substitute its judgment for that of the duly appointed board. We disagree. Historically the Comptroller, in the exercise of his authority under section 112 of the State Finance Law to approve state agency contracts, has considered whether such contracts are reasonable and in the best interests in the state. See Laws of 1995 Chapter 83, section 32. It may reasonably be assumed that in enacting the Public Authorities Reform Act, the Legislature envisioned that the Comptroller would review public authority contracts applying standards of review similar to those utilized with respect to state agency contracts, and, therefore, that the Legislature intended that the Comptroller could apply such criterion. Finally, we would note that in the exercise of his contract approval authority, the comptroller generally does not substitute the expertise of OSC for that of the contracting entity as to technical issues solely within the expertise of the contracting entity.

206.5(a). One responder asked if OSC would consider "concurrent review" of the contract in order to avoid perceived costly delays during the 90 day period OSC has to approve or disapprove an eligible contract. "Concurrent review" would entail the Comptroller reviewing the contract prior to its final approval by the State authority board and execution of the contract. OSC would not review a contract that has not received final approval by the State authority board. We are sensitive to the fact that State authority may have to begin the procurement process in farther in advance and there is a fear that OSC approval may cause bidders to escalate their bids. However, OSC does utilize such a practice with state agencies, and does not believe concurrent review is a feasible option with respect to state authorities. However, consistent with our practice for state agencies, OSC will be available to answer questions and provide consultative services to state authorities prior to formal submission of the contract.

206.5(b). One responder questioned the language revising the regulations to clarify the authorities' obligations with respect to Vendor Responsibility. The rule requires that a certification be included with each eligible contract or contract amendment. The responder is concerned that such language could be misconstrued to require that a new responsibility determination must be performed for the contractor and every significant subcontractor each time there is an amendment to the Contract. This is not a misconstruction of the regulation. Best practices dictate that a vendor's responsibility be affirmatively reviewed each time a new agreement or amendment is entered into. Accordingly, a certification that an affirmative Vendor Responsibility review has been conducted and the vendor has been deemed responsible must be accompanied with each eligible contract and eligible contract amendment is submitted to OSC for pre-approval.

Additionally, a responder requested that the term "significant subcontractor" as referenced in 206.5(b) not be defined in terms of a fixed dollar amount to be paid. Rather the responder suggested that preferably such determinations be made solely on the basis of whether those subcontractors were a material factor in the award; but that in if a monetary standard is necessary, such standard be stated as a percentage (i.e. 25% of the total contract).

OSC agrees that a fixed dollar amount may not always be an appropriate measure of a subcontractor's significance; that is why the rules state that "value" will be established, not a dollar amount. OSC anticipates that it will state a percentage as a guiding factor for

determining if a subcontractor is significant. Further direction will be given in the format of the State Authority Contract Manual.

Section 206.7. Some responders stated that the filing requirement for eligible contracts and eligible contract amendments is unduly burdensome. Additionally, one responder noted that filing requirement for eligible contract amendments appears to include construction contract change orders that do not exceed \$100,000 and agreements to extend the duration of the contract for which there is no change in the contract amount. While the responders accurately state the requirements of the revised regulations, OSC does not agree that any change is necessary or warranted. Filing of these contracts is authorized under the Comptroller's audit authority under the New York State Constitution. The purpose of requesting the filing is to maximize transparency and to assist OSC in determining future contracts that may be subjected to OSC's prior approval. OSC is sensitive to the fact that these are new obligations placed upon the State authorities; however OSC believes that it will not be unduly burdensome particularly since all filings will be electronic. Again, OSC will work with State authorities to minimize adverse impact upon operations of the State authorities to the extent possible.

State Authority Contract Manual. One responder, both in their comments on the original proposed regulations and in their comments on the revised proposed regulations, noted that the proposed regulations reference the State Authority Contract Manual, and the authority stated that the Manual should be included in the rules because the guidance provided in such document may constitute a collection of rules of general applicability. Generally, the Manual will include forms and instructions, interpretive statements and statements of general policy which in and of themselves do not have the effect of law but are merely explanatory or ministerial. Such type of guidance is specifically exempted from being included in the rule making process pursuant to section 102 (b) (iv) of the State Administrative Procedure Act. Since the references to the Manual in the revised rule relate to matters that we do not believe need to be included in the regulations, such references, and the definition, have been deleted and where applicable language has been inserted stating that formatting instructions, and/or interpretive and explanatory material will be prescribed by the Comptroller. We do not believe these changes are substantive.

New York State Canal Corporation

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Snowmobiling on Canal Lands

I.D. No. NCC-43-10-00005-P

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

Proposed Action: Amendment of section 150.6 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 354(5), 382(7)(d) and (k); Canal Law, sections 10(9), (15), (26), 85, 100 and 138-b(5)(a)

Subject: Snowmobiling on Canal Lands.

Purpose: Authorize the issuance of revocable permits to organized snowmobile clubs where local municipal support has been demonstrated.

Text of proposed rule: § 150.6 Prohibited Activities

(8) operate a snowmobile, motorbike or any other motorized vehicle, provided however, the Canal Corporation may, in its discretion, issue a revocable permit to a snowmobile club that is a member of the New York State Snowmobile Association for snowmobile use after each municipal governing board located within the permit area has passed a Resolution approving of such snowmobile use;

Text of proposed rule and any required statements and analyses may be obtained from: Marcy Pavone, NYS Thruway Authority, 200 Southern Blvd, Albany, NY 12209, (518) 436-2860, email: marcy_pavone@thruway.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory Authority:

Public Authorities Law (PAL) section 354, subdivision 5, authorizes the Thruway Authority to make "rules and regulations governing the use of the thruways and all other properties and facilities under its jurisdiction." Further, section 382, subdivision 7(d) authorizes the Canal Corporation to "make and alter by-laws for its organization and internal management and make rules and regulations governing the use of its property and facilities." Subdivision 7(k) of the same section authorizes the Canal Corporation to "exercise those powers and duties of the authority pursuant to the canal law." Canal Law section 10, subdivision 9 authorizes the Canal Corporation to "prescribe rules and regulations not inconsistent with law relating to the navigation, protection and maintenance of the canal system..." Subdivision 15 authorizes the Canal Corporation to "issue revocable permits pursuant to this chapter" and subdivision 26 authorizes the Canal Corporation to "[P]erform such other acts as in its judgment constitute a duty required to efficiently administer the canal system." Canal Law section 85 states that "[T]he corporation shall prescribe and enforce rules and regulations, not inconsistent with the law, governing navigation on the canals and for the use of the terminals connected with the canals and for the use of all other property of the corporation under the corporation's control and maintained as a part of the canal system." Canal Law section 100 authorizes the Canal Corporation to issue revocable permits and Canal Law section 138-b(5)(a) directs the Canal Recreationway Commission, in carrying out the duties of the Canal Corporation under the Canal Recreationway Plan, to "evaluate and make recommendations for new operational, maintenance and capital initiatives or projects to enhance the canal."

2. Legislative Objectives:

The amendment to 21 NYCRR 150.6 would authorize the Canal Corporation to issue revocable permits for snowmobile use to a snowmobile club that is a member of the New York State Snowmobile Association where local municipal support for such snowmobile use in the form of a resolution has been demonstrated. The Canal Corporation initiated a pilot program in 1998 that allowed snowmobile use on Canal lands on a case-by-case basis in rural areas where local municipal support was demonstrated. The program was initiated in response to requests made by organized snowmobile groups and their elected representatives. This amendment is in response to additional requests that have been received by the Canal Corporation. Although snowmobiling is a prohibited activity in the Canal Rules and Regulations, the use is consistent with the Canal Recreationway Plan and this issuance of revocable permits provides an opportunity to enhance the overall use of the Canal System.

3. Needs and Benefits:

The proposed change to the regulation authorizes the issuance of revocable permits for snowmobile use on a case-by-case basis to clubs that are members of the New York State Snowmobile Association where local municipal support in the form of a resolution has been demonstrated. A pilot program was initiated in 1998 in response to requests made by organized snowmobile groups and their elected representatives. Although snowmobiling on Canal lands is a prohibited activity, the use is consistent with the Canal Recreationway Plan. Also, the prohibition against snowmobiling is difficult to enforce. Allowing snowmobiling through permits with organized clubs has helped manage the use and provided the Canal Corporation with a level of protection by requiring clubs to provide liability insurance coverage. It also makes the clubs responsible for placing signage and for repairing damage to the Canalway Trail caused by snowmobiles.

Approximately five snowmobile pilot programs have operated in different parts of the State on Canal lands since 1998. The clubs have acted responsibly and they are helping to maintain the trails. Although the pilot programs have been allowed to continue, no other permits for snowmobile use have been issued despite the additional requests received each year from clubs across the State and a number of municipal resolutions that were recently adopted urging the Canal Corporation to allow snowmobiling on Canal lands.

The permit would require liability insurance in the amount of \$1 million per occurrence and \$2 million aggregate through a blanket insurance policy administered by the New York State Snowmobile Association and funded by the Office of Parks, Recreation and Historic Preservation, which administers the snowmobiling program statewide. The blanket insurance is made available to clubs for their use of designated State corridor snowmobile trails. The permit would also require that signing be placed in accordance with the New York State Snowmobile Trail Signing Handbook and that all operations be consistent with laws, rules and regulations governing the use and operation of snowmobiles. Minimum snow cover for snowmobile operations, trail opening and closing times and dates, and a 25 mile per hour maximum speed limit would be specified.

Given the success of the snowmobile pilot programs and the popularity of snowmobiling in rural portions of the Canal System, the Canal Corporation is enacting this regulation to enhance the use of the Canal System.

4. Costs:

There is no cost to regulated parties for the implementation of and continuing compliance with the regulation. There are no additional administrative costs for implementation of the revised regulation.

5. Local Government Mandates:

This rule imposes no additional program, service, duty, or responsibility on local government beyond the local governing duties required in the normal course of business.

6. Paperwork:

None.

7. Duplication:

There is no duplication of State or Federal Law.

8. Alternatives:

The Canal Corporation considered a no action alternative but chose to pursue this rule in response to requests from local governments, elected officials and snowmobiling clubs. This is an opportunity to help manage the use of Canalway Trails, expand a popular pilot program and enhance the overall use of the New York State Canal System. The Canal Corporation considered offering this program to clubs that are not members of the New York State Snowmobile Association, however, few clubs exist who are not members of the Association and the ability of those clubs to obtain the required insurance independently is unlikely. Further, clubs who are not members of the Association are also not eligible for funds for trail maintenance through the New York State Office of Parks, Recreation and Historic Preservation which would make it virtually impossible for a club to have maintained trails without that funding.

9. Federal Standards:

There is no specific federal requirement.

10. Compliance Schedule:

The revocable permits will be issued to snowmobiling clubs at the discretion of the Canal Corporation upon receipt of a completed application supported by resolution of the local governing municipality.

Regulatory Flexibility Analysis

1. Effect of rule: This rule provides local governments an opportunity to demonstrate support, in the form of a resolution, to snowmobiling clubs that are members of the New York State Snowmobile Association and want to apply for a revocable permit from the Canal Corporation.

2. Compliance requirements: Participation is voluntary. Local governments would have an opportunity to demonstrate support of local snowmobiling clubs in the form of a resolution.

3. Professional services: There is no need for professional services.

4. Compliance costs: There are no compliance costs.

5. Economic and technological feasibility: There are no additional economic or technological requirements.

6. Minimizing adverse impact: This rule will have no adverse impact on local governments because participation in the program authorized by this rule making is voluntary and the resolution in support of clubs that are members of the New York State Snowmobile Association would be conducted as part of a local governments' normal course of business.

7. Small business and local government participation: This regulation is in response to requests from various local municipalities, such as those in Washington and Niagara County, that have contacted the Canal Corporation in response to requests made by organized snowmobile groups to allow snowmobiling on Canal lands.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: This rule allows local municipalities along the Canal System to offer their support, in the form of a resolution, to snowmobiling clubs that want to apply for a revocable permit from the Canal Corporation.

2. Reporting, recordkeeping and other compliance requirements: No reporting, recordkeeping and other compliance requirements will be necessary by a local government other than what is required in its normal course of business.

3. Costs: No additional costs are required.

4. Minimizing adverse impact: Participation is voluntary and the application for the permit will be made by a snowmobiling club where support for participation in the program in the form of a resolution by the local governing municipality has been demonstrated.

5. Rural area participation: Participation is voluntary. This regulation is in response to requests from various local municipalities, such as those in Washington and Niagara County, that have contacted the Canal Corporation in response to requests made by organized snowmobile groups to allow snowmobiling on Canal lands.

Job Impact Statement

Based on the nature and purpose of the proposed rule, it will not have a substantial adverse impact on jobs and employment opportunities. As such, a Job Impact Statement is not required.

Office of Children and Family Services

EMERGENCY RULE MAKING

The Protection of Children in Residential Facilities from Child Abuse and Neglect

I.D. No. CFS-43-10-00001-E

Filing No. 1041

Filing Date: 2010-10-06

Effective Date: 2010-10-06

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

Action taken: Amendment of Parts 166, 180 and 182 of Title 9 NYCRR; and amendment of Parts 433 and 434 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d) and 34(3)(f); and L. 2008, ch. 23, section 19

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

Specific reasons underlying the finding of necessity: The adoption of these regulations on an emergency basis is necessary to protect the health, safety and welfare of children in residential care by implementing the provisions of Chapter 323 of the Laws of 2008, which relates to the protection of children in residential facilities from child abuse and neglect.

Subject: The protection of children in residential facilities from child abuse and neglect.

Purpose: To implement chapter 323 of the Laws of 2008.

Substance of emergency rule: Part 433 of Title 18 (Child Abuse and Neglect in Residential Care)

The amendment implements Chapter 323 of the Laws of 2008, relating to the protection of children in residential facilities from child abuse and neglect. The amendment updates the scope statement to include the statutory changes and implements the updated statutory definitions. The amendment also updates the obligations and procedures of the Office of Children and Family Services (OCFS), authorized agencies and residential care facilities in conformance with the statutory changes and updates outdated references to the former Department of Social Services.

Sections 434.1, 434.2, and 434.10 of Title 18 (Child Protective Services Administrative Hearing Procedure)

The amendment implements statutory changes, which reflect existing practice, in conformance with past federal and state court decisions, requiring that administrative review and fair hearing determinations of child abuse and maltreatment be made using the fair preponderance of the evidence standard. The amendment also updates outdated references to the former Department of Social Services.

Section 166-1.4 of Title 9 (Prevention and Remediation Procedures)

The amendment implements Chapter 323 of the Laws of 2008, relating to the protection of children in residential facilities from child abuse and neglect. The amendment updates procedures for the protection of youth in OCFS-operated residential facilities in conformance with statutory changes. The amendment also updates outdated references to the former Department of Social Services and the former Division for Youth.

Sections 180.3 and 180.5 of Title 9 (Juvenile Detention Facilities Regulations)

The amendment implements Chapter 323 of the Laws of 2008, relating to the protection of children in residential facilities from child abuse and neglect. The amendment updates procedures for the protection of youth in juvenile detention facilities in conformance with statutory changes. The amendment also updates outdated references to the former Department of Social Services and the former Division for Youth.

Sections 182-1.2 and 182-1.12 of Title 9 (Runaway and Homeless Youth Regulations for Approved Runaway Programs)

The amendment implements Chapter 323 of the Laws of 2008, relating to the protection of children in residential facilities from child abuse and neglect. The amendment updates procedures for the protection of youth in runaway and homeless youth programs in conformance with statutory changes. The amendment also updates outdated references to the former Department of Social Services and the former Division for Youth.

Sections 182-2.2 and 182-2.11 of Title 9 (Runaway and Homeless Youth Regulations for Transitional Independent Living Support Programs)

The amendment implements Chapter 323 of the Laws of 2008, relating to the protection of children in residential facilities from child abuse and neglect. The amendment updates procedures for the protection of youth in runaway and homeless youth programs in conformance with statutory changes. The amendment also updates outdated references to the former Department of Social Services and the former Division for Youth.

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 January 3, 2011.

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, regulations and policies to carry out its powers and duties.

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

Chapter 436 of the Laws of 1997 transferred certain functions, powers, duties and obligations of the former Department of Social Services and all of the functions, powers, duties and obligations of the former Division for Youth to OCFS.

Chapter 323 of the Laws of 2008 amended sections 412, 413, 415, 422, 424-a, 424-b, 424-c and 460-c of the SSL and created sections 412-a and 424-d of the SSL to clarify the definitions of abuse and neglect of a child in residential care and strengthen the process used to investigate and respond to such allegations. Section 19 of Chapter 323 of the Laws of 2008 authorizes OCFS to promulgate rules and regulations on an emergency basis for the purpose of implementing the provisions of the Chapter.

2. Legislative objectives:

The regulations implement Chapter 323 of the Laws of 2008 relating to the protection of children in residential facilities from child abuse and neglect. Specifically, the regulations implement the updated statutory definitions and requirements for additional determinations relating to reports of child abuse and maltreatment in residential settings that were enacted in the new sections 412-a and 424-d of the SSL. For example, residential care now includes inpatient or residential settings certified by the Office of Alcoholism and Substance Abuse Services (OASAS) and designated as serving youth, and care provided by an authorized agency licensed to provide both foster care and residential care as licensed or operated by OASAS.

The regulations also implement statutory changes, which reflect existing practice, in conformance with past federal and state court decisions, requiring that administrative review and fair hearing determinations of child abuse and maltreatment be made using the fair preponderance of the evidence standard. In addition, the regulations make technical changes, such as updating outdated references to the former Department of Social Services and the former Division for Youth.

3. Needs and benefits:

The regulations are necessary for OCFS to conform to statutory changes to the SSL relating to the protection of children in residential

facilities from child abuse and neglect. Specifically, the regulations clarify and update the definitions of abuse and neglect of a child in residential care and strengthen the process used to investigate and respond to such allegations. For example, residential care now includes inpatient or residential settings certified by the Office of Alcoholism and Substance Abuse Services (OASAS) and designated as serving youth, and care provided by an authorized agency licensed to provide both foster care and residential care as licensed or operated by OASAS. Additionally, the statute and regulations require an immediate law enforcement referral in the event that an investigation reveals that it is likely that a crime may have been committed against a child.

The regulations are also necessary to conform the regulations to the statutory changes, which reflect existing practice, in conformance with past federal and state court decisions, requiring that administrative review and fair hearing determinations of child abuse and maltreatment be made using the fair preponderance of the evidence standard.

The regulations will not apply to incidents that occur before January 17, 2009, which is the effective date of the statutory changes.

4. Costs:

The regulations are necessary to comply with the enactment of Chapter 323 of the Laws of 2008. The actual fiscal impact to OCFS is \$397,000 for six positions and associated non-personal service expenses, as that is the amount of the budget request to support the six positions that was actually received by OCFS. The budget request included an additional \$161,000 to support fringe benefit and indirect costs, but OCFS did not receive those funds.

5. Local government mandates:

For local governments that operate residential facilities for children, the regulations require that a copy of a facility's and licensing state agency's corrective action plan or plan of prevention and remediation be sent to OCFS if OCFS conducted the investigation of the abuse or neglect, even where the facility is licensed by another State agency. This adds one copy of a report to the paperwork already required to be sent to the licensing State agency under the current statutory and regulatory standards.

6. Paperwork:

The regulations require that a copy of a facility's and licensing state agency's corrective action plan or plan of prevention and remediation be sent to OCFS if OCFS conducted the investigation of the abuse or neglect, even where the facility is licensed by another State agency. This adds one copy of a report to the paperwork already required to be sent to the licensing State agency under the current statutory and regulatory standards.

7. Duplication:

The regulations do not duplicate other State requirements.

8. Alternatives:

The proposed regulations are required to implement the state law, Chapter 323 of the Laws of 2008. No alternatives were considered.

9. Federal standards:

The regulations and Chapter 323 of the Laws of 2008 are consistent with the requirements of the federal Child Abuse Prevention and Treatment Act (CAPTA), which does not have special requirements pertaining to children in residential care.

10. Compliance schedule:

Chapter 323 of the Laws of 2008 provides for a January 17, 2009 effective date of the changes set forth in the regulations. For purposes of transition between the former statutory and regulatory provisions and the new law, the effective date will apply to the date when the abuse or neglect was alleged to have occurred. If a report came in on or after January 17, 2009 that involves an incident or incidents that occurred before January 17, 2009, the former definitions of abuse and neglect of children in residential care will apply.

Regulatory Flexibility Analysis

1. Effect on small business and local governments:

The regulations will affect social services districts, voluntary authorized agencies, residential runaway and homeless youth programs and counties that contract for detention programs. There are 58 social ser-

vices districts, approximately 160 voluntary authorized agencies and 83 residential runaway and homeless youth programs. There are 38 counties plus New York City that contract for detention programs.

2. Reporting, recordkeeping and compliance requirements:

The regulations are necessary to comply with state statutory requirements relating to the protection of children in residential facilities from child abuse and neglect. The regulations reflect the enactment of Chapter 323 of the Laws of 2008, which requires implementation of the statutory changes to be effective January 17, 2009.

Social services districts and voluntary authorized agencies will continue to operate under the current definitions and determination standards for incidents that occurred before January 17, 2009. The regulations reflect the statutory clarification of the definitions of abuse and neglect of a child in residential care and the process used to investigate and respond to such allegations.

The regulations require that a copy of a facility's and licensing state agency's corrective action plan or plan of prevention and remediation be sent to OCFS if OCFS conducted the investigation of the abuse or neglect, even where the facility is licensed by another State agency. This adds one copy of a report to the paperwork already required to be sent to the licensing State agency under the current statutory and regulatory standards.

3. Professional services:

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

4. Compliance costs:

The regulations are necessary to comply with the enactment of Chapter 323 of the Laws of 2008. The actual fiscal impact to OCFS is \$397,000 for six positions and associated non-personal service expenses, as that is the amount of the budget request to support the six positions that was actually received by OCFS. The budget request included an additional \$161,000 to support fringe benefit and indirect costs, but OCFS did not receive those funds.

5. Economic and technological feasibility:

The social services districts, counties, voluntary authorized agencies and other agencies affected by the regulations have the economic and technological ability to comply with the regulations.

6. Minimizing adverse impact:

It is anticipated that the regulations will not have an adverse impact. The regulations build on existing procedures.

7. Small business and local government participation:

The regulatory changes make the changes necessary to conform the regulations to the statutory changes made by Chapter 323. In December of 2008, OCFS conducted six regional trainings for voluntary authorized agencies and facilities licensed by OCFS, OMRDD and OMH regarding the changes in state statutory provisions relating to the protection of children in residential facilities from child abuse and neglect. A statewide teleconference was held in November of 2008 regarding the changes in law and that training was recorded so that the training is available to all agencies that were not able to attend one of the regional trainings. A reminder of the statutory changes will be sent to the voluntary agencies in an informational letter in January 2009.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The regulations will affect 44 social services districts that are defined as being rural counties and the seven social services districts that include significant rural areas within their borders. In addition, there are approximately 100 voluntary authorized agencies that service rural communities that will be affected by the regulations.

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

The regulations are necessary to comply with state statutory requirements relating to the protection of children in residential facilities from child abuse and neglect. The regulations reflect the enactment of Chapter 323 of the Laws of 2008, which requires implementation of the statutory changes to be effective January 17, 2009.

Social services districts and voluntary authorized agencies will

continue to operate under the current definitions and determination standards for incidents that occurred before January 17, 2009. The regulations reflect the statutory clarification of the definitions of abuse and neglect of a child in residential care and the process used to investigate and respond to such allegations.

The regulations require that a copy of a facility's and licensing state agency's corrective action plan or plan of prevention and remediation be sent to OCFS if OCFS conducted the investigation of the abuse or neglect, even where the facility is licensed by another State agency. This adds one copy of a report to the paperwork already required to be sent to the licensing State agency under the current statutory and regulatory standards.

3. Costs:

The regulations are necessary to comply with the enactment of Chapter 323 of the Laws of 2008. The actual fiscal impact to OCFS is \$397,000 for six positions and associated non-personal service expenses, as that is the amount of the budget request to support the six positions that was actually received by OCFS. The budget request included an additional \$161,000 to support fringe benefit and indirect costs, but OCFS did not receive those funds.

4. Minimizing adverse impact:

It is anticipated that the regulations will not have an adverse impact on rural areas. The regulations build on existing procedures.

5. Rural area participation:

The regulatory changes make the changes necessary to conform the regulations to the statutory changes made by Chapter 323. In December 2008, OCFS conducted six regional trainings for voluntary authorized agencies and facilities licensed by OCFS, OMRDD and OMH regarding the changes in state statutory provisions relating to the protection of children in residential facilities from child abuse and neglect. A Statewide teleconference was held in November of 2008 regarding the changes in law and that training was recorded so that the training is available to all agencies that were not able to attend one of the regional trainings. A reminder of the statutory changes will be sent to the voluntary agencies in an informational letter in January 2009.

Job Impact Statement

A full job impact statement has not been prepared for the regulations which contain new requirements imposed by Chapter 323 of the Laws of 2008. The regulations will not have an impact on jobs and employment opportunities because they will not adversely impact the number of staff authorized agencies must maintain to provide residential care for children.

Education Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Distinguished Educators

I.D. No. EDU-43-10-00009-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 100.17 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207, 305, 211-b(1-5), 211-c(1-8); and L. 2007, ch. 57, part A, section 1

Subject: Distinguished Educators.

Purpose: To prescribe requirements regarding appointment of distinguished educators to assist low-performing schools.

Substance of proposed rule (Full text is posted at the following State website: <http://www.p12.nysed.gov/accountability/APA/Memos/Updates.html>): The Commissioner of Education proposes to add a new section 100.17 and amend section 100.16 of the Commissioner's Regulations, effective February 2, 2011, relating to the appointment of distinguished educators to assist low-performing schools pursuant to Education Law sections 211-b and 211-c. The following is a summary of the substance of the proposed rule.

1. Subdivision (a) of section 100.17 sets forth criteria regarding eligibility for designation as a distinguished educator.

2. Subdivision (b) of section 100.17 sets forth selection criteria for distinguished educators appointed to a school district and distinguished educators appointed to a school within a school district.

3. Subdivision (c) of section 100.17 sets forth procedures, criteria and requirements for the appointment of distinguished educators, including provisions for reassignment of an appointed distinguished educator.

4. Subdivision (d) of section 100.17 sets forth the roles and responsibilities of distinguished educators and school districts, including specific responsibilities for distinguished educators appointed to a school district and distinguished educators appointed to a school within a school district.

5. Subdivision (e) of section 100.17 sets forth provisions for the removal of distinguished educators.

6. Subdivision (f) of section 100.17 sets for reporting requirements for appointed distinguished educators.

7. Subdivision (g) of section 100.17 sets forth provisions for the evaluation of distinguished educators.

8. Subdivision (h) of section 100.17 sets forth provisions for school district and school follow-up procedures upon completion of service of a distinguished educator.

9. Section 100.16 of the Regulations of the Commissioner of Education, regarding calculation of reasonable and necessary expenses of distinguished educators is amended to provide that the consulting fee for distinguished educators assigned to school districts shall be increased by an additional ten percent.

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

Data, views or arguments may be submitted to: John B. King, Senior Deputy Commissioner for P-12 Education, State Education Department, State Education Building, Room 125, 89 Washington Avenue, Albany, NY 12234, (518) 474-3862, email: NYSEDP12@mail.nysed.gov

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

Education Law section 305(1) designates the Commissioner as chief executive officer of the State system of education and the Regents, and authorizes the Commissioner to enforce laws relating to the educational system and to execute the Regents' educational policies.

Education Law section 211-b, as added by section 1 of Part A of Chapter 57 of the Laws of 2007, provides for the inclusion of distinguished educators in joint school intervention teams that are appointed by the Commissioner to assist school districts in developing, reviewing and recommending plans for reorganizing or reconfiguring of schools in restructuring status or schools under registration review (SURR) status that have failed to demonstrate progress as specified in their corrective action plan or comprehensive education plan.

Education Law section 211-c, as added by section 1 of Part A of Chapter 57 of the Laws of 2007, directs the Regents to establish a distinguished educator program providing for the appointment of distinguished educators to assist low performing districts in improving their academic performance.

LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above statutory authority and is necessary to implement Education Law sections 211-b and 211-c, by establishing selection criteria for appointment of distinguished educators to assist low performing schools.

NEEDS AND BENEFITS:

The proposed rule is necessary to establish criteria for selection, roles, responsibilities, protocols and procedures and expenses for distinguished educators. The proposed rule will ensure the appointment, consistent with statutory requirements, of qualified individuals, who have demonstrated consistent growth in academic performance or educational expertise including superior performance in the classroom, to serve as distinguished educators to assist low performing schools.

COSTS:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c to establish requirements for the appointment of distinguished educators to assist low performing schools, and will not impose any costs beyond those inherent in Education Law statutes.

(a) Costs to State government: None.

(b) Costs to local government: Education Law sections 211-b(2)(a) and (b) and 211-c(7), and the proposed rule, provide that the reasonable and necessary expenses incurred in the performance of a distinguished educator's duties shall be a charge on the school district or charter school

that operates the school to which the distinguished educator is appointed. These costs were analyzed in a separate rule making that resulted in the adoption of section 100.16 of this Part (EDU-14-08-00010-P, State Register, Volume XXX, Issue 14, April 2, 2008), relating to the calculation of reasonable and necessary expenses for distinguished educators, and for members of school quality review teams and joint school intervention teams. As indicated in that analysis, the costs will vary by the extent of the involvement (based upon the academic conditions at the school) and number of schools engaged by distinguished educators, the labor market prices in the areas the schools are located, and the travel distance to the school. For example, based upon the criteria in section 100.16, it has been determined that a distinguished educator assigned to a school district within the counties of NYC, Nassau, Suffolk and Westchester would receive \$1,021 per day and a Distinguished Educator assigned to a school would receive \$928 per day. A Distinguished Educator assigned to a school district within Albany, Onondaga, Monroe and Erie counties would receive \$801 per day and a Distinguished Educator assigned to a school would receive \$728 per day. A Distinguished Educator assigned to a school district within Broome County would receive \$730 per day and a Distinguished Educator assigned to a school would receive \$664 per day.

In addition, school districts will incur costs associated with the preparation and submission of follow-up reports, and/or the modification of district plans. These costs are anticipated to be minimal and can be absorbed using existing school district staff and resources.

(c) Costs to private regulated parties: None. Participation in the distinguished educator program is voluntary. As discussed above, under costs to local government, the reasonable and necessary expenses of appointed distinguished educators shall be a charge on the school district or charter school that operates the school to which the distinguished educator is appointed.

(d) Costs to regulating agency for implementation and continued administration of this rule: None. The proposed amendment does not impose any additional costs to the State Education Department beyond those inherent in Education Law sections 211-b and 211-c.

LOCAL GOVERNMENT MANDATES:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c to establish requirements for the appointment of distinguished educators to assist low performing schools, and will not impose any program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district, beyond those inherent in the Education Law.

The school district to which a distinguished educator is appointed shall cooperate fully with an appointed distinguished educator.

The reasonable and necessary expenses incurred by the appointed distinguished educators while performing their official duties shall be paid by the school district pursuant to section 100.16 of the Commissioner's Regulations.

Consistent with and to the extent permitted under any applicable provisions of law and any existing collective bargaining agreements:

(1) a school district employee appointed as a distinguished educator shall be ensured that at the end of his/her term of services as a distinguished educator, he/she will be returned to the previously held position or a position comparable to the one he/she had at the beginning of his/her leave, whether or not a reduction in work force is required to comply with this requirement;

(2) upon return to service with his/her employer, the employee's term of service as a distinguished educator shall count as service time for purposes of scheduled, routine or general compensation enhancements, retirement eligibility, retirement benefit calculation and seniority.

The school district shall ensure that a distinguished educator, upon appointment, shall be subject to the fingerprint and criminal history check requirements contained in law.

PAPERWORK:

Appointed district educators shall enter into separate written agreements, in a form prescribed by the Commissioner, as follows:

(1) an agreement with the Commissioner to carry out all responsibilities consistent with the proposed rule; and

(2) an agreement with each school district to which the distinguished educator is appointed specifying the terms of service.

Appointed distinguished educators shall review or provide assistance in the development and implementation of any district improvement plan and/or any corrective action, restructuring, or comprehensive plan of any school within the district to which the distinguished educator is assigned. Such distinguished educator shall either endorse without change or make recommendations for modifications to any such plan to the school district and the Commissioner.

Upon receipt of any recommendations from the distinguished educator for modification of a district improvement plan and/or any corrective action, restructuring, or comprehensive plan, the school district shall either modify the plans accordingly or provide a written explanation to the Com-

missioner of its reasons for not adopting such recommendations. The Commissioner shall direct the district to modify the plans as recommended by the distinguished educator unless the Commissioner finds that the written explanation provided by the district has compelling merit.

Within 45 days of appointment to the district, a distinguished educator shall develop an action plan outlining his/her goals and objectives for the district for the ensuing school year and shall also submit such action plan to the Commissioner with a copy to the school district. The distinguished educator shall also submit quarterly reports to the Commissioner in a form prescribed by the Commissioner.

Upon completion of service of the distinguished educator, the school district and school shall prepare and submit to the Commissioner a written report describing how they shall continue, sustain and extend the continuous improvement structures and systems that have been implemented to reverse chronic failure and to support improved academic achievement and improved graduation outcomes.

DUPLICATION:

The rule is necessary to implement Education Law sections 211-b and 211-c and does not duplicate, overlap or conflict with State or federal legal requirements.

ALTERNATIVES:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c by establishing criteria for selection, roles, responsibilities, protocols and procedures and expenses for distinguished educators. Consequently, the major provisions of the proposed rule are statutorily imposed, and there are no significant alternatives, and none were considered.

FEDERAL STANDARDS:

There are no applicable federal standards for distinguished educators appointed pursuant to Education Law sections 211-b and 211-c.

COMPLIANCE SCHEDULE:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c by establishing criteria for selection, roles, responsibilities, protocols and procedures and expenses for distinguished educators. Consequently, the major provisions of the proposed rule are statutorily imposed. It is anticipated that regulated parties can achieve compliance with the proposed rule by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c by establishing selection criteria for the appointment of Distinguished Educators to assist low performing districts in improving their academic performance. The proposed rule does not impose any economic impact, or other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

EFFECT OF RULE:

The proposed rule applies to each public school district and charter school in the State to which a Distinguished Educator may be appointed pursuant to Education Law sections 211-b and 211-c. The Commissioner has not appointed any Distinguished Educator as yet.

COMPLIANCE REQUIREMENTS:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c and imposes no compliance requirements on school districts beyond those inherent in the statutes.

The school district to which a distinguished educator is appointed shall cooperate fully with an appointed distinguished educator.

The reasonable and necessary expenses incurred by the appointed distinguished educators while performing their official duties shall be paid by the school district pursuant to section 100.16 of the Commissioner's Regulations.

Consistent with and to the extent permitted under any applicable provisions of law and any existing collective bargaining agreements:

(1) a school district employee appointed as a distinguished educator shall be ensured that at the end of his/her term of services as a distinguished educator, he/she will be returned to the previously held position or a position comparable to the one he/she had at the beginning of his/her leave, whether or not a reduction in work force is required to comply with this requirement;

(2) upon return to service with his/her employer, the employee's term of service as a distinguished educator shall count as service time for purposes of scheduled, routine or general compensation enhancements, retirement eligibility, retirement benefit calculation and seniority.

The school district shall ensure that a distinguished educator, upon appointment, shall be subject to the fingerprint and criminal history check requirements contained in law.

Appointed district educators shall enter into separate written agreements, in a form prescribed by the Commissioner, with each school district

to which the distinguished educator is appointed specifying the terms of service.

Appointed distinguished educators shall review or provide assistance in the development and implementation of any district improvement plan and/or any corrective action, restructuring, or comprehensive plan of any school within the district to which the distinguished educator is assigned. Such distinguished educator shall either endorse without change or make recommendations for modifications to any such plan to the school district and the Commissioner.

Upon receipt of any recommendations from the distinguished educator for modification of a district improvement plan and/or any corrective action, restructuring, or comprehensive plan, the school district shall either modify the plans accordingly or provide a written explanation to the Commissioner of its reasons for not adopting such recommendations. The Commissioner shall direct the district to modify the plans as recommended by the distinguished educator unless the Commissioner finds that the written explanation provided by the district has compelling merit.

Within 45 days of appointment to the district, a distinguished educator shall develop an action plan outlining his/her goals and objectives for the district for the ensuing school year and shall also submit such action plan to the Commissioner with a copy to the school district. The distinguished educator shall also submit quarterly reports to the Commissioner in a form prescribed by the Commissioner.

Upon completion of service of the distinguished educator, the school district and school shall prepare and submit to the Commissioner a written report describing how they shall continue, sustain and extend the continuous improvement structures and systems that have been implemented to reverse chronic failure and to support improved academic achievement and improved graduation outcomes.

PROFESSIONAL SERVICES:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c by establishing selection criteria for appointment of Distinguished Educators. The proposed rule imposes no additional professional services requirements on school districts beyond those inherent in the statute.

COMPLIANCE COSTS:

Education Law sections 211-b(2)(a) and (b) and 211-c(7), and the proposed rule, provide that the reasonable and necessary expenses incurred in the performance of a distinguished educator's duties shall be a charge on the school district or charter school that operates the school to which the distinguished educator is appointed. These costs were analyzed in a separate rule making that resulted in the adoption of section 100.16 of this Part (EDU-14-08-00010-P, State Register, Volume XXX, Issue 14, April 2, 2008), relating to the calculation of reasonable and necessary expenses for distinguished educators, and for members of school quality review teams and joint school intervention teams. As indicated in that analysis, the costs will vary by the extent of the involvement (based upon the academic conditions at the school) and number of schools engaged by distinguished educators, the labor market prices in the areas the schools are located, and the travel distance to the school. For example, based upon the criteria in section 100.16, it has been determined that a distinguished educator assigned to a school district within the counties of NYC, Nassau, Suffolk and Westchester would receive \$1,021 per day and a Distinguished Educator assigned to a school would receive \$928 per day. A Distinguished Educator assigned to a school district within Albany, Onondaga, Monroe and Erie counties would receive \$801 per day and a Distinguished Educator assigned to a school would receive \$728 per day. A Distinguished Educator assigned to a school district within Broome County would receive \$730 per day and a Distinguished Educator assigned to a school would receive \$664 per day.

In addition, school districts will incur costs associated with the preparation and submission of follow-up reports, and/or the modification of district plans. These costs are anticipated to be minimal and can be absorbed using existing school district staff and resources.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule does not impose any new technological requirements on school districts. Economic feasibility is discussed in the Compliance Costs section above.

MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c by establishing criteria for selection, roles, responsibilities, protocols and procedures and expenses for distinguished educators. Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establish differing compliance or reporting requirements or timetables or to exempt school districts from coverage by the rule. Nevertheless, a substantial effort was made to involve school districts and other interested parties in the development of this rule, and their comments were considered in drafting the proposed rule.

SMALL BUSINESSES AND LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from school districts through the offices of the district superintendents of each supervisory district in the State, and from the chief school officers of the five big city school districts. In addition, comments were solicited from educational organizations and school districts across the State.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed rule applies to each public school district and charter school in the State for which a Distinguished Educator will be appointed pursuant to Education Law sections 211-b and 211-c. Currently, the Commissioner has not appointed any Distinguished Educators to school districts located in rural areas.

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

The proposed rule is necessary to implement Education Law sections 211-b and 211-c [as added by Chapter 57 of the Laws of 2007] and imposes no compliance requirements on entities in rural areas beyond those inherent in the statute.

The school district to which a distinguished educator is appointed shall cooperate fully with an appointed distinguished educator.

The reasonable and necessary expenses incurred by the appointed distinguished educators while performing their official duties shall be paid by the school district pursuant to section 100.16 of the Commissioner's Regulations.

Consistent with and to the extent permitted under any applicable provisions of law and any existing collective bargaining agreements:

(1) a school district employee appointed as a distinguished educator shall be ensured that at the end of his/her term of services as a distinguished educator, he/she will be returned to the previously held position or a position comparable to the one he/she had at the beginning of his/her leave, whether or not a reduction in work force is required to comply with this requirement;

(2) upon return to service with his/her employer, the employee's term of service as a distinguished educator shall count as service time for purposes of scheduled, routine or general compensation enhancements, retirement eligibility, retirement benefit calculation and seniority.

The school district shall ensure that a distinguished educator, upon appointment, shall be subject to the fingerprint and criminal history check requirements contained in law.

Appointed distinguished educators shall enter into separate written agreements, in a form prescribed by the Commissioner, as follows:

(1) an agreement with the Commissioner to carry out all responsibilities consistent with the proposed rule; and

(2) an agreement with each school district to which the distinguished educator is appointed specifying the terms of service.

Appointed distinguished educators shall review or provide assistance in the development and implementation of any district improvement plan and/or any corrective action, restructuring, or comprehensive plan of any school within the district to which the distinguished educator is assigned. Such distinguished educator shall either endorse without change or make recommendations for modifications to any such plan to the school district and the Commissioner.

Upon receipt of any recommendations from the distinguished educator for modification of a district improvement plan and/or any corrective action, restructuring, or comprehensive plan, the school district shall either modify the plans accordingly or provide a written explanation to the Commissioner of its reasons for not adopting such recommendations. The Commissioner shall direct the district to modify the plans as recommended by the distinguished educator unless the Commissioner finds that the written explanation provided by the district has compelling merit.

Within 45 days of appointment to the district, a distinguished educator shall develop an action plan outlining his/her goals and objectives for the district for the ensuing school year and shall also submit such action plan to the Commissioner with a copy to the school district. The distinguished educator shall also submit quarterly reports to the Commissioner in a form prescribed by the Commissioner.

Upon completion of service of the distinguished educator, the school district and school shall prepare and submit to the Commissioner a written report describing how they shall continue, sustain and extend the continuous improvement structures and systems that have been implemented to reverse chronic failure and to support improved academic achievement and improved graduation outcomes.

COSTS:

Education Law sections 211-b(2)(a) and (b) and 211-c(7), and the proposed rule, provide that the reasonable and necessary expenses incurred in the performance of a distinguished educator's duties shall be a charge on the school district or charter school that operates the school to which the distinguished educator is appointed. These costs were analyzed in a separate rule making that resulted in the adoption of section 100.16 of this Part (EDU-14-08-00010-P, State Register, Volume XXX, Issue 14, April

2, 2008), relating to the calculation of reasonable and necessary expenses for distinguished educators, and for members of school quality review teams and joint school intervention teams. As indicated in that analysis, the costs will vary by the extent of the involvement (based upon the academic conditions at the school) and number of schools engaged by distinguished educators, the labor market prices in the areas the schools are located, and the travel distance to the school. For example, based upon the criteria in section 100.16, it has been determined that a distinguished educator assigned to a school district within the counties of NYC, Nassau, Suffolk and Westchester would receive \$1,021 per day and a Distinguished Educator assigned to a school would receive \$928 per day. A Distinguished Educator assigned to a school district within Albany, Onondaga, Monroe and Erie counties would receive \$801 per day and a Distinguished Educator assigned to a school would receive \$728 per day. A Distinguished Educator assigned to a school district within Broome County would receive \$730 per day and a Distinguished Educator assigned to a school would receive \$664 per day. In general, it is anticipated that costs would be lower for schools located in rural areas because of lower labor market prices.

In addition, school districts will incur costs associated with the preparation and submission of follow-up reports, and/or the modification of district plans. These costs are anticipated to be minimal and can be absorbed using existing school district staff and resources.

The proposed rule imposes no additional professional services requirements on entities in rural areas beyond those inherent in the statutes.

MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Education Law sections 211-b and 211-c, by establishing criteria for selection, roles, responsibilities, protocols and procedures and expenses for distinguished educators. Consequently, the major provisions of the proposed rule are statutorily imposed and it is not feasible to establish differing compliance or reporting requirements or timetables or to exempt school districts from coverage by the rule. Furthermore, since the proposed rule will establish State-wide standards for the appointment of distinguished educators to assist low performing schools, consistent with Education Law sections 211-b and 211-c, it was not possible to establish different requirements for regulated parties in rural areas, or to exempt them from the rule's provisions. Nevertheless, a substantial effort was made to involve school districts and other interested parties in the development of this rule, and their comments were considered in drafting the proposed rule.

RURAL AREA PARTICIPATION:

The proposed rule was shared with the members of educational organizations across the state. In addition, comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

Job Impact Statement

The proposed rule is necessary to implement Education Law sections 211-b and 211-c by establishing selection criteria for the appointment of Distinguished Educators. The proposed rule will not have a substantial adverse impact on job or employment opportunities. Because it is evident from the nature and purpose of the proposed repeal that it will have no impact on jobs or employment opportunities, no further measures were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Waivers from Corporate Practice Restrictions for Certain Entities to Provide Certain Services Under Title 8 of the Education Law

I.D. No. EDU-43-10-00010-P

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

Proposed Action: Addition of sections 29.18 and 59.14 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6501(not subdivided), 6503-a, 6504 (not subdivided), 6506(6), 6507(2)(a), 6508(1), 6509 (not subdivided), 6510 (not subdivided) and 6511 (not subdivided)

Subject: Waivers from corporate practice restrictions for certain entities to provide certain services under Title 8 of the Education Law.

Purpose: To implement Chapter 130 and 132 of the Laws of 2010.

Substance of proposed rule (Full text is posted at the following State website:<http://www.op.nysed.gov/>): The Commissioner of Education proposes to promulgate regulations to implement the provisions of section

6503-a of the Education Law. The following is a summary of the substance of the regulations:

§ 59.14 Waiver for entities providing certain professional services.

(a) Applicability. Section 6503-a of the Education Law authorizes the Department to issue a waiver for certain entities for:

(1) services provided under Articles 154 or 163 of the Education Law for which licensure would be required, or

(2) services constituting the provision of psychotherapy as defined in section 8401(2) of the Education Law and authorized and provided under article 131, 139, or 153 of the Education Law.

(b) Eligibility. To be eligible for a waiver, an entity must be in existence prior to June 18, 2010 and be either:

(1) a not-for-profit corporation formed for charitable, educational, or religious purposes or other similar purposes deemed acceptable by the Department; or

(2) an education corporation as defined in section 216-a of the Education Law.

(c) Application for a waiver.

(1) To provide the services described in subdivision (a) of this section, an entity shall have obtained a waiver from the Department no later than July 1, 2012. The Department may issue a waiver to a qualified entity after July 1, 2012, regardless of the date on which the entity was created, upon a demonstration of need for the entity's services satisfactory to the Department.

(2) Within 120 days after the posting of the application form on the Department's website, any entity described in subdivision (b) of this section providing services described in subdivision (a) of this section on or after June 18, 2010, shall submit an application for a waiver on forms prescribed by the Commissioner. Upon submission of an application for a waiver under this section, the entity may continue to operate and provide services until the Department either denies or approves the entity's application.

(3) An application for a waiver under this section shall include:

(i) the name of the entity;

(ii) evidence that the entity is either a not-for-profit corporation; or an education corporation as defined in section 6503-a of the Education Law;

(iii) evidence of the date the entity came into existence;

(iv) the primary address, phone number, website and email address for the entity;

(v) contact information for the individual responsible for submitting the application;

(vi) the name and address of each director and officer of the entity;

(vii) a copy of the certificate of incorporation or other documentation that authorizes the entity to provide the services described in subdivision (a);

(viii) a listing of other jurisdictions in which the entity may provide the services described in subdivision (a);

(ix) the information required in paragraph (1) of subdivision (e) of this section; and

(x) an attestation by an officer authorized by the entity that:

(a) identifies the scope of services to be provided;

(b) includes a list of professions under Title 8 of the Education Law in which professional services will be provided;

(c) includes a statement that only a licensed professional, a person authorized to provide such services, or a professional entity authorized by law to provide such services shall provide services authorized under this section;

(d) the entity will comply with section 18 of the Public Health Law relating to patient access to records;

(e) the entity will make available information requested by the Department relating to the entity's eligibility for a waiver and compliance with the requirements of this section and section 6503-a of the Education Law;

(f) includes a statement as to whether any application by the

entity for an operating certificate or license with another state or federal agency, political subdivision, municipal corporation, or local government agency has been granted and such operating certificate or license is currently in effect; whether such application is pending or was disapproved; whether such a certificate or license was revoked; and whether a written authorization or contract was terminated for cause by one of such agencies;

(g) the entity has adequate fiscal and financial resources to provide such services;

(h) the statements on the application are true and accurate.

(d) Entities that do not require a waiver. A waiver is not required of:

(1) any entity operated under an operating certificate appropriately issued in accordance with article sixteen, thirty-one, or thirty-two of the mental hygiene law, article twenty-eight of the public health law, or comparable procedures by a New York state or federal agency, political subdivision, municipal corporation, or local government agency or unit, in accordance with the scope of the authority of such operating certificate;

(2) a university faculty practice corporation duly incorporated pursuant to the not-for-profit corporation law;

(3) an institution of higher education authorized to provide a program leading to licensure in a profession defined under article 131, 139, 153, 154, or 163 of the Education Law, to the extent that the scope of such services is limited to the services authorized to be provided within such registered program;

(4) an institution of higher education providing counseling only to the students, staff, or family members of students and staff of such institution; or

(5) any other entity that is otherwise authorized by law to provide such services and only to the extent that services are authorized under any certificates of incorporation or such other organizing documents as may be applicable.

(e) Provision of professional services.

(1) The entity shall describe in the application the services that will be provided that would otherwise be restricted to individuals licensed or authorized under Articles 153, 154 or 163 of the Education Law. The description shall indicate the profession(s) in which services will be provided and include:

(i) An attestation that individuals authorized to practice only under supervision will receive the required supervision;

(ii) A description of whether the services will be provided by licensed or authorized individuals employed by the entity or provided through a contract with licensed professional(s) or a professional entity, as defined in Education Law section 6503-a(5); and

(iii) An attestation that the entity will verify the licensure, limited permit or other authorization of individuals and professional entities providing services as employees of or on behalf of the entity.

(2) Unless otherwise authorized by law, an entity that holds a waiver under this section shall not provide services in any profession other than those authorized in 6503-a of the Education Law and included on the application for a waiver.

(f) Attestation of moral character.

(1) Each director and officer shall submit on forms prescribed by the Commissioner an attestation regarding whether:

(i) the individual has been found guilty after trial, or pleaded guilty, no contest or nolo contendere to a crime (felony or misdemeanor) in any court;

(ii) the individual has criminal charges (felony or misdemeanor) pending in any court;

(iii) any licensing or disciplinary authority has refused to issue a license or has ever revoked, annulled, cancelled, accepted surrender of, suspended, placed on probation, or refused to renew a professional license or certificate held by the individual now or previously, or has ever fined, censured, reprimanded or otherwise disciplined the individual;

(iv) there are any pending charges against the individual in any jurisdiction for any sort of professional misconduct; or

(v) a hospital or licensed facility has restricted or terminated the individual's professional training, employment or privileges, or whether the individual has ever voluntarily resigned or withdrawn from such association to avoid imposition of such measure.

(2) Any information included in the application that indicates that a director or officer of the entity has committed an act which raises a reasonable question as to the individual's moral character shall be made in accordance with the procedures specified in Subpart 28-1 of the Rules of the Board of Regents.

(g) Review of waiver applications. The application shall not be deemed acceptable if the entity has not submitted information identified in paragraphs (c), (e), and (f). The Department may deny an application based on the failure of the applicant to submit the required information within a reasonable period of time. When, in the determination of the department, all necessary information has been received, a decision shall be made within 90 days of such determination. If the waiver application is denied, then the entity shall cease the provision of professional services as defined in section 6503-a(1)(a) of the Education Law. The determination of the Department shall be final, and a copy thereof shall be forwarded to the applicant.

(h) Waiver certificates.

(1) An entity that has been issued a waiver under this section shall apply for a waiver certificate for each setting at which the entity provides professional services in New York.

(2) The application may be made as part of the initial application for a waiver or after the Department has approved the entity for a waiver.

(3) Each waiver certificate shall display the name of the entity and the address of the site.

(4) Any entity that willfully fails to obtain a certificate of waiver for each site and/or to display the waiver certificate at each site shall be subject to the penalties set forth in section 6511 of the Education Law.

(i) Notification of changes.

(1) An entity that is issued a waiver pursuant to section 6503-a of the Education Law shall notify the Department within 60 days of any change in the information supplied to the department, including but not limited to a change in the:

(i) name and terms of officers or directors;

(ii) site(s) at which professional services are provided; and

(iii) person responsible for filing the waiver application or the person's contact information; and/or

(iv) a transfer or assignment of interest as set forth in subdivision (j) of this section, provided that the entity shall notify the Department immediately of such change.

(2) Notification shall be made in a form prescribed by the department.

(j) Transfer or assignment of waiver. A waiver issued by the Department pursuant to section 6503-a of the Education Law shall not be transferable or assignable. For purposes of this section, a transfer or assignment shall mean the conveyance of a waiver under this section from one entity to another entity.

(k) Triennial application. A waiver issued pursuant to this section shall be valid for three years. An entity that is issued a waiver shall submit an application for renewal of the waiver every three years.

§ 29.18 Unprofessional conduct in waived entities.

(a) An entity that is issued a waiver pursuant to section 6503-a of the Education Law and section 59.14 of this Title shall be under the supervision of the Board of Regents and subject to the disciplinary procedures and penalties set forth in subarticle 3 of Article 130 of the Education Law. Any such waiver shall be subject to suspension, revocation or annulment for cause, and any entity holding such a waiver shall be subject to disciplinary proceedings and penalties in the same manner, to the same extent, and for the same reasons as individuals and professional entities practicing the same profession. A certificate of waiver shall be considered the same as a license to practice a profession.

(b) Failure to disclose information. It shall be unprofessional

conduct for an entity issued a waiver to have failed to disclose all information required by the Department in order to make an accurate determination of the entity's application. This shall include the failure to notify the Department that a director or officer of the entity has committed an act which raises a reasonable question as to moral character.

(c) Penalties for professional misconduct. The Board of Regents may impose upon an entity found guilty of unprofessional conduct under this section those penalties and fines authorized in section 6511 of the Education Law.

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

Data, views or arguments may be submitted to: Frank Munoz, Deputy Commissioner, NYS Education Department, Office of the Professions, 89 Washington Avenue, Albany, NY 12234, (518) 474-1756, email: fmunoz@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Section 6501 of the Education Law provides that, to qualify for admission to a profession, an applicant must meet requirements prescribed in the article of the Education Law that pertains to the particular profession.

Section 6503-a of the Education Law authorizes the Board of Regents to issue a waiver to qualified entities that seek to provide certain professional services, as defined in the Education Law.

Section 6504 of the Education Law authorizes the Board of Regents to supervise the admission to and regulation of the practice of the professions.

Paragraph (6) of section 6506 of the Education Law authorizes the Board of Regents to indorse a license issued by a licensing board of another state or country upon the applicant fulfilling the requirements.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations relating to the professions.

Subdivision (1) of section 6508 of the Education Law authorizes the state boards for the professions to assist the Regents and the Department in matters of professional licensure and practice.

Section 6510 of the Education Law sets for the procedures to be followed in cases of professional misconduct.

Section 6511 of the Education Law establishes penalties for professional misconduct that may be imposed by the Board of Regents.

2. LEGISLATIVE OBJECTIVES:

The proposed regulation carries out the intent of section 6503-a of the Education Law by setting forth the requirements by which a qualified not-for-profit or educational corporations may submit an application for a waiver authorizing it to provide professional services that are within the scopes of practice of psychology, licensed master social work, licensed clinical social work, and the mental health practitioner professions. The proposed amendment is necessary to ensure that entities employing licensed professionals and authorized persons, as defined in the Education Law, meet minimum standards for a waiver and that the entity is accountable and subject to the disciplinary authority of the Board of Regents, in the same way as a licensed professional under Title VIII of the Education Law.

3. NEEDS AND BENEFITS:

Chapters 130 and 132 of the Laws of 2010 amend the Education Law to address critical issues relating to the authority of certain entities to employ licensed master social workers (LMSW), licensed clinical social workers (LCSW), licensed mental health counselors (LMHC), licensed marriage and family therapists (LMFT), licensed creative arts therapists (LCAT), licensed psychoanalysts (LP), and licensed psychologists and to provide services within the scopes of

practice of those professions. Prior to the restrictions on practice of those professions established by laws enacted in 2002, any individual or entity could provide psychotherapy and other services that are now restricted. While the new licensing laws provided exemptions for individuals in certain programs, these exemptions did not extend to thousands of not-for-profit and educational corporations throughout New York that provide essential services. This affected not only access to services for vulnerable persons, but also the ability of new graduates to meet the experience requirements for licensure in authorized settings, thereby restricting access to the licensed professions.

On June 18, 2010, Governor Paterson signed into law Chapters 130 and 132 of the Laws of 2010 to authorize the Department to issue waivers authorizing qualified entities to provide certain professional services; to accept supervised experience for licensure completed in settings that are eligible for waivers; to extend the exemption from licensure requirements for individuals in certain programs; and to mandate the Department to recommend, by July 1, 2012, with input from exempt agencies and key stakeholders, any amendments in laws or regulations needed to fully implement licensure by July 1, 2013.

The new section 6503-a of the Education Law authorizes the Department to issue a waiver to certain not-for-profit or educational corporations that were in existence on the effective date of the law, June 18, 2010. An entity must submit a waiver application within 120 days of the applications being posted on the Department's website and may continue to provide services until the application is approved or denied. The law allows entities to continue providing services until July 1, 2012, but if an application is denied by the Department, the entity must cease providing professional services in New York.

The law is very clear that the waiver is not intended to supplant the authority of other State agencies, such as the Department of Health or Office of Mental Health, that have oversight of health and mental health services. In reviewing applications for a waiver, the law requires the Education Department to collaborate with other State agencies to ensure public protection by minimizing the risk of an unqualified entity receiving a waiver to provide professional services. There are also provisions in the law in regard to eligible entities, professional services that may be offered by entities, oversight by the Board of Regents, and attestations by each officer or director of the entity that he or she is of good moral character. An entity that receives a waiver under the law must apply for a renewal every three years and must request a waiver certificate for each site in New York at which professional services are provided.

Section 6503-a identifies a number of entities that do not require a waiver from the corporate practice prohibitions, including any entity with an operating certificate issued under the Public Health Law, Mental Hygiene Law or in accordance with comparable procedures by a State, federal or local government agency; an institution of higher education that provides a program leading to licensure in medicine, nursing, psychology, social work or the mental health professions; an institution of higher education that provides counseling to students, staff and family members of students and staff; and a university faculty practice corporation. The law allows the Regents to identify in regulation other entities that do not require a waiver, provided that such entity is otherwise authorized by law to provide such services.

The proposed regulations implement the provisions of law by setting forth the requirements to be met by a qualified entity in order to receive a waiver. These include, but are not limited to, the submission of the certificate of incorporation or other documentation that authorizes the entity to provide services described in the law and a description of the services that will be offered to the public. The entity must attest to adequate financial resources and that it will comply with section 18 of the Public Health Law in regard to access to patient information and records. Although the granting of a waiver resolves the issue of the authority of the entity to provide professional services, only licensed or authorized persons may provide services, and the entity is responsible for verifying the licensure of providers and the appropriate supervision of interns or permit holders who are only authorized to practice under supervision.

The proposed addition of section 29.18 of the Rules of the Board of Regents implements the Board of Regents disciplinary authority over

entities receiving waivers under Education Law section 6503-a. The amendment clarifies that the entity is subject to the same professional misconduct provisions of the Regents Rules as a licensed professional or professional entity, and that the entity has the same due process rights as a licensed professional or professional entity.

4. COSTS:

(a) Costs to State government: The proposed amendment does not impose any additional costs on State government, beyond those imposed by statute.

(b) Cost to local government: The proposed amendment establishes requirements for certain entities that apply for a waiver of the corporate practice prohibitions, but the law does not authorize local governments to apply for such waivers; therefore, there will be no cost to local government.

(c) Cost to private regulated parties: The proposed regulation will not impose any costs on applicants for the waiver of corporate practice prohibitions.

(d) Cost to the regulatory agency: As stated above in Costs to State government, the proposed regulation does not impose any additional costs beyond those imposed by statute.

5. LOCAL GOVERNMENT MANDATES:

The proposed regulation implements the requirements of section 6503-a of the Education Law, in regard to the services provided by individuals licensed or authorized under the Education Law in certain not-for-profit or educational corporations. Therefore, the proposed regulation does not impose any program, service, duty or responsibility upon local governments.

6. PAPERWORK:

The proposed regulation imposes no additional reporting or recordkeeping requirements beyond those imposed by section 6503-a of the Education Law. In accordance with section 6503-a, entities applying for a waiver will be required to submit to the State Education Department an application and evidence satisfactory to the Department that the entity meets the requirements in law and regulation for a waiver.

7. DUPLICATION:

The proposed regulation does not duplicate other existing State or Federal requirements.

8. ALTERNATIVES:

The proposed amendment implements the requirements of section 6503-a of the Education Law. Therefore, there are no viable alternatives.

9. FEDERAL STANDARDS:

There are no Federal standards for the waiver of corporate practice prohibitions for certain not-for-profit or educational corporations, as defined in section 6503-a of the Education Law.

10. COMPLIANCE SCHEDULE:

Applicants for the waiver must comply with the regulation on the stated effective date.

Regulatory Flexibility Analysis

The proposed amendments to the Commissioner's regulations and the Rules of the Board of Regents implement amendments to the Education Law that authorize the Department to issue to certain entities a waiver from restrictions on corporate practice for services provided under Articles 154 and 163 of the Education Law and psychotherapy services under section 8401(2) of the Education Law and authorized and provided under Articles 131, 139 or 153 of the Education Law. Chapters 130 and 132 of the Laws of 2010 were signed on June 18, 2010 to address critical issues relating to the authority of certain entities to employ licensed master social workers, licensed clinical social workers, licensed mental health counselors, licensed marriage and family therapists, licensed creative arts therapists, licensed psychoanalysts, and licensed psychologists to provide services within the scopes of practice of those professions.

The amendments will require certain not-for-profit and educational corporations to apply for a waiver from corporate practice prohibitions. While there may be an economic impact and recordkeeping, reporting, or other compliance requirements on not-for-profit and educa-

tional corporations, there will be no such impact or requirements imposed on small businesses as they are not authorized to apply for a waiver. Because it is clear from the nature of the regulation that there will be no effect on small businesses or local governments, no further steps were needed to ascertain that fact and none were taken.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

Education Law section 6503-a was signed into law on June 18, 2010 to address critical issues relating to the authority of certain entities to employ licensed master social workers, licensed clinical social workers, licensed mental health counselors, licensed marriage and family therapists, licensed creative arts therapists, licensed psychoanalysts, and licensed psychologists to provide services within the scopes of practice of those professions. These regulations will affect not-for-profit and educational corporations that provide these services in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The changes in law authorize certain entities, that employ licensed professionals to provide services that are restricted under Title VIII of the Education Law, to submit an application and meet the requirements in law and regulation. They will also be required to apply to renew their waivers triennially. There is no cost for the application and the regulations do not impose any additional reporting or record-keeping requirements on entities, including those located in rural areas, beyond those requirements inherent in statute.

3. COSTS:

The proposed amendment does not impose any additional costs beyond those imposed by statute.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment implements the provisions of Chapters 130 and 132 of the Laws of 2010. These requirements are in place to ensure that not-for-profit or educational corporations that employ licensed professionals are subject to oversight by the Board of Regents to safeguard the public.

Due to the nature of the proposed amendment, the State Education Department does not believe it to be warranted to establish different requirements for institutions located in rural areas.

5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the State Board for Mental Health Practitioners and from statewide professional associations whose memberships include individuals who live or work in rural areas.

Job Impact Statement

Education Law section 6503-a was signed into law on June 18, 2010 to address critical issues relating to the authority of certain entities to employ licensed master social workers, licensed clinical social workers, licensed mental health counselors, licensed marriage and family therapists, licensed creative arts therapists, licensed psychoanalysts, and licensed psychologists to provide services within the scopes of practice of those professions. The proposed amendments implement the requirements of section 6503-a to allow the Department to issue a waiver that allows certain not-for-profit corporations and educational corporations, as defined in the law, to overcome the corporate practice prohibitions in the Education Law.

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

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Registration Requirements for Teacher Education Programs and Special Education Certification Requirements for Grades 5 Through 12

I.D. No. EDU-43-10-00011-P

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

Proposed Action: Amendment of sections 52.21, 80-3.7, 80-4.2 and 80-4.3 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207, 305(1) and (2) and 3004(1)

Subject: Registration requirements for teacher education programs and special education certification requirements for grades 5 through 12.

Purpose: Amend current special education certification structure and strengthen teacher preparation requirements.

Substance of proposed rule (Full text is posted at the following State website: <http://www.highered.nysed.gov>): The Board of Regents proposes to amend Sections 52.2, 80-4.2 and 80-4.3 of the Regulations of the Commissioner of Education, effective October 17, 2010, relating to teacher education program registration requirements, the structure of adolescence level students with disabilities certificates and individual evaluation requirements and timelines for such titles. The following is a summary of the substance of the proposed amendments.

Item (iii) of subclause (1) of clause (c) of subparagraph (ii) of paragraph (2) of subdivision (b) of section 52.21 is amended to put in place requirements to better prepare all teachers in developing the skills necessary to provide instruction that will promote the participation and progress of students with disabilities in the general education curriculum by requiring all registered teacher education programs to include a minimum of three semester hours in understanding the needs of students with disabilities. The item identifies the areas of study that must be included in the three semester hour requirement and prescribes a process for a waiver from the requirement.

Subitems (A) and (B) are added to item (i) of subclause (2) of clause (c) of subparagraph (ii) of paragraph (2) of subdivision (b) of section 52.21 to require that at least 15 of the 100 clock hours of field experience in all teacher preparation programs include a focus on understanding the needs of students with disabilities.

Subclauses (3) and (4) of clause (a) of subparagraph (iii) of paragraph (2) of subdivision (b) of section 52.21 are amended to establish a start date of September 2, 2011 for requirements for new special education adolescence level-generalist teacher preparation programs.

Subparagraph (vi) of paragraph (3) of subdivision (b) of section 52.21 is amended to establish the program registration requirements for programs registered on or after September 2, 2011 for the new students with disabilities grades 7-12 generalist certificate title to include, within the content core, six semester hours in mathematics, science, English language arts and social studies and sufficient pedagogy to teach these subjects.

Items (iii) and (iv) of subclause (1) of clause (b) of subparagraph (xvii) of paragraph (3) of subdivision (b) of section 52.21 establishes a start date of September 2, 2011 for new special education adolescence level teacher preparation programs preparing special educators for Transitional B certificates.

Item (v) is added to subclause (1) of clause (b) of subparagraph (xvii) of paragraph (3) of subdivision (b) of section 52.21 to establish the program registration requirements for Transitional B certificate candidates for the new students with disabilities grades 7-12 generalist to include, six semester hours in mathematics, science, English language arts and social studies and sufficient pedagogy to teach those subjects prior to program completion.

Items (ii) and (iii) of subclauses (2) of clause (b) of subparagraph (xvii) of paragraph (3) of section 52.21 requires that at least 6 of the 40 clock hours of field experience for Transitional B programs focus on meeting the needs of students with disabilities.

Subparagraph (i) of paragraph (4) of subdivision (c) of section 52.21

is amended to clarify that program registration requirements for programs leading to an extension for students with disabilities middle childhood titles are in effect for programs registered prior to September 2, 2011, since the students with disabilities middle childhood title will be eliminated.

Subparagraph (viii) is added to paragraph (4) of subdivision (c) of section 52.21 to establish extensions to authorize the teaching of certain subjects in grades 7 through 12 to students with disabilities for a certificate in students with disabilities adolescence (generalist) and to require study of at least 18 semester hours in the subject to be taught.

Subparagraph (v) of paragraph (2) of subdivision (a) of section 80-3.7 is amended to require that, under individual evaluation, the pedagogical core include three semester hours of study to develop the skills necessary to provide specifically designed instruction to students with disabilities to participate and progress in the general education curriculum.

Subparagraphs (vii) and (viii) of paragraph (3) of subdivision (a) of section 80-3.7 are amended to phase out individual evaluation for candidates seeking students with disabilities in middle childhood titles or students with disabilities in specialist (grades 7-12) certificate. Candidates must apply for their certificate prior to September 1, 2011 and complete all requirements before February 1, 2012 to be eligible for these certificates under individual evaluation. These subparagraphs also establish requirements for individual evaluation for the new students with disabilities grades 7-12 generalist certificate title, requiring within the content core, six semester hours in mathematics, science, English language arts and social studies and sufficient pedagogy to teach these subjects.

Paragraphs (9) and (10) are amended and new paragraphs (11) through (18) are added to subdivision (a) of section 80-4.2 to establish extensions in earth science, biology, chemistry, physics, mathematics, social studies, English language arts and languages other than English (specified) in grades 5-9 or 7-12.

Subdivision (c) is added to section 80-4.2 to provide a general requirement for all extensions which requires (candidates or applicants) to achieve at least a certain course level and course grade for the course to be credited toward the semester hour requirement for the extension sought.

Clauses (a) and (b) of subparagraph (i) of paragraph (2) of subdivision (a); clause (d) of subparagraph (ii) of paragraph (4) of subdivision (a); paragraph (2) of subdivision (b); paragraph (2) of subdivision (c); subparagraph (ii) of paragraph (2) of subdivision (d); subparagraph (ii) of paragraph (2) of subdivision (e); and subparagraph (ii) of paragraph (2) of subdivision (f) of section 80-4.3 are amended to delete duplicative language included in the proposed amendment to subdivision (c) of section 80-4.2.

A new subdivision (n) is added to section 80-4.3 establishing the requirements for subject area extensions to teach adolescence level students with disabilities including 18 semester hours or the equivalent in the subject are of the extension sought and the passage of the content specialty test in that area. For district and BOCES teachers with such an extension, weekly collaboration and monthly co-teaching with a certified general education content specialist in the subject are required to teach the subject to students with disabilities in a special class. There is an exception that allows certain schools identified in the regulation, that cannot meet the regulatory requirement for weekly collaboration and monthly co-teaching, to submit a plan acceptable to the Department with a description of the mentoring and collaboration the candidate will receive. Schools enumerated in article 81, 85, 87, 88 or 89 of the Education Law or a special act school district as defined in subdivision 8 of section 4001 of the Education Law that educates only students with disabilities are the schools identified in the regulation that may be eligible for a waiver under this subdivision.

Text of proposed rule and any required statements and analyses may be obtained from: Chris Moore, Education Department, 89 Washington Avenue, Albany, New York 12234, (518) 473-8296, email: cmoore@mail.nysed.gov

Data, views or arguments may be submitted to: Peg Rivers, New York State Education Department, Education Building Annex, 89 Washington Avenue, Albany, New York 12234, (518) 408-1189, email: privers@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Section 215 of the Education Law authorizes the Commissioner of Education to visit, examine, and inspect schools or institutions under the educational supervision of the State and require reports from such schools.

Subdivision (1) of section 305 of the Education Law empowers the Commissioner of Education to be the chief executive officer of the state system of education and of the Board of Regents and authorizes the Commissioner of Education to enforce laws relating to the educational system and to execute educational policies determined by the Regents.

Subdivision (2) of section 305 of the Education Law authorizes the Commissioner of Education to have general supervision over all schools subject to the Education Law.

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

2. LEGISLATIVE OBJECTIVES:

The proposed rule carries out the legislative objectives of the above referenced statutes by establishing requirements for a new teaching certificate title, i.e., a students with disabilities adolescence generalist certificate, subject area extensions for this certificate and related standards for the registration of teacher preparation programs leading to such certificates.

3. NEEDS AND BENEFITS:

The purpose of the proposed amendment is to ensure an adequate supply of effective adolescence level students with disabilities teachers and to better prepare all teachers to instruct students with disabilities and skillfully collaborate with their colleagues. In 1999, the Board of Regents endorsed a new structure of certificate titles in general and special education. In 2000, teacher preparation programs began offering programs aligned with the new titles. Prior to February 2004, there had been only one special education certificate for teaching students with disabilities Pre-K through Grade 12, in all instructional settings. The 1999 changes to the special education certificate structure focused on student developmental levels and academic content knowledge, to ensure that special educators had sufficient content knowledge in at least one academic subject. This special education redesign resulted in a four-tiered certification structure. Since the changes to the State certification requirements went into effect, the Department has analyzed data related to the supply and demand of special education teachers and found that there is a shortage of these teachers with the appropriate certification to teach students with disabilities in grades 7-12. Approximately 50 percent of students with disabilities are in the birth to grade six, yet, for those students selecting special education as a teaching profession, 80 percent are being prepared at the early childhood or childhood level and only 20 percent at the middle or secondary level. This issue is further exacerbated since the 20 percent are divided between the middle childhood level (5-9) and the secondary level (7-12) and further subdivided by academic disciplines.

Establishment of a students with disabilities generalist certificate at the adolescence level and the phasing out of the students with disabilities 5-9 generalist and content specialist and 7-12 content specialist will entice more candidates into the adolescence level as generalists who can act in supportive roles such as consultant teacher and provide resource room services. These teachers can further develop content expertise through a subject area extension and teach the subject to a special class with required weekly collaboration and monthly co-teaching with a certified general education content specialist.

As more and more students with disabilities are included in regular

classes, all teachers must be better prepared to teach students with disabilities. The proposed amendment also requires all teacher preparation programs to include a minimum of three semester hours in educating students with disabilities and defining the elements of those semester hours coupled with a focusing a specific number of hours of required field experience that must focus on the needs of students with disabilities to ensure that all teachers are prepared to instruct such students to their highest level of achievement.

4. COSTS:

(a) Costs to State government: The amendment will impose minimal costs on State government including the State Education Department. The proposed amendment will not impose additional costs on State government, including the State Education Department (“SED”). It is anticipated that SED will use existing staff to review and process applications for new teacher education program registrations and certificates and extensions under individual evaluation for these titles. In addition, existing staff will review plans submitted by schools enumerated in article 81, 85, 87, 88 or 89 of the Education Law or a special act school district who cannot meet the regulatory requirement of consultation and co-teaching to address the consultation and co-teaching requirements though mentoring and collaboration.

(b) Costs to local governments: School districts and BOCES will need to make a certified general education content specialist teacher available for consultation and collaborative teaching to special education teachers that hold a content area extension and are teaching a specific subject area. It is estimated that for each subject area, the equivalent of .25 FTEs will need to be employed as a consultant for every four sections of the subject area.

(c) Cost to private regulated parties: The proposed amendment will impose minimal costs on institutions of higher education as they phase out teacher preparation programs for students with disabilities programs leading to certification in 7-12 and 5-9 students with disabilities content specialist and generalist certificates and design and apply for the new 7-12 students with disabilities adolescence generalist certificate title with the option for a content area extension. It is not anticipated that institutions will need to hire additional faculty for the new programs.

(d) Costs to regulating agency for implementing and continued administration of the rule: As stated above in “Costs to State Government,” the amendment will impose some minimal costs on the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

School districts and BOCES employing special education teachers with extensions must make a certified general education content specialist available to special education teachers assigned to teach special classes that have a content area extension for the purposes of consultation and co-teaching. The school district or BOCES will determine the length of the weekly collaborative time and the co-teaching and will monitor the quality of the consultation and co-teaching. For students with disabilities teachers employed by a school enumerated in article 81, 85, 87, 88 or 89 of the Education Law or a special act school district that educates only students with disabilities and who cannot meet the co-teaching and collaboration requirements of the regulation, such schools must submit a plan acceptable to the Department with a description of the mentoring and collaboration the teacher will receive.

6. PAPERWORK:

The proposed amendment will require that for students with disabilities teachers employed by a school enumerated in article 81, 85, 87, 88 or 89 of the Education Law or a special act school district that educates only students with disabilities and who cannot meet the regulatory requirement for consultation and co-teaching, such schools must submit a plan acceptable to the Department with a description of the mentoring and collaboration the special education teacher will receive.

The proposed amendment will impose minimal paperwork requirements for institutions of higher education as they phase out teacher preparation programs for students with disabilities programs leading to certification in 7-12 and 5-9 students with disabilities content specialist certificates and the 5-9 students with disabilities generalist

certificate and design and apply for the new 7-12 students with disabilities generalist certificate titles with the option for a content area extension.

7. DUPLICATION:

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

8. ALTERNATIVES:

Over the course of three years, alternatives to the amendments were considered, such as preparing every teacher for students with disabilities certification. However, after reaching out to the field and researching the topic, the Department selected the most viable option to ensure the quality and quantity of adolescence level special education teachers and to ensure that all teachers are better prepared to work with students with disabilities.

9. FEDERAL STANDARDS:

There are no related Federal standards.

10. COMPLIANCE SCHEDULE:

If adopted as an emergency measure at the October Regents meeting, the proposed amendment will become effective October 26, 2010. It is anticipated that the proposed amendment will be adopted as a permanent rule in January and that will become effective as a permanent rule on February 2, 2011. Registered programs will not be required to meet the program registration standards for the new certificate title until September 2, 2011. No additional time is needed to comply with the proposed regulation before its stated effective date.

Regulatory Flexibility Analysis

(a) Small businesses:

The proposed amendment applies to school districts and boards of cooperative educational services (BOCES) and institutions or higher education that offer teacher preparation programs. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local governments:

1. EFFECT OF RULE:

The purpose of the proposed amendment is to amend the current special education certification structure to ensure the demand for special education teachers at the adolescence level is met and to strengthen the preparation requirements for all teachers so they are able to work more effectively with students with disabilities.

2. COMPLIANCE REQUIREMENTS:

School districts and BOCES employing special education teachers with extensions must make a certified general education content specialist available to special education teachers assigned to teach special classes that have a content area extension for the purposes of consultation and co-teaching. The school district or BOCES will determine the length of the weekly collaborative meeting time and the co-teaching and will monitor the quality of the consultation and co-teaching. For students with disabilities teachers employed by a school enumerated in article 81, 85, 87, 88 or 89 of the Education Law or a special act school district that educates only students with disabilities and who cannot meet the co-teaching and consultation regulatory requirements, such schools must submit a plan acceptable to the Department with a description of the mentoring and collaboration the teacher will receive.

3. PROFESSIONAL SERVICES:

No additional professional services are required for local governments to comply with the proposed amendment.

4. COMPLIANCE COSTS:

The State Education Department anticipates that all School districts and BOCES, including those in rural areas, will need to make a certified general education content specialist available for consultation and collaborative teaching to special education teachers holding a content area extension that are teaching a subject area. It is estimated that for each subject area, the equivalent of .25 FTEs will need to be employed for each subject area.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment will not impose any additional technological requirements on small businesses.

6. MINIMIZING ADVERSE IMPACT:

In developing the proposed amendment, the State Education Department considered other approaches to meeting the needs of students with disabilities in the state, however, those approaches were not feasible. Because of the nature of the proposed amendment, establishing different standards for local governments is inappropriate.

7. SMALL BUSINESS PARTICIPATION:

Over a three-year period beginning in 2007, the Department has engaged the field in trying to resolve the problems associated with the limited supply of adolescence special educators and improving the effectiveness of all teachers to work with students with disabilities. Since February 2007 the Department has been seeking guidance from New York State stakeholders through requests for comments, surveys and workgroup meeting, all of which were available for public participation. Local education agencies and institutions of higher education throughout the state participated in providing recommendations.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment will apply to all public school districts, boards of cooperative educational services (BOCES), State-operated and State-supported schools, approved private schools in the State and institutions of higher education with teacher preparation programs in all parts of the State, including the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendment requires all registered teacher education programs to include a minimum of three semester hours in educating students with disabilities to ensure that all teachers are better prepared to skillfully collaborate with other teachers and to teach students with disabilities and defines what the three semester hour requirement shall include. The proposed amendment also requires that 15 of the 100 clock hours of field experience required for teacher education programs focus on students with disabilities and that 6 of the 40 clock hours of field experience for Transitional B programs focus on students with disabilities.

The proposed amendment changes the current certification structure for students with disabilities certificates for grades 5 through 9 and 7 through 12 and the registration requirements for programs leading to certificates in these areas. Candidates will no longer be able to enroll in special education teacher preparation programs that lead to students with disabilities (grades 5-9 generalist) and students with disabilities (grades 5-9-specialist) and (grades 7-12-specialist) certificate titles after February 1, 2011. A certificate title in students with disabilities (grades 7-12- generalist) will be created. For candidates seeking this certificate, the candidate will be required to complete six semester hours in mathematics, science, English language arts and social studies within their content core and have sufficient pedagogy to teach these subjects. Teachers holding this certificate will be eligible to be employed to teach in supportive roles such as consultant teachers, resource room service providers and integrated co-teachers.

Teachers holding the new students with disabilities (grades 7-12-generalist) will also have the option of obtaining an extension to this certificate, to authorize the teacher to be employed as the special class teacher of students with disabilities in a specific subject area, upon the completion of certain requirements. To obtain an extension in a specific subject, the teacher shall complete 18 semester hours of study or its equivalent in the subject area of the extension sought. For social studies, the candidate shall complete the 18 semester hours through a combination of study in United State history, world history and geography. This, coupled with passing the content specialty test in the specific subject area, will allow candidates to earn an extension to the base certificate to permit the teacher to be employed as the special class teacher of students with disabilities in that subject in the

developmental level of their base certificate. Any district or BOCES that employs a candidate holding this extension must provide weekly collaboration between a certified general education content specialist in the subject area of the extension and the teacher holding the extension, with at least one period per month co-taught by both teachers. The length of the required weekly collaboration and co-taught lesson will be defined at the local level.

Schools enumerated in article 81, 85, 87, 88 or 89 of the Education Law or a special act school district that educates only students with disabilities and who cannot meet the regulatory requirement for collaboration and co-teaching for their employed special education teachers, must submit a plan acceptable to the Department with a description of the mentoring and collaboration the teacher will receive.

The proposed regulation also establishes requirements for individual evaluation for the new students with disabilities (grades 7-12-generalist) certificate by requiring candidates seeking a certificate in this area to complete, among other requirements, six semester hours in mathematics, science, social studies and English language arts and have sufficient pedagogical training to teach these subjects. The proposed amendment also phases out individual evaluation for the students with disabilities (grades 5-9- generalist) certificate and the students with disabilities (grades 5-9) and (grades 7-12) content specific certificates by requiring candidates to apply for these certificates prior to September 1, 2011 and to complete the requirements for such certificate before February 1, 2012 to obtain certification through individual evaluation in these titles.

The amendments do not impose any additional professional service requirements on rural areas, beyond those imposed by such federal statutes and regulations and State statutes.

3. COSTS:

The State Education Department anticipates that all School districts and BOCES, including those in rural areas, will need to make a certified general education content specialist available for consultation and collaborative teaching to special education teachers assigned to teach special classes that have a content area extension. It is estimated that for each subject area, the equivalent of .25 FTEs will need to be employed as a consultant for every four sections of the subject area.

The proposed amendment will also impose minimal costs on institutions of higher education with teacher preparation programs, including those in rural areas, as they plan for the phase out teacher preparation programs for students with disabilities programs leading to certification in 7-12 and 5-9 students with disabilities content specialist certificates and the 5-9 students with disabilities generalist certificate and design and apply for the new 7-12 students with disabilities generalist certificate titles with the option for a content area extension. It is not anticipated that institutions will need to hire additional faculty for the new programs.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment makes no exception for institutions, schools or BOCES that are located in rural areas. Because of the nature of the proposed amendment, establishing different standards for institutions located in rural areas of New York State is inappropriate.

5. RURAL AREA PARTICIPATION:

Since February 2007 the Department has been seeking guidance from New York State stakeholders through requests for comments, surveys and workgroup meeting, all of which were available for public participation. Local education agencies and institutions of higher education throughout the state participated in providing recommendations, including those located in rural areas of the State.

Job Impact Statement

The proposed amendment changes the existing structure of adolescence level students with disabilities certificates, strengthens the program registration requirements for all teachers to understand the needs of students with disabilities and establishes certain subject area extensions for students with disabilities teachers to teach a special class provided there is weekly collaboration with a certified content specialist in the subject being taught and monthly co-teaching. The State Education Department expects that the proposed amendment will not have a negative impact on the number of jobs or employment opportunities at higher education institutions, BOCES or school districts. Therefore, the amend-

ment will have no negative impact on jobs or employment opportunities at these institutions. Because it is evident from the nature of the proposed amendment that it will have no negative impact on jobs and employment opportunities, no further steps were needed to ascertain these facts and none were taken. Accordingly, a job impact statement was not required and one was not prepared.

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

Teacher Tenure Determinations

I.D. No. EDU-43-10-00012-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 repeal Subpart 30-2 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided) and 3012-b (not subdivided); and L. 2008, ch. 57, part C, section 2

Subject: Teacher tenure determinations.

Purpose: Repealing provisions to eliminate regulatory requirements that have had their statutory authority repealed.

Text of proposed rule: Subpart 30-2 of the Rules of the Boards of Regents is repealed, effective February 2, 2011.

Text of proposed rule and any required statements and analyses may be obtained from: Chris Moore, NYS Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Avenue, Albany, NY 12234, (518) 474-4921, email: legal@mail.nysed.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.

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

Consensus Rule Making Determination

The proposed repeal makes necessary changes to eliminate regulatory requirements that have had their statutory authority repealed. Subpart 30-2 of the Rules of the Board of Regents was applicable only to the extent that Education Law § 3012- b remained effective. Education Law § 3012- b was repealed by the Laws of 2008 Chapter 57 effective July 1, 2010. As this action repeals regulatory provisions which are no longer applicable to any person and conforms the Rules of the Board of Regents to current statutory authority, it is not likely that anyone will object to the repeal as written.

Job Impact Statement

The purpose of the proposed amendment is to repeal regulatory provisions which are no longer applicable to any person. This regulatory change will have no effect on the number of jobs or employment opportunities relating to tenured teachers or upon any other field.

Because it is evident from the nature of the proposed amendment that it will have no impact on jobs and employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

Department of Labor

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

Restrictions on the Consecutive Hours of Work for Nurses As Enacted in Section 167 of the Labor Law

I.D. No. LAB-43-10-00003-EP

Filing No. 1043

Filing Date: 2010-10-06

Effective Date: 2010-10-06

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

Proposed Action: Addition of Part 177 to Title 12 NYCRR.

Statutory authority: Labor Law, section 21

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

Specific reasons underlying the finding of necessity: Section 167 of the Labor Law was effective July 1, 2009. However, Section 167 does not provide sufficient details with regard to what is expected of health care providers so as to avoid mandatory overtime for nurses, except in emergency situations. Section 167 was enacted to improve the health care environment for patients and the working environment for nurses.

Subject: Restrictions on the consecutive hours of work for nurses as enacted in Section 167 of the Labor Law.

Purpose: To clarify the emergency circumstances under which an employer may require mandatory overtime for nurses.

Text of emergency/proposed rule: A new Part 177 is added to 12 N.Y.C.R.R. to read as follows:

PART 177

RESTRICTIONS ON CONSECUTIVE HOURS OF WORK FOR NURSES

(Statutory authority: Labor Law § 167)

§ 177.1 Application.

In accordance with Labor Law, Section 167, this Part shall apply to health care employers, who shall be prohibited from assigning mandatory overtime to nurses except in certain circumstances as described in this regulation.

§ 177.2 Definitions.

(a) "Emergency" shall mean an unforeseen event that could not be prudently planned for by a health care employer and does not regularly occur, including an unanticipated staffing emergency.

(b) "Health care disaster" shall mean a natural or other type of disaster that increases the need for health care personnel, unexpectedly affecting the county in which the nurse is employed or in a contiguous county, as more fully explained in Section 177.3 of this Part.

(c) "Health care employer" shall mean any individual, partnership, association, corporation, limited liability company or any person or group of persons acting directly or indirectly on behalf of or in the interest of the employer, who provides health care services (i) in a facility licensed or operated pursuant to article twenty-eight of the public health law, including any facility operated by the state, a political subdivision or a public corporation as defined by section sixty-six of the general construction law, or (ii) in a facility operated by the state, a political subdivision or a public corporation as defined by section sixty-six of the general construction law, operated or licensed pursuant to the mental hygiene law, the education law or the correction law.

Examples of a health care facility include, but are not limited to, hospitals, nursing homes, outpatient clinics, comprehensive rehabilitation hospitals, residential health care facilities, residential drug and alcohol treatment facilities, adult day health care programs, and diagnostic centers.

(d) "Nurse" shall mean a registered professional nurse or a licensed practical nurse as defined by article one hundred thirty-nine of the education law who provides direct patient care, regardless of whether such nurse is employed full-time, part-time, or on a per diem basis. Nurses who provide services to a health care employer through contracts with third party staffing providers such as nurse registries, temporary employment agencies, and the like, or who are engaged to perform services for health care employers as independent contractors shall also be covered by this Part.

(e) "On call" shall mean when an employee is required to be ready to perform work functions and required to remain on the employer's premises or within a proximate distance, so close thereto that s/he cannot use the time effectively for his or her own purposes. An employee who is not required to remain on the employer's premises or within a proximate distance thereto but is merely required to leave information, at his or her home or with the health care employer, where he or she may be reached is not on call.

(f) "Overtime" shall mean work hours over and above the nurse's regularly scheduled work hours. Determinations as to what constitutes overtime hours for purposes of this Part shall not limit the nurse's receipt of overtime wages to which the nurse is otherwise entitled.

(g) "Patient care emergency" shall mean a situation which is unforeseen and could not be prudently planned for, which requires nurse overtime in order to provide safe patient care as more fully explained in Section 177.3 of this Part.

(h) "Regularly scheduled work hours" shall mean the predetermined

number of hours a nurse has agreed to work and is normally scheduled to work pursuant to the budgeted hours allocated to the nurse's position by the health care employer.

(1) For purposes of this Part, for full-time nurses, "the budgeted hours allocated to the nurses position" shall be the hours reflected in the employer's full-time employee (FTE) level for the unit in which the nurse is employed.

(2) If no such allocation system exists, regularly scheduled work hours shall be determined by some other measure generally used by the health care employer to determine when an employee is minimally supposed to work.

(3) The term regularly scheduled work hours shall be interpreted in a manner that is consistent with any relevant collective bargaining agreement and other statutes or regulations governing the hours of work, if any.

(4) Regularly scheduled work hours shall include pre-scheduled on-call time subject to the exceptions set forth in Section 177.3(b)(1) of this Part and the time spent for the purpose of communicating shift reports regarding patient status necessary to ensure patient safety.

(5) For a part-time nurse, regularly scheduled work hours mean those hours a part-time nurse is normally scheduled to work pursuant to the employer's budgeted hours allocated. If advance scheduling is not used for part-time nurses, the percentage of full-time equivalent, which shall be established by the health care employer (e.g. a 50% part-time employee), shall serve as the measure of regularly scheduled work hours for a part-time nurse.

(6) For per diem, privately contracted, or employment agency nurses, the employment contract and the hours provided therein shall serve as the basis for determining the nurse's regularly scheduled work hours.

§ 177.3 Mandatory Overtime Prohibition

(a) Notwithstanding any other provision of law, a health care employer shall not require a nurse to work overtime. On call time shall be considered time spent working for purposes of determining whether a health care employer has required a nurse to work overtime. No employer may use on-call time as a substitute for mandatory overtime.

(b) The following exceptions shall apply to the prohibition against mandatory overtime for nurses:

(1) *Health Care Disaster.* The prohibition against mandatory overtime shall not apply in the case of a health care disaster, such as a natural or other type of disaster unexpectedly affecting the county in which the nurse is employed or in a contiguous county that increases the need for health care personnel or requires the maintenance of the existing on-duty personnel to maintain staffing levels necessary to provide adequate health care coverage. A determination that a health care disaster exists shall be made by the health care employer and shall be reasonable under the circumstances. Examples of health care disasters within the meaning of this Part include unforeseen events involving multiple serious injuries (e.g. fires, auto accidents, a building collapse), chemical spills or releases, a widespread outbreak of an illness requiring hospitalization for many individuals in the community served by the health care employer, or the occurrence of a riot, disturbance, or other serious event within an institution which substantially affects or increases the need for health care services.

(2) *Government Declaration of Emergency.* The prohibition against mandatory overtime shall not apply in the case of a federal, state or local declaration of emergency in effect pursuant to State law or applicable federal law in the county in which the nurse is employed or in a contiguous county.

(3) *Patient Care Emergency.* The prohibition against mandatory overtime shall not apply in the case of a patient care emergency, which shall mean a situation that is unforeseen and could not be prudently planned for and, as determined by the health care employer, that requires the continued presence of the nurse to provide safe patient care, subject to the following limitations:

(i) Before requiring an on-duty nurse to work beyond his or her regularly scheduled work hours in connection with a patient care emergency, the health care employer shall make a good faith effort to have overtime covered on a voluntary basis or to otherwise secure nurse coverage by utilizing all methods set forth in its Nurse Coverage Plan required pursuant to Section 177.4 of this Part. The health care employer shall document attempts to secure nurse coverage through use of phone logs or other records appropriate to this purpose.

(ii) A patient care emergency cannot be established in a particular circumstance if that circumstance is the result of routine nurse staffing needs due to typical staffing patterns, typical levels of absenteeism, and time off typically approved by the employer for vacation, holidays, sick leave, and personal leave, unless a Nurse Coverage Plan which meets the

requirements of Section 177.4 is in place, has been fully implemented and utilized, and has failed to produce staffing to meet the particular patient care emergency. Nothing in this provision shall be construed to limit an employer's right to deny discretionary time off (e.g., vacation time, personal time, etc.) where the employer is contractually or otherwise legally permitted to do so.

(iii) A patient care emergency will not qualify for an exception to the provisions of this Part if it was caused by the health care employer's failure to develop or properly and fully implement a Nurse Coverage Plan as required under Section 177.4 of this Part.

(4) *Ongoing Medical or Surgical Procedure.* The prohibition against mandatory overtime shall not apply in the case of an ongoing medical or surgical procedure in which the nurse is actively engaged and in which the nurse's continued presence through the completion of the procedure is needed to ensure the health and safety of the patient. Determinations with regard to whether the nurse's continued active engagement in the procedure is necessary shall be made by the nursing supervisor or nurse manager supervising such nurse.

(c) Nothing in this Part shall prohibit a nurse from voluntarily working overtime. A nurse may signify his or her willingness to work overtime by either: a) agreeing to work a particular day or shift as requested, b) agreeing to be placed on a voluntary overtime list or roster, or c) agreeing to prescheduled on-call time pursuant to a collective bargaining agreement or other written contract or agreement to work.

§ 177.4 Nurse Coverage Plans

(a) Every health care employer shall implement a Nurse Coverage Plan, taking into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors. Such plan should also reflect the health care employer's typical levels and types of patients served by the health care facility.

(b) The Plan shall identify and describe as many alternative staffing methods as are available to the health care employer to ensure adequate staffing through means other than use of mandatory overtime including contracts with per diem nurses, contracts with nurse registries and employment agencies for nursing services, arrangements for assignment of nursing floats, requesting an additional day of work from off-duty employees, and development and posting of a list or roster of nurses seeking voluntary overtime.

(c) The Plan must identify the Supervisor(s) or Administrator(s) at the health care facility or at another identified location who will make the final determination as to when it is necessary to utilize mandatory overtime. The Plan may not require a nurse to find his or her own shift replacement or to self-mandate overtime.

(d) The Plan shall require documentation of all attempts to avoid the use of mandatory overtime during a patient care emergency and seek alternative staffing through the methods identified in subdivision (b) of this Section. In the event that the health care employer does utilize mandatory overtime, the documentation of such efforts to avoid the use of mandatory overtime shall be made available, upon request, to the nurse who was required to work the mandatory overtime and/or to the nurse's collective bargaining representative, provided, however, that the names and other personal identifying information about patients shall not be included unless authorized under State and federal law and regulations.

(e) The Plan shall be in writing and upon completion or amendment of such plan, it shall:

(i) be made readily available to all nursing staff through distribution to nursing staff, or conspicuously posting the Plan in a physical location accessible to nursing staff, or through other means that will ensure availability to nursing staff, e.g. posting on the employer's intranet site or its functional equivalent.

(ii) be provided to any collective bargaining representative representing nurses at the health care facility.

(iii) be provided to the Commissioner of Labor, or his or her designee, upon request.

(f) Nothing herein shall be read to establish the Nurse Coverage Plans required herein as standards to be used in assessing the health care employer's compliance with any other obligation or requirement, including facility accreditation.

(g) All such Plans were to have been prepared by October 13, 2009 in accordance with emergency regulations that were in effect. For health care employers who were not operating covered facilities on October 13, 2009, a Nurse Coverage Plan shall be in place prior to the time they commence operations.

§ 177.5 Report of Violations

Parties who wish to file complaints of violations of this Part shall follow procedures and utilize the forms set forth for this purpose on the Department's website.

§ 177.6 Conflicts with Law and Regulation; Collective Bargaining Rights Not Diminished

The provisions of this Part shall not be construed to diminish or waive any rights or obligations of any nurse or health care provider pursuant to any other law, regulation, or collective bargaining agreement.

§ 177.7 Waiver of Rights Prohibited

A health care employer covered by this Part may not utilize employee waivers of the protections afforded under Labor Law § 167 or this Part as an alternative to compliance with such law or regulation. A health care employer who seeks such a waiver from a nurse in its employ shall be considered to have violated this Part.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire January 3, 2011.

Text of rule and any required statements and analyses may be obtained from: Teresa Stoklosa, Department of Labor, State Office Campus, Building 12, Room 508, Albany, NY 12240, (518) 457-4380, email: teresa.stoklosa@dol.state.ny.us

Data, views or arguments may be submitted to: Joan Connell, Esq., New York State Department of Labor, State Office Campus, Building 12, Room 509, Albany, NY 12240, (518) 457-4385

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

Regulatory Impact Statement

1. Statutory authority:

Section 21 of the Labor Law provides the Commissioner with authority to issue regulations governing any provision of the Labor Law as she finds necessary and proper. This rule is proposed pursuant to Section 167 of the Labor Law enacted by chapter 493 of the Laws of 2008. The effective date of the law was July 1, 2009.

2. Legislative objectives:

Legislation passed during the 2008 legislative session recognized the physical and emotional toll that mandatory overtime can take on nurses and on patient care. In response to these concerns, the legislation requires that health care employers take steps to prudently plan for adequate nursing staff coverage in their facilities so as to avoid the need to require mandatory overtime of nurses in most instances.

3. Needs and benefits:

Nurses work in a demanding and stressful environment where sound decision-making is a matter of life and death for patients. Limitations on mandatory overtime avoid successive work shifts which take a physical and mental toll on nurse's performance and can impact the quality of patient care. Labor Law Article 6, section 167 places restrictions on consecutive hours of work for nurses, except in emergency situations, while not prohibiting a nurse from voluntarily working overtime and allows an employer who experiences an unanticipated staffing emergency that does not regularly occur, to require overtime to ensure patient safety.

The enabling legislation does not provide sufficient details with regard to what is expected of health care employers so as to avoid mandatory overtime, except in emergency situations. The rule addresses these statutory gaps by requiring that covered employers develop a Nurse Coverage Plan (the Plan), by setting forth the minimum elements to be addressed in the Plan, and by requiring that the Plan be posted and made available to the Commissioner, to nursing staff and their employee representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will allow health care employers to use mandatory overtime to cover nurse staffing needs.

4. Costs:

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services, and temporary agencies to have a viable source of additional nursing staff to use in lieu of mandating overtime of current staff. The cost for individual health care employers will depend upon the extent to which the Plan relies on these contract workers and the degree of coverage that the health care employer will need. In the current environment of nursing shortages, a major medical center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff. At the other end of the spectrum, facilities with a very small staff, few resources or in underserved or remote locations may not be able to compete to fill vacancies. At the time this legislation was before the Governor for action in 2008, the Division of Budget estimated compliance would cost approximately \$13 million in its first year. However, these projected costs - attributable to the hiring of per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime - should have been offset by savings of \$5 million, which otherwise would have been paid for such overtime.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Nurse Coverage Plan.

The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. It is not anticipated that any health care employer would have to retain outside professional services to prepare the Nurse Coverage Plan. Although there are administrative costs and time associated with developing and maintaining a written Plan and a log of efforts to obtain coverage using the Plan, these costs may be offset through use of a Plan that may reduce the need for last-minute supplemental staffing.

Legal services may be required to negotiate, draft or review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

Requirements with regard to the posting of such Plan and the logging of efforts to obtain staff coverage in compliance with the Plan will result in minimal or no additional cost.

5. Paperwork:

The employer will be required to develop and post the Nurse Coverage Plan discussed above, along with all necessary paperwork to log the efforts to obtain staff coverage in compliance with the Plan. Additionally, the Nurse Coverage Plan may require the drafting of contracts with alternative staffing providers such as per diem agencies and the posting of a list of nurses seeking voluntary overtime. The rule does provide alternative, paperless options to meet this requirement including posting of the Nurse Coverage Plan on the employer's intranet or by sending electronic copies of the Plan to staff and their representatives.

6. Local government mandates:

This rule will have an impact on any county, city, town, village, school district, fire district or other special district that employ nurses. The impact will depend on the size of the facility and nursing staff and the degree to which mandatory, unscheduled overtime is currently being used on a routine basis.

7. Duplication:

This rule does not duplicate any state or federal regulations.

8. Alternatives:

One alternative is to draft regulations which allow the employers to have full discretion to make determinations regarding the existence of an emergency on an ad hoc basis. However, such discretion is inconsistent with the letter and spirit of the statute. Clearly, certain levels of absenteeism based upon sick leave, bereavement, leaves of absences, and breaks during shifts will always exist in all employment settings, including health care facilities. A health care employer must plan to cover for these expected staff absences, based upon patterns that have emerged from operating a facility and must have staffing options that address the need to provide appropriate nursing care. The Department of Labor circulated draft regulations for comment to State Agencies and other employer groups, and to various employee representative groups. In some instances, changes to the regulations were made in response to such concerns. For example, the Department of Corrections (DOCS) requested clarification regarding examples of health care disasters set forth in Section 177.3 of the regulations. The regulations were revised to include such language.

The Department received comments from one employer group, the Healthcare Association of New York State, that the regulations should provide alternatives to healthcare employers regarding the conspicuous posting of the Nurse Coverage Plans. It was suggested that the regulations authorize employers to utilize other means to make the Nurse Coverage Plans available to nursing staff such as the employer's intranet. The Department revised the regulations to allow for the use of other means to make the Nurse Coverage Plan available to nursing staff.

The Department also received a comment from employee representatives about requiring the filing of all Nurse Coverage Plans with the Commissioner of Labor. The Department considered such a filing requirement but decided it was unnecessary since the Commissioner will request such Plans once a complaint has been received about an employer. The Department heard from representatives of public sector nurses that the definition of regularly scheduled work hours should include a reference to regulations governing such typical work hours. The language in relevant sections of the rule has been changed in response to this request.

The representatives of public sector nurses had comments about the Nurse Coverage Plans and the requirement for documentation of all attempts to avoid the use of mandatory overtime during a patient care emergency. The representatives were concerned that some health care employers might have a nurse working alone and if that nurse is unable to find relief through alternative staffing methods, he or she might then have to self-mandate overtime. A Nurse Coverage plan that requires a nurse to find her own shift replacement or to self-mandate overtime is inadequate. The Department added language to Section 177.4 (c) (Nurse Coverage

Plans) to require the Plan to identify the Supervisor at the health care facility who will make the final determination as to when it is necessary to utilize mandatory overtime.

Parties commenting on behalf of nurses in the public sector also asked that the regulations outline a system of record keeping regarding the documentation of all attempts to avoid the use of mandatory overtime. It was suggested that such documentation include information that would already be available in the employer's payroll records. The information provided in a nurse's complaint, the employer payroll records, and the documentation regarding all attempts to avoid mandatory overtime through the use of the Nurse Coverage Plan, should be sufficient for the Department to complete an investigation regarding a violation of Section 167 and 12 NYCRR Part 177. The representatives also suggested that in the event a health care employer utilizes mandatory overtime for a patient care emergency, the documentation regarding the efforts to avoid the use of such mandatory overtime should be available upon request to the nurse who had to work the mandatory overtime and/or the collective bargaining representative. The Department added language to Section 177.4(d) to require that such documentation is made available, upon request, to the nurse or the collective bargaining representative. The representatives also noted that any amendment to Nurse Coverage Plans should be made available to nurses and their collective bargaining representatives. Accordingly, Section 177.4(d) now includes language regarding amendments to the Nurse Coverage Plans.

The representatives of public sector nurses also suggested that Section 177.3(c) be revised to make it clear that an individual nurse must volunteer to remain on-call regardless of any contractual provisions which provide for on-call time for nurses. The Department does not have the authority to modify the terms of collective bargaining agreements. If the collective bargaining agreement provides for on-call time for nurses, than such on-call time is presumed to be voluntary.

The representatives of public sector nurses all suggest the regulations collapse the separate and independent requirements set forth in Labor Law, Section 167(3)(c) to prudently plan for routine staffing shortages and to make good faith efforts to cover staffing on a voluntary basis before mandating overtime when a patient care emergency exists. The regulations require Nurse Coverage Plans to take into account typical patterns of absenteeism and to reflect the employer's typical levels and types of patients served in the facility. The Nurse Coverage Plan must identify and describe as many alternative staffing methods as are available to the employer to ensure adequate staffing other than by use of mandatory overtime during a patient care emergency. This language clearly requires employers to have a Nurse Coverage Plan that provides sufficient staffing to account for typical patterns of absenteeism and, at the same time, have alternative staffing methods to cover patient care emergencies.

The representatives of public sector nurses also suggest that the regulations provide for enforcement action against a health care employer who fails to develop and implement the required policies and procedures and maintain the required recordkeeping. While the Department does find penalties to be an effective means of encouraging employer compliance with regulations protecting the rights of workers, the implementing legislation does not provide for such penalties.

The representatives of public sector nurses also suggest that the regulations should clearly set forth protections against reprisals for filing a complaint. Such protections already exist under Section 215 of the Labor Law for nurses in private facilities. Civil Service Law, Section 75-b prohibits retaliatory actions by public employers against public employees.

The representatives of public sector nurses also suggest that the regulations set forth that the investigatory process be completed within 90 days and include an informal conference or means by which a Department Investigator, the complainant and/or the collective bargaining representative, and the employer meet to discuss issues arising from the investigation. The representatives also suggest a closing conference and a clearly defined appeal process or mechanism to dispute the Department's issuance of an order in a situation where the complainant employee or collective bargaining representative disputes the Department's decision. In short, the representatives of public sector nurses are requesting a procedural investigatory process similar to that for public employee safety and health complaints pursuant to Labor Law, Section 27-a. However, that investigatory process is clearly detailed in Section 27-a and includes site inspections, where representatives of the employer and an authorized employee representative are given an opportunity to accompany the Department Investigator during an inspection. This type of on-site inspection is needed to view whether safety and health hazards exist.

The representatives of public sector nurses suggest that nurse administrators or employees that have a nursing license, but do not provide direct patient care in their positions be covered under the provisions of Section 167 if the employer mandates them to provide direct patient care. Such a requirement is clearly contrary to the statutory provisions of Section 167. Specifically, Section 167(1)(b) defines a nurse as a registered professional

nurse or a licensed practical nurse as defined by article one hundred thirty-nine of the Education Law who provides direct patient care. (Emphasis supplied) The Department does not have the statutory authority to expand the coverage of Section 167 to nurse administrators or other employees that have a nursing license, but do not have regularly scheduled work hours where they provide direct patient care.

During rule development, several parties presented diverse comments on many issues, some of which resulted in modification of this proposal. The Department looks forward to the public comment period, which will provide the opportunity for additional regulated parties and interested parties to explain their different perspectives and share expertise in this area that would help clarify, balance and generally improve the final regulation.

9. Federal standards:

There are no federal standards with like requirements.

10. Compliance schedule:

The rule will be effective on the date of final adoption.

However, emergency regulations have been in place for several months which have established the requirement for Nurse Coverage Plans. The Nurse Coverage Plans were required to be established by October 13, 2009.

Regulatory Flexibility Analysis

1. Effect of rule:

This rule will apply to all health care employers which include any individual, partnership, association, corporation, limited liability company or any person or group of persons acting directly or indirectly on behalf of or in the interest of the employer, which provides health care services in a facility licensed or operated pursuant to Article 28 of the Public Health Law, including any facility operated by the State, a political subdivision or a public corporation as defined by Section 66 of the General Construction Law or in a facility operated by the State, a political subdivision or a public corporation as defined by Section 66 of the General Construction Law, operated or licensed pursuant to the Mental Hygiene Law, the Education Law, or the Correction Law. Accordingly, small businesses and local governments may be impacted if they provide health care services in a facility noted above. The Department's Division of Research and Statistics estimates that there are 4,175 health care facilities in the State with fewer than 100 employees. Of these 4,175 employers, 4,143 are private employers and 32 are public employers.

2. Compliance requirements:

The record and reporting requirements contained in the proposed rule are minimal. Healthcare employers must prepare a Nurse Coverage Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. Additionally, the health care employer must make the Nurse Coverage Plan available to: nursing staff by posting the Plan or making it available to nursing staff by the intranet, employee representatives and to the Commissioner upon request. The health care employer must also maintain a log of efforts to obtain staff coverage in compliance with the Plan.

3. Professional services:

Legal services may be required to negotiate, draft and review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

The rule will require health care employers to seek alternative sources to obtain the services of nurses other than forcing their current nursing staff to work mandatory overtime shifts. In this respect, the health care employers will be seeking professional nursing services which would have otherwise been performed by their current nursing staff on a mandatory basis.

4. Compliance costs:

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services, and temporary agencies to have a viable source of nursing staff to use in lieu of mandatory overtime. The cost for individual health care employers will depend upon the extent to which the nurse staffing plan relies on these contract workers and the degree of coverage that the health care facility will need. For example, a major medical center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff because of the need to fill such vacancies with nurses having the same specialized training. At the other end of the spectrum, facilities with very a small staff may find it equally difficult to fill vacancies without having to utilize outside staffing service providers. At the time this legislation was before the Governor for action in 2008, the Division of Budget estimated compliance would cost approximately \$13 million in its first year. However, these costs - attributable to the hiring of

per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime - should have been offset by savings of \$5 million, which otherwise would have been paid for such overtime. Also, it is likely that in the approximately one and a half year period from when Section 167 was enacted into law, employers have been preparing for implementation of the statute and have taken steps to mitigate costs associated with this new law.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Nurse Coverage Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. It is not anticipated that any health care employer would have to retain outside professional services to prepare the Nurse Coverage Plan. Although there are administrative costs and time associated with developing and maintaining a written Plan and log, these costs may be offset through the use of a Plan that may reduce the need for last-minute supplemental staffing.

Legal services may be required to negotiate, draft or review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

Requirements with regard to the posting of such Plan and the logging of efforts to obtain staff coverage in compliance with the Plan will result in minimal or no additional cost.

5. Economic and technological feasibility:

The proposed rule does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

6. Minimizing adverse impact:

This rule is necessary to implement Labor Law, Section 167, as enacted by chapter 493 of the Laws of 2008. Although this enabling legislation does not require the promulgation of regulations, it does not provide sufficient details with regard to what is expected of health care employers so as to avoid, to the greatest extent possible, unnecessary mandatory overtime. The rule addresses these statutory gaps by requiring that covered employers develop a staffing plan, by setting forth the minimum elements to be addressed in this plan, and by requiring that the plan be made available to the Commissioner and to nursing staff and their representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will exempt health care employers from the prohibition against mandatory overtime to cover nursing staffing needs that would otherwise apply.

This rule fulfills the legislative objective of chapter 493 by improving the health care environment for patients and the working environments for nurses and their families, while at the same time minimizes the potential impact on the health care employers by allowing them to develop a Nurse Coverage Plan which addresses their specific needs and takes into account all of their specific circumstances.

7. Small business and local government participation:

The Department solicited input on these regulations from various employer representatives. These employer representatives have members from small businesses and local governments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

Any rural area where nurses are employed will be affected. The type of affect will depend on the degree to which those areas are currently relying on unscheduled, mandatory overtime to fill staffing requirements.

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

The reporting, recordkeeping and compliance requirements contained in the proposed rule are minimal. The employer will be required to develop a Nurse Coverage Plan which identifies and describes as many alternative staffing methods as are available to the health care employer to ensure adequate staffing through means other than use of overtime, including, but not limited to, contracts with per diem nurses, contracts with nurse registries and employment agencies for nursing services, arrangements for assignment of nursing floats, requesting an additional day of work from off-duty employees, and development and posting of a list of nurses seeking voluntary overtime. The healthcare employer must log all good faith attempts to seek alternative staffing through the methods identified in the health care employers' Nurse Coverage Plan. The Plan must be in writing, and be provided to the nursing staff, to any collective bargaining representative representing nurses at the health care facility and to the Commissioner of Labor upon request.

The rule will also require health care employers to seek alternative sources to obtain the services of nurses other than forcing their current nursing staff to work mandatory overtime shifts. In this respect, the health care employers will be seeking professional nursing services which would

have otherwise been performed by their current nursing staff on a mandatory basis. This may necessitate the drafting of contracts with alternative staffing providers such as per diem agencies.

3. Costs:

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services, and temporary agencies to have a viable source of additional nursing staff to use in lieu of mandating overtime of current staff. The cost for individual health care employers will depend upon the extent to which the Plan relies on these contract workers and the degree of coverage that the health care employer will need. In the current environment of nursing shortages, a major medical center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff. At the other end of the spectrum, facilities with a very small staff, few resources or in underserved or remote locations may not be able to compete to fill vacancies. At the time this legislation was before the Governor for action in 2008, the Division of Budget estimated compliance would cost approximately \$13 million in its first year. However, these costs - attributable to the hiring of per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime - should have been offset by savings of \$5 million, which otherwise would have been paid for such overtime. Also, it is likely that in the approximately one and a half year period from when Section 167 was enacted into law, employers have been preparing for implementation of the statute and have taken steps to mitigate costs associated with this new law.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. It is not anticipated that any health care employer would have to retain outside professional services to prepare the Nurse Coverage Plan. Although there are administrative costs and time associated with developing and maintaining a written Plan and log, these costs may be offset through the use of a Plan in place that may reduce the need for last-minute supplemental staffing.

Legal services may be required to negotiate, draft or review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

Requirements with regard to the posting of such Plan and the logging of efforts to obtain staff coverage in compliance with the Plan will result in minimal or no additional cost.

4. Minimizing adverse impact:

This rule is necessary to implement Labor Law, Section 167, as enacted by chapter 493 of the Laws of 2008. Although this enabling legislation does not require the promulgation of regulations, it does not provide sufficient details with regard to what is expected of health care employers so as to avoid, to the greatest extent possible, unnecessary mandatory overtime. The rule addresses these statutory gaps by requiring that covered employers develop a staffing plan, by setting forth the minimum elements to be addressed in this plan, and by requiring that the plan be made available to the Commissioner and to nursing staff and their representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will exempt health care employers from the prohibition against mandatory overtime to cover nursing staffing needs that would otherwise apply.

This rule fulfills the legislative objective of chapter 493 by improving the health care environment for patients and the working environments for nurses and their families, while at the same time minimizes the potential impact on the health care employers by allowing them to develop a Nurse Coverage Plan which addresses their specific needs and takes into account all of their specific circumstances.

5. Rural area participation:

The Department sought input on these regulations from various employer representative groups which represent rural area employees. Additionally, the Department received input from various employer representative groups which also represent rural area employers.

Job Impact Statement

Health care employers covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services and temporary agencies to have a viable source of nursing staff to use in lieu of mandatory overtime. At the time Section 167 of the Labor Law (the statutory authority for this rule) was before the Governor for signature, the Division of the Budget estimated compliance would cost ap-

proximately \$13 million in its first year, which was attributable to the hiring of per diem nurses to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime. Accordingly, it is apparent from the nature and purpose of this rule that it will not have any adverse impact on jobs or employment opportunities; in fact it will create more jobs.

Division of the Lottery

EMERGENCY RULE MAKING

Operation of the LOTTO Game and the New York Lottery Subscription Program

I.D. No. LTR-35-10-00018-E

Filing No. 1045

Filing Date: 2010-10-07

Effective Date: 2010-10-07

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

Action taken: Repeal of sections 2804.14 and 2804.15 and Part 2817; and addition of new sections 2804.14 and 2804.15 and Part 2817 to Title 21 NYCRR.

Statutory authority: Tax Law, sections 1601, 1604 and 1612

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

Specific reasons underlying the finding of necessity: Emergency adoption of the new LOTTO regulations is necessary to counteract the budgetary crisis currently facing the State of New York. Governor Paterson discussed the severity of this crisis in his January 7, 2009 State of the State address:

New York faces an historic economic challenge, the gravest in nearly a century. For several months, events have shaken us to the core. Bank closures, job losses and stock market meltdowns have destabilized the foundations of our economy. Since January 2008, two million Americans have lost their jobs. During this recession, an estimated 225,000 New Yorkers will be laid off. Many others have lost their homes. The pillars of Wall Street have crumbled. The global economy is reeling. Trillions of dollars of wealth have vanished.

We still do not know the extent of the economic chaos that awaits us. We do know that this may be the worst economic contraction since the Great Depression. New York entered recession in August. Wall Street was hit the hardest. At least 60,000 jobs will be lost in the financial services sector, which is devastating to our state budget. Financial services provide 20% of state government revenues, so this year's budget will be exceptionally difficult.

Let me be clear - our state faces historic challenges. Our economy is damaged, our confidence is shaken, and the economic obstacles we face seem overwhelming. . . These problems may last for many more months or even years.

Since his State of the State address, the Governor has continued to underscore the importance of reversing New York State's ominous fiscal situation.

The New York Lottery (the "Lottery") has the unique ability to generate revenue for the State quickly and at a critical time when additional revenue is essential. By offering a new version of the LOTTO game, the Lottery will reverse a downward trend in LOTTO sales and increase revenue earned for education in New York State.

The new regulations allow the Lottery to address the continuing decline in LOTTO sales. Over the course of State Fiscal Years 2004-05 through 2007-08, LOTTO sales decreased by an average of 10.4% annually. LOTTO sales declined to only \$208,400,000 in the fiscal year ending on March 31, 2008 compared to earlier levels of over \$356,000,000 a year. If the 10.4% annual decline in LOTTO sales continues through the fiscal year ending March 31, 2012, sales for that year will total only \$134,420,000. The aid to education from this game will also drop from an estimated \$109,858,000 in FY

2007-08 to only \$70,860,000 in FY 2011-12, which is a difference of almost forty million dollars that will need to be subsidized from the General Fund. LOTTO sales even further declined in FY 2008-09 at a rate of 14.6% compared to the previous fiscal year. If this amplified downward trend continues, the consequential decline in aid to education will be even more significant than what is currently projected.

The declining sales of the LOTTO game must be addressed immediately to not only maintain current revenue earned for education, but to generate additional money for the State. The new game rules are intended to re-ignite interest in the game by providing for a more attractive prize structure with better odds of winning top prizes. Marketing research and consumer surveys indicate that interest in the new LOTTO game is high, which suggests that the State is likely to realize indispensable budgetary relief in the form of increased revenue for education earned through improved LOTTO sales.

In an effort to make the LOTTO game more attractive, the Lottery has further revised the LOTTO game rules to permit multiple variations of the game and to allow flexibility for the Lottery to adjust the game or games based on market trends. The ability to respond to the player market will also provide the Lottery with the opportunity to increase ticket sales for the LOTTO game or games and ultimately generate more revenue to the State for aid to education.

Due to the unprecedented need for revenue at this time, the Lottery and the State cannot afford to delay relaunch of the LOTTO game until completion of a normal rulemaking process under the State Administrative Procedure Act. Therefore, the new LOTTO regulations must first be implemented through Emergency Adoption.

Subject: Operation of the LOTTO game and the New York Lottery subscription program.

Purpose: To revise the rules of the LOTTO game and related subscription provisions.

Substance of emergency rule: The amendments revise the regulations for the operation of the LOTTO game. Due to the prolonged decline in popularity of the Lottery's former flagship game, the Lottery is relaunching LOTTO to make it more appealing to consumers, which should ultimately generate more revenue to the State for aid to education.

The revised game rules provide for a more attractive prize structure for players and are intended to re-ignite interest in the game. The first prize for the game shall be \$1,000,000 paid as a lump sum. There will be approximately three times as many top prizes as under the existing LOTTO game. The first prize will not be a shared prize unless a certain maximum number of game panels match the applicable numbers for a particular drawing. The revised regulations also address the second prize category through the fourth prize category.

Definitions are revised to accommodate the new design while also providing that certain specific game rules shall be publicly announced by the Lottery. The definition of the LOTTO game was revised to permit the Lottery to change the name of the game or to offer two or more versions of the LOTTO game with different fields of numbers and prize structures.

The LOTTO regulations are amended to permit minor changes in the game structure if marketing evidence suggests that alteration may result in greater interest in the game and increased revenue for the State. Game details not specified in the regulations will be communicated to players via the Lottery's official website, on which the Lottery will designate the odds of winning, the prize structure, including fixed prize amounts, and details about any additional version of the LOTTO game. The Lottery will also announce details regarding LOTTO in advertisements, news releases, play slips, brochures located at retailers, or in any other form that the Director may prescribe. Therefore, slight modifications to the game will not necessarily require amendment of the regulations. This ensures that the Lottery will be able to offer the best possible game, which will appeal to more customers and maximize revenue for aid to education in New York State.

The regulations relating to subscriptions are also amended to comply with revisions to the LOTTO game. The revised subscription regulations generally describe subscription costs and subscription application requirements. In addition to LOTTO, these regulations apply to any other game that the Lottery has or may have available under the subscription program.

Technical amendments are also made throughout the proposed regulations.

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. LTR-35-10-00018-P, Issue of September 1, 2010. The emergency rule will expire December 5, 2010.

Text of rule and any required statements and analyses may be obtained from: Julie B. Silverstein Barker, Associate Attorney, New York Lottery, One Broadway Center, PO Box 7500, Schenectady, NY 12301-7500, (518) 388-3408, email: nylrules@lottery.state.ny.us

Regulatory Impact Statement

1. Statutory authority: The new regulations for the New York Lottery's subscription program and the LOTTO game are proposed pursuant to Tax Law, Sections 1601, 1604 and 1612.

Tax Law § 1601 describes the purpose of the New York State Lottery for Education Law (Tax Law Article 34) as being to establish a lottery operated by the State, the net proceeds of which are applied exclusively for aid to education. Tax Law § 1604 authorizes the Division of the Lottery (the Lottery) "to promulgate rules and regulations governing the establishment and operation thereof." Tax Law § 1612(a)(4) specifies the percentages for disposition of LOTTO sales revenues and describes the game as, "'Lotto', offered no more than once daily, a discrete game in which all participants select a specific subset of numbers to match a specific subset of numbers, as prescribed by rules and regulations promulgated and adopted by the division, from a larger specific field of numbers, as also prescribed by such rules and regulations."

2. Legislative objectives: The purpose of operating Lottery games is to generate earnings for the support of education in the State. Repeal and replacement of these regulations will improve the Lottery's ability to generate earnings for education by increasing consumer interest in LOTTO games.

3. Needs and benefits: The LOTTO game has sustained competitive pressure from large jackpot lottery games, which has produced a decline in LOTTO revenues and a loss of player interest. A comparison of LOTTO revenues for 2004-05 to revenues for 2008-09 shows an annual decline of 12.9%. For the fiscal year ending on March 31, 2009, revenues declined to only \$178,100,000 from earlier levels of over \$356,000,000 a year. If the 12.9% annual decline in revenues continues through the fiscal year ending March 31, 2012, revenues for that year will total only \$117,900,000. The aid to education from this game will also drop from an estimated \$93,900,000 in FY 2008-09 to only \$62,200,000 in the fiscal year ending on March 31, 2012.

Repeal and replacement of the LOTTO regulations will allow the Lottery to reverse this trend and continue its effort to keep and enlarge its market share of players (from within New York State and those visiting New York State from other states) who play lottery games. The new regulations allow the Lottery to offer additional versions of the LOTTO game. Pursuant to the new regulations, including an emergency regulation adopted on July 31, 2009, the Lottery has, as of September 15, 2009, introduced a variation of the LOTTO game called Sweet Million with more attractive odds of winning intended to generate renewed interest in LOTTO games. Because the new variation of the LOTTO game has more favorable odds of winning a first prize, revenues are expected to increase.

Marketing research and consumer surveys indicate that interest in the new variation of the LOTTO game is high. Players are motivated by "better odds," and many think the new game is a great value. Research reveals that players find the improved odds of winning when compared to the current LOTTO game to be the single most exciting aspect of the new game. Survey participants also responded favorably to first prize being paid as a lump sum. Of those surveyed, 86% prefer jackpot winnings to be paid all at once in cash as opposed to installments. This evidence suggests that New Yorkers are intrigued by the new game, and the State is likely to realize a tangible benefit in the form of increased earnings for education.

4. Costs:

a. Costs to regulated parties for the implementation and continuing compliance with the rule: None.

b. Costs to the agency, the State, and local governments for the implementation and continuation of the rule: No additional operating costs; since current funds reserved for administrative expenses of operating lottery games are expected to be sufficient to support the new variation of the LOTTO game, including advertising expenses, point of sale material production costs, and the cost of printing play slips for the new game. The new variation of the LOTTO game will generate more earnings for aid to education, which will far exceed the minimal expenses necessary to operate the new game. More aid to education from the Lottery will have a positive effect on the State because less funds will then be required from other General Fund resources to aid education. Furthermore, if less funds are required from other General Fund resources to aid education, local governments will benefit because increased funding for local schools from Lottery earnings will ease local tax burdens. Local retailers will earn higher commissions as ticket sales increase, which may result in more employment opportunities.

c. Sources of cost evaluations: The foregoing cost evaluations are based on the Lottery's experience in operating State Lottery games for more than 40 years.

5. Local government mandates: None. No local government is authorized or required to do any act, apply any effort, expend any funds, or use any other resources in connection with the operation of the LOTTO game or LOTTO game variations. All necessary actions will be carried out by the Lottery or licensed Lottery retailers who will be completely responsible for all aspects of game operations at the local retail level. The Lottery has no authority and no need to impose any mandate on any local government. Consequently, no provision of the rule imposes any burden on any local government in the State.

6. Paperwork: There are no changes in paperwork requirements. Game information will be issued by the New York Lottery for public convenience on the Lottery's website and through point of sale advertising materials at retailer locations.

7. Duplication: None.

8. Alternatives: The revised LOTTO regulations permit minor changes in the structure of any variation of the LOTTO game if marketing evidence suggests that alteration may result in greater interest in that game and increased revenue for the State. Specific game details not specified in the regulations will be communicated to players via the Lottery's official website, on which the Lottery will designate the odds of winning, the prize structure, including fixed prize amounts, and details about any additional version of the LOTTO game. The Lottery will also announce details of LOTTO games in mass media advertisements, news releases, play slips, point of sale materials located at retailers, or in any other form that the Director may prescribe. Therefore, slight modifications to any variation of the LOTTO game will not require amendment of the regulations. This will ensure that the Lottery will be able to offer the best possible game or games, which will appeal to more customers and result in maximum sales and revenue for aid to education in New York State.

The alternative to amending the LOTTO regulations is to not address the declining revenues for the existing LOTTO game and forfeit the investment already made by the Lottery in the game. The annual LOTTO sales decline of 12.9% will likely continue, and the State will lose millions of dollars in revenue. The failure to proceed will also result in lost aid to education that is anticipated to be earned following introduction of a new variation of the LOTTO game.

9. Federal standards: None.

10. Compliance schedule: None.

Regulatory Flexibility Analysis and Rural Area Flexibility Analysis

This rulemaking does not require a Regulatory Flexibility Analysis or a Rural Area Flexibility Analysis. There will be no adverse impact on rural areas, small business or local governments.

The proposed amendments to the LOTTO game and subscription regulations will not impose any adverse economic or reporting, recordkeeping or other compliance requirements on small businesses or local governments. Small businesses will not have any additional recordkeeping requirements as a result of the amendments. Additionally, the proposed amendments are anticipated to have a positive ef-

fect on the revenue of small businesses that sell lottery tickets as more players will be interested in the game, which will increase sales commissions paid to retailers. Local governments are not regulated by the New York Lottery or its subscription regulations, nor are any economic or recordkeeping requirements imposed on local governments as a result of the amendments.

Job Impact Statement

The proposed repeal and replacement of 21 NYCRR sections 2804.14 and 2804.15 and Part 2817 does not require a Job Impact Statement because there will be no adverse impact on jobs and employment opportunities in New York State. The repeal and replacement of the regulations is sought to relaunch the New York Lottery's LOTTO game to generate more revenue for the State for aid to education.

The revisions may have a positive effect on jobs or employment opportunities as a result of an increase in LOTTO ticket sales, which would increase sales commissions paid to Lottery retailers.

NOTICE OF WITHDRAWAL

Operation of the LOTTO Game and the New York Lottery Subscription Program

I.D. No. LTR-35-10-00018-W

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

Action taken: Notice of proposed rule making, I.D. No. LTR-35-10-00018-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on September 1, 2010.

Subject: Operation of the LOTTO game and the New York Lottery subscription program.

Reason(s) for withdrawal of the proposed rule: Incorrect text filed.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Operation of the LOTTO Game and the New York Lottery Subscription Program

I.D. No. LTR-43-10-00008-P

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

Proposed Action: Repeal of sections 2804.14 and 2804.15 and Part 2817; and addition of new sections 2804.14 and 2804.15 and Part 2817 to Title 21 NYCRR.

Statutory authority: New York Tax Law, sections 1601, 1604 and 1612

Subject: Operation of the LOTTO game and the New York Lottery subscription program.

Purpose: To revise the rules of the LOTTO game and related subscription provisions.

Substance of proposed rule (Full text is posted at the following State website: nylottery.org): This repeal and replacement rulemaking revises the New York Lottery's (the "Lottery's") LOTTO and Lottery Subscription regulations governing the operation of the LOTTO game. Due to the consistent decline in popularity of the former flagship game, the Lottery has launched a new variation of the LOTTO game called Sweet Million that is intended to be more appealing to consumers, which should ultimately generate more earnings for aid to education. The revisions to the LOTTO and subscription regulations accommodate the launch of Sweet Million by allowing the Lottery to offer additional versions of the LOTTO game.

Although administration of the existing LOTTO game will generally remain the same, the revised regulations permit the Lottery to introduce additional variations of the game, including a particular variation called Sweet Million that has a more attractive prize structure for players and is intended to re-ignite interest in LOTTO games. The regulation governing the distribution of prize money for variations of the LOTTO game provides that the first prize shall be a fixed prize, paid as a lump sum. Because the new variation of the LOTTO game has more favorable odds of winning a first prize, revenues are expected to increase. The first prize is not a shared prize unless a certain

maximum number of game panels match the winning numbers for a particular drawing. The revised regulations also address the second prize category through the fourth prize category for any variation of the LOTTO game offered by the Lottery.

The new LOTTO regulations permit minor changes in the game structure of any LOTTO variation if marketing evidence suggests that alteration may result in greater interest in LOTTO games or increased revenues. Specific details regarding any variation of the LOTTO game that are not specified by the regulations will be communicated to players via the Lottery's official website, on which the Lottery will designate the odds of winning and the prize structure, including fixed prize amounts. The Lottery will also announce details regarding variations of the LOTTO game in advertisements, news releases, play slips, brochures located at retailers, or in any other form that the Director may prescribe. Therefore, slight modifications to any variation of the LOTTO game will not require amendment of the regulations. This will ensure that the Lottery will be able to offer the best possible games, which will appeal to more customers and result in higher revenues and aid to education in New York State.

The Lottery's regulations governing subscriptions are also amended to comply with revisions to LOTTO games. The revised subscription regulations generally describe subscription costs and subscription application requirements. In addition to LOTTO games, these regulations apply to any other game that the Lottery has or may have available by subscription.

Technical amendments are also made throughout the proposed regulations.

Text of proposed rule and any required statements and analyses may be obtained from: Julie B. Silverstein Barker, Associate Attorney, New York Lottery, One Broadway Center, PO Box 7500, Schenectady, NY 12301-7500, (518) 388-3408, email: nyrules@lottery.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory authority: The new regulations for the New York Lottery's subscription program and the LOTTO game are proposed pursuant to Tax Law, Sections 1601, 1604 and 1612.

Tax Law § 1601 describes the purpose of the New York State Lottery for Education Law (Tax Law Article 34) as being to establish a lottery operated by the State, the net proceeds of which are applied exclusively for aid to education. Tax Law § 1604 authorizes the Division of the Lottery (the Lottery) "to promulgate rules and regulations governing the establishment and operation thereof." Tax Law § 1612(a)(4) specifies the percentages for disposition of LOTTO sales revenues and describes the game as, "'Lotto', offered no more than once daily, a discrete game in which all participants select a specific subset of numbers to match a specific subset of numbers, as prescribed by rules and regulations promulgated and adopted by the division, from a larger specific field of numbers, as also prescribed by such rules and regulations."

2. Legislative objectives: The purpose of operating Lottery games is to generate earnings for the support of education in the State. Repeal and replacement of these regulations is expected to advance the Lottery's ability to generate earnings for education by increasing consumer interest in LOTTO games.

3. Needs and benefits: The LOTTO game has sustained competitive pressure from large jackpot lottery games, which has produced a decline in LOTTO revenues and a loss of player interest. A comparison of LOTTO revenues for 2004-05 to revenues for 2008-09 shows an annual decline of 12.9%. For the fiscal year ending on March 31, 2009, revenues declined to only \$178,100,000 from earlier levels of over \$356,000,000 a year. If the 12.9% annual decline in revenues continues through the fiscal year ending March 31, 2012, revenues for that year will total only \$117,900,000. The aid to education from this game will also drop from an estimated \$93,900,000 in FY 2008-09 to only \$62,200,000 in the fiscal year ending on March 31, 2012.

Repeal and replacement of the LOTTO regulations will allow the Lottery to reverse this trend and continue its effort to keep and enlarge its market share of players (from within New York State and those

visiting New York State from other states) who play lottery games. The new regulations allow the Lottery to offer additional versions of the LOTTO game. Pursuant to the new regulations, including an emergency regulation adopted on July 31, 2009, the Lottery has, as of September 15, 2009, introduced a variation of the LOTTO game called Sweet Million with more attractive odds of winning intended to generate renewed interest in LOTTO games. Because the new variation of the LOTTO game has more favorable odds of winning a first prize, revenues are expected to increase.

Marketing research and consumer surveys indicate that interest in the new variation of the LOTTO game is high. Players are motivated by “better odds,” and many think the new game is a great value. Research reveals that players find the improved odds of winning when compared to the current LOTTO game to be the single most exciting aspect of the new game. Survey participants also responded favorably to first prize being paid as a lump sum. Of those surveyed, 86% prefer jackpot winnings to be paid all at once in cash as opposed to installments. This evidence suggests that New Yorkers are intrigued by the new game, and the State is likely to realize a tangible benefit in the form of increased earnings for education.

4. Costs:

a. Costs to regulated parties for the implementation and continuing compliance with the rule: None.

b. Costs to the agency, the State, and local governments for the implementation and continuation of the rule: No additional operating costs are anticipated, since current funds reserved for administrative expenses of operating lottery games are expected to be sufficient to support the new variation of the LOTTO game, including advertising expenses, point of sale material production costs, and the cost of printing play slips for the new game. The new variation of the LOTTO game will generate more earnings for aid to education, which will far exceed the minimal expenses necessary to operate the new game. More aid to education from the Lottery will have a positive effect on the State because less funds will then be required from other General Fund resources to aid education. Furthermore, if less funds are required from other General Fund resources to aid education, local governments will benefit because increased funding for local schools from Lottery earnings may ease local tax burdens. Local retailers will earn higher commissions as ticket sales increase, which may result in more employment opportunities.

c. Sources of cost evaluations: The foregoing cost evaluations are based on the Lottery’s experience in operating State Lottery games for more than 40 years.

5. Local government mandates: None. No local government is authorized or required to do any act, apply any effort, expend any funds, or use any other resources in connection with the operation of the LOTTO game or LOTTO game variations. All necessary actions will be carried out by the Lottery or licensed Lottery retailers who will be completely responsible for all aspects of game operations at the local retail level. The Lottery has no authority and no need to impose any mandate on any local government. Consequently, no provision of the rule imposes any burden on any local government in the State.

6. Paperwork: There are no changes in paperwork requirements. Game information will be issued by the New York Lottery for public convenience on the Lottery’s website and through point of sale advertising materials at retailer locations.

7. Duplication: None.

8. Alternatives: The revised LOTTO regulations permit minor changes in the structure of any variation of the LOTTO game if marketing evidence suggests that alteration may result in greater interest in that game and increased revenue for the State. Specific game details not enumerated within the regulations will be communicated to players via the Lottery’s official website, on which the Lottery will designate the odds of winning, the prize structure, including fixed prize amounts, and details about any additional version of the LOTTO game. The Lottery will also announce details regarding LOTTO games in mass media advertisements, news releases, play slips, point of sale materials located at retailers, or in any other form that the Director may prescribe. Therefore, slight modifications to any variation of the LOTTO game will not require amendment of the regulations. This

will ensure that the Lottery will be able to offer the best possible game or games, which will appeal to more customers and result in maximum sales and revenue for aid to education in New York State.

The alternative to amending the LOTTO regulations is to not address the declining revenues for the existing LOTTO game and forfeit the investment already made by the Lottery in the game. The annual LOTTO sales decline of 12.9% will likely continue, and the State will lose millions of dollars in revenue. The failure to proceed will also result in lost aid to education that is anticipated to be earned following introduction of a new variation of the LOTTO game.

9. Federal standards: None.

10. Compliance schedule: None.

Regulatory Flexibility Analysis and Rural Area Flexibility Analysis

The proposed rulemaking does not require a Regulatory Flexibility Analysis or a Rural Area Flexibility Analysis. There will be no adverse impact on rural areas, small business or local governments.

The proposed amendments to the New York Lottery’s LOTTO game and subscription regulations will not impose any adverse economic or reporting, recordkeeping or other compliance requirements on small businesses or local governments. Small businesses will not have any additional recordkeeping requirements as a result of the proposed amendments. Additionally, the proposed amendments are anticipated to have a positive affect on the revenue of small businesses that sell lottery tickets as more players will be interested in the game, which will increase sales commissions paid to retailers. Local governments are not regulated by the New York Lottery or its subscription regulations nor are any economic or recordkeeping requirements imposed on local governments as a result of the proposed amendments to such regulations.

Job Impact Statement

The proposed addition of 21 NYCRR Part 2806 sections 2806.13 and 2806.14 does not require a Job Impact Statement because there will be no adverse impact on jobs and employment opportunities in New York State. The repeal and replacement of the regulations is sought merely to add additional games to generate more revenue for the State in aid to education.

The proposed revision to the Mega Millions regulations will not have any adverse effect on jobs or employment opportunities.

The proposed revision may have a positive effect on jobs or employment opportunities as a result of an increase in ticket sales, which would increase sales commissions paid to Lottery retailers.

Office of Mental Health

NOTICE OF ADOPTION

Mental Health Services - General Provisions; Community Based Service System for Children; Operation of Outpatient Programs

I.D. No. OMH-31-10-00017-A

Filing No. 1046

Filing Date: 2010-10-07

Effective Date: 2010-10-27

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

Action taken: Amendment of Parts 501, 507 and 587 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 31.01 and 31.04

Subject: Mental Health Services - General Provisions; Community Based Service System for Children; Operation of Outpatient Programs.

Purpose: To add a definition of “serious emotional disturbance”.

Text of final rule: A new subdivision (g) is added to Section 501.2 of Title 14 NYCRR as follows:

(g) *Serious emotional disturbance means a child or adolescent has a designated mental illness diagnosis according to the most current Diagnostic and Statistical Manual of Mental Disorders (DSM) and*

has experienced functional limitations due to emotional disturbance over the past 12 months on a continuous or intermittent basis. The functional limitations must be moderate in at least two of the following areas or severe in at least one of the following areas:

- (1) ability to care for self (e.g., personal hygiene; obtaining and eating food; dressing; avoiding injuries); or
- (2) family life (e.g., capacity to live in a family or family like environment; relationships with parents or substitute parents, siblings and other relatives; behavior in family setting); or
- (3) social relationships (e.g., establishing and maintaining friendships; interpersonal interactions with peers, neighbors and other adults; social skills; compliance with social norms; play and appropriate use of leisure time); or
- (4) self-direction/self-control (e.g., ability to sustain focused attention for a long enough period of time to permit completion of age-appropriate tasks; behavioral self-control; appropriate judgment and value systems; decision-making ability); or
- (5) ability to learn (e.g., school achievement and attendance; receptive and expressive language; relationships with teachers; behavior in school).

Section 507.4 of Title 14 NYCRR is amended to read as follows:

(a) Expanded children's services is a program established to provide new and expanded community based services to [seriously emotionally disturbed] children and adolescents with *serious emotional disturbance* and to provide grants for 100 percent net deficit costs for those services.

(b) [Seriously emotionally disturbed means persons under the age of 18 who have serious, persistent disability which:

- (1) is caused by a medically determined mental illness as evidenced by primary psychiatric diagnosis made by a physician, or is caused by other serious emotional disturbance as defined by the regulations of the commissioner;
- (2) has continued or is likely to continue for a period of at least one year;
- (3) would cause substantial risk of psychiatric hospitalization in the absence of community based mental health services; and
- (4) results in substantial functional limitations in two or more of the following areas:
 - (i) self-care at an appropriate developmental level;
 - (ii) receptive and expressive language;
 - (iii) learning;
 - (iv) self-direction; and
 - (v) capacity for living in a family environment.]

Serious emotional disturbance means a child or adolescent has a designated mental illness diagnosis according to the most current Diagnostic and Statistical Manual of Mental Disorders (DSM) and has experienced functional limitations due to emotional disturbance over the past 12 months on a continuous or intermittent basis. The functional limitations must be moderate in at least two of the following areas or severe in at least one of the following areas:

- (1) ability to care for self (e.g., personal hygiene; obtaining and eating food; dressing; avoiding injuries); or
- (2) family life (e.g., capacity to live in a family or family like environment; relationships with parents or substitute parents, siblings and other relatives; behavior in family setting); or
- (3) social relationships (e.g., establishing and maintaining friendships; interpersonal interactions with peers, neighbors and other adults; social skills; compliance with social norms; play and appropriate use of leisure time); or
- (4) self-direction/self-control (e.g., ability to sustain focused attention for a long enough period of time to permit completion of age-appropriate tasks; behavioral self-control; appropriate judgment and value systems; decision-making ability); or
- (5) ability to learn (e.g., school achievement and attendance; receptive and expressive language; relationships with teachers; behavior in school).

Paragraph (8) of subdivision (a) of Section 587.4 of Title 14 NYCRR is amended to read as follows:

(8) [Extended impairment in functioning due to] *Serious* emotional disturbance means a child or adolescent has a *designated mental illness diagnosis according to the most current Diagnostic and Statistical Manual of Mental Disorders (DSM) and has experienced functional limitations due to emotional disturbance over the past 12 months on a continuous or intermittent basis. The functional problems must be moderate in at least two of the following areas or severe in at least one of the following areas:*

- (i) [self-care] *ability to care for self (e.g., personal hygiene; obtaining and eating food; dressing; avoiding injuries); or*
- (ii) family life (e.g., capacity to live in a family or family like environment; relationships with parents or substitute parents, siblings and other relatives; behavior in family setting); or
- (iii) social relationships (e.g., establishing and maintaining friendships; interpersonal interactions with peers, neighbors and other adults; social skills; compliance with social norms; play and appropriate use of leisure time); or
- (iv) self-direction/self-control (e.g., ability to sustain focused attention for a long enough period of time to permit completion of age-appropriate tasks; behavioral self-control; appropriate [judgment] *judgment and value systems; decision-making ability); or*
- (v) [learning] *ability to learn (e.g., school achievement and attendance; receptive and expressive language; relationships with teachers; behavior in school).*

Final rule as compared with last published rule: Nonsubstantive changes were made in section 587.4(a)(8)(v).

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

Revised Job Impact Statement

A Job Impact Statement is not submitted with this notice because this consensus rule merely clarifies the definition of "serious emotional disturbance" and provides consistency with other Office regulations. There will be no impact on jobs and employment opportunities as a result of this rulemaking.

Assessment of Public Comment

The agency received one letter of comment regarding the amendments to Part 501, 507 and 587 of Title 14 NYCRR.

Issue: The writer stated that his agency was strongly supportive of the creation of one definition of "serious emotional disturbance" that is based on the child's behavior over the past 12 months. Further, the writer supports the concept of the definition applying to all OMH children's programs and services. The writer felt that it would be helpful for OMH to ensure that all children's providers are made aware of this definition, and he suggested that OMH provide written communication of this change.

Response: OMH believes the writer makes a good point in this suggestion. It is the policy of the agency, when adopting a rule as final, to not only publish the Notice of Adoption in the State Register, but also to post the text of the rule and the adoption on the OMH website at http://www.omh.state.ny.us/omhweb/policy_and_regulations/. Providers of mental health services are strongly encouraged to visit this site to keep up to date on regulatory changes. In addition, this regulatory change will be shared via e-mail with providers.

Issue: The writer stated that the proposed definition of serious emotional disturbance does not reference an age. The writer further stated that he understands that the eligible ages will continue to be defined in each program, and he encourages OMH to clearly define the age limits in each of the program's guidance documents and regulations.

Response: The Office of Mental Health agrees conceptually with this suggestion and will continue to make every effort to ensure that the age of the children to be served appears in the various programs' guidance documents and regulations.

Issue: The writer is seeking clarification of the services under the category of "expanded community based services".

Response: The language referencing "expanded children's services" and "expanded community based services" is existing

language in Section 507.4(a) and was not modified by this rule making. The reference within that subdivision that was modified referred to the term “seriously emotionally disturbed children and adolescents”, which, as a result of this rule making, was changed to “children and adolescents with serious emotional disturbance” in keeping with the agency’s policy of using respectful, “person-first” language. Any questions regarding agency policies or programs can always be addressed to appropriate agency personnel.

Department of Motor Vehicles

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

To Eliminate the NYTEST Emissions Program in the New York Metropolitan Region on January 1, 2011

I.D. No. MTV-43-10-00007-P

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

Proposed Action: Amendment of Part 79 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 301(a), (c), (d)(1), 302(a), (e) and 303(d)(1)

Subject: To eliminate the NYTEST emissions program in the New York Metropolitan Region on January 1, 2011.

Purpose: Provides for the elimination of the NYTEST emissions inspection program in the New York Metropolitan Region.

Substance of proposed rule (Full text is posted at the following State website: www.nydmv.state.ny.us): This primary purpose of this regulation is elimination of the NY Transient Emissions Short Test (NYTEST) program in the New York Metropolitan Area. Conforming amendments are made throughout Part 79.

The regulation clarifies which types of motor vehicles are subject to specific safety and emissions tests.

The regulation clarifies the definition of seating capacity in a motor vehicle.

In 2011, DMV anticipates that inspection stations will be able to transmit inspection results to DMV via broadband access instead of the current dedicated phone line. The proposed rule provides for the potential use of broadband access.

Text of proposed rule and any required statements and analyses may be obtained from: Monica J Staats, NYS Department of Motor Vehicles, Legal Bureau, Room 526, 6 Empire State Plaza, Albany, NY 12228, (518) 486-3131, email: monica.staats@dmv.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory authority: Section 301(a) of the Vehicle and Traffic Law provides that the Commissioner shall require every motor vehicle registered in this state to have an emissions inspection. Section 301(d)(1) of such Law authorizes the Commissioner, in consultation with the Commissioner of the Department of Environmental Conservation, to implement a motor vehicle emissions inspection program. Section 302(a) of such Law provides that it shall be the duty of the Commissioner to administer the provisions of Article 5. Section 302(e) of such Law empowers the Commissioner to make reasonable rules and regulations for the administration and enforcement of Article 5 and the periods during which motor vehicles are required to be inspected. Section 303(d)(1) of such Law provides that the Commissioner shall supervise and cause inspections to be made of official inspection stations. The Federal Clean Air Act of 1990 (42 U.S.C 7401 et. seq.) required states to implement certain emissions inspection programs in order to comply with the Act and avoid the loss of federal funding.

2. Legislative objectives: The Federal Clean Air Act of 1990 (42 U.S.C 7401 et. seq.) and the accompanying regulations at 40 CFR Part

51 required states to implement an inspection and maintenance program that conforms to such federal regulations. The Clean Air Act required New York State to establish a dynamometer based emissions inspection program in the New York Metropolitan Area (NYMA). Failure to do so would have cost the State millions of dollars in federal highway funding. Thus, pursuant to Article 5 of the Vehicle and Traffic Law, the Department established such a program in the NYMA in 1998, known as the NYTEST (NY Transient Emissions Short Test) program. Since 2005, with the implementation of the NY Vehicle Inspection Program (NYVIP) using the on board-diagnostic equipment (OBDII), the NYTEST program has primarily applied to pre-1996 vehicles.

The elimination of the NYTEST program at the end of 2010 is in accordance with the Clean Air Act’s requirements. New York State’s emissions program will still align with the Act’s objectives and specifications. In addition, the Department of Environmental Conservation’s State Implementation Plan, which documents how the State complies with the Clean Air Act, provides for the elimination of the NYTEST program at the end of 2010. DEC supports this proposed rulemaking.

3. Needs and benefits: Effective January 1, 2011, the proposed amendments to Part 79 will eliminate the NYTEST emissions program at the end of 2010. The NYTEST program is no longer necessary to comply with the Clean Air Act. Pre-1996 motor vehicles registered in the New York Metropolitan Area (NYMA) will be subject to the low enhanced emissions test, which is currently used for pre-1996 motor vehicles outside of the NYMA, and is set forth in Part 79.24(i). This consists of a visual review of emissions related equipment; such review takes about two minutes to perform.

Elimination of the NYTEST program will have numerous benefits for the inspection industry. A licensed inspection station must pay about \$2,500 for the NYVIP computerized vehicle inspection system (CVIS) equipment, while the cost for the NYTEST CVIS equipment is about \$35,000.00 to \$45,000.00. Service and warranty costs for the NYVIP equipment are included in the original purchase price, while service contracts for the NYTEST CVIS equipment currently cost about \$3,500.00 to \$8,000.00 per year. If an inspection station does not maintain a service contract, all costs for the parts and labor required for repairs must be paid for by the station. A certified motor vehicle inspector spends fifteen to twenty minutes on a NYTEST emissions inspection, while an OBD II emissions inspection takes about five minutes to complete. The public also benefits from the shorter inspection process, because their waiting time for the inspection is reduced.

In addition, since stations will no longer be required to maintain a NYTEST dynamometer, the space used for the dynamometer can be converted back to usable space for performing repairs.

Finally, in 2011, DMV anticipates that inspection stations will be able to transmit inspection results to DMV via broadband access instead of the current dedicated phone line. This will require a software update to the inspection equipment and will save the inspection stations about \$70 a month, which represents the cost of the dedicated line. The proposed rule provides for the potential use of broadband access.

The rule also makes some minor clarifying amendments to Part 79 that are not substantive in nature.

4. Costs:

a. Cost to regulated parties: There will be no cost to inspection stations, the State or to local governments. There are savings to the industry in relation to equipment cost and the time needed to conduct an inspection. A licensed inspection station must pay about \$2,500 for the NYVIP computerized vehicle inspection system (CVIS) equipment, while the cost for the NYTEST CVIS equipment is about \$35,000.00 to \$45,000.00. Service and warranty costs for the NYVIP equipment are included in the original purchase price, while service contracts for the NYTEST CVIS equipment currently cost about \$3,500.00 to \$8,000.00 per year. If an inspection station does not maintain a service contract, all costs for the parts and labor required for repairs must be paid for by the station. A certified motor vehicle inspector spends fifteen to twenty minutes on a NYTEST emissions

inspection, while an OBD II emissions inspection takes about five minutes to complete. The low enhanced emissions test is performed in about two minutes.

Finally, in 2011, DMV anticipates that inspection stations will be able to transmit inspection results to DMV via broadband access instead of the current dedicated phone line. This will require a software update to the inspection equipment and will save the inspection stations about \$70 a month, which represents the cost of the dedicated line.

b. Source: DMV's Office of Vehicle Safety.

c. Cost to vehicle registrants: There are no costs to motor vehicle registrants.

5. Local government mandates: There are no new mandates imposed upon local governments.

6. Paperwork: This proposal does not impose any new paperwork requirements.

7. Duplication: This proposed regulation does not duplicate or conflict with any State or Federal rule.

8. Alternatives: The Department consulted with 25 organizations and individuals who have expressed interest in the State's emissions inspection program. Such organizations include the Greater New York Automobile Dealers Association, the New York Independent Dealers Association and the Gasoline & Automotive Service Dealers Association, Ltd. We received no comments about this proposed rule.

Since the NYTEST program remains very costly and continues to serve fewer pre-1996 vehicles each year, there is no compelling justification to continue the program, particularly since its termination will not jeopardize the State's compliance with the Clean Air Act. For these reasons, a no action alternative was rejected.

9. Federal standards: This proposal does not duplicate a federal rule. The rule does not exceed the Federal emission standards set forth in the Clean Air Act of 1990 or its accompanying regulations at 40 CFR Part 51. The proposal maintains New York State's compliance with the Clean Air Act.

10. Compliance schedule: The regulation will be effective on January 1, 2011.

Regulatory Flexibility Analysis

1. Effect of rule: There are currently 3,316 NYTEST equipped public inspection stations in the New York Metropolitan Area (NYMA) that are small businesses. Twenty-five local governments run 63 inspection stations with NYTEST equipment.

2. Compliance requirements: Effective January 1, 2011, NYTEST equipped inspection stations will no longer be required to inspect pre-1996 motor vehicles with a dynamometer. Instead, pre-1996 motor vehicles registered in the New York Metropolitan Area (NYMA) will be subject to the low enhanced emissions test, which is currently used for pre-1996 motor vehicles outside of the NYMA, and is set forth in Part 79.24(i). This consists of a visual review of emissions related equipment; such review takes about two minutes to perform.

3. Professional services: This regulation would not require inspection stations to obtain new professional services beyond any that they may already use.

4. Compliance costs: There are no compliance costs associated with this proposal.

5. Economic and technological feasibility: This proposal will not impose any new technological requirements for inspection stations. This proposal is economically feasible due to cost savings. A licensed inspection station must pay about \$2,500 for the NYVIP computerized vehicle inspection system (CVIS) equipment, while the cost for the NYTEST CVIS equipment is about \$35,000.00 to \$45,000.00. Service and warranty costs for the NYVIP equipment are included in the original purchase price, while service contracts for the NYTEST CVIS equipment currently cost about \$3,500.00 to \$8,000.00 per year. If an inspection station does not maintain a service contract, all costs for the parts and labor required for repairs must be paid for by the station. A certified motor vehicle inspector spends fifteen to twenty minutes on a NYTEST emissions inspection, while an OBD II emissions inspection takes about five minutes to complete.

In 2011, DMV anticipates that inspection stations will be able to transmit inspection results to DMV via broadband access instead of the current dedicated phone line. This will require a software update to the inspection equipment and will save the inspection stations about \$70 a month, which represents the cost of the dedicated line. The proposed rule provides for the potential use of broadband access.

6. Minimizing adverse impact: This proposal has no adverse impact on small businesses and local governments. As stated above, this proposal will result in significant savings for inspection stations.

7. Small business and local government participation: The Department consulted with 25 organizations and individuals who expressed interest in the State's emissions inspection program. Such organizations include the Greater New York Automobile Dealers Association, the New York Independent Dealers Association and the Gasoline & Automotive Service Dealers Association, Ltd. We received no comments about this proposed rule.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not attached because this rule will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

A Job Impact Statement is not submitted with this proposal because there is no adverse impact on job creation or development in New York State.

Office for People with Developmental Disabilities

NOTICE OF ADOPTION

HCBS Waiver Community Habilitation Services

I.D. No. PDD-33-10-00010-A

Filing No. 1057

Filing Date: 2010-10-12

Effective Date: 2010-11-01

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

Action taken: Amendment of Subparts 635-10 and 635-12, and sections 635-99.1 and 686.99 of Title 14 NYCRR.

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

Subject: HCBS Waiver Community Habilitation Services.

Purpose: To establish Community Habilitation as a new type of HCBS waiver service.

Substance of final rule: • Effective November 1, 2010, the final regulations establish Community Habilitation (CH), a new type of Home and Community Based (HCBS) Waiver service in the OPWDD system.

• Allowable CH services include all of the allowable services specified for HCBS waiver residential habilitation and HCBS waiver day habilitation.

• All existing HCBS Waiver At Home Residential Habilitation (AHRH) services are converted to become CH services on November 1, 2010.

• Rules for CH services are generally the same as the rules for AHRH services. Significant changes from AHRH rules are as follows:

– In order to be billable, AHRH services are required to be delivered at the individual's home, or be initiated or concluded there. This requirement is not included in the regulations for CH services.

– AHRH services are billable on an individual basis, or for groups of 2, 3, or 4 or more individuals per staff person. CH services are not billable for more than 4 individuals per staff person.

– Billable CH services may not be delivered at a site certified by OPWDD or at a site operated by OPWDD which would be required to be certified if it were operated by another provider. An exception is made for Article 16 clinic sites. Regulations for AHRH do not include this restriction.

– The regulations specifically state that CH services are not billable while the individual is in a hospital, nursing home, rehabilitation facility, or ICF/DD. Services are billable on the day of admission or day of discharge from these facilities, so long as the services are not provided at the

facility site. Although this issue was not specifically addressed in the AHRH regulations, AHRH services were subject to the same restrictions (excepting the restriction on the location of service delivery).

– Reimbursement for AHRH is contingent upon the prior approval of OPWDD. CH regulations add standards for this prior approval.

- The regulations include provisions for self-directed and family-directed CH services which parallel provisions for self-directed and family-directed AHRH services.

- The regulations establish that prior to August 1, 2011, an Individualized Service Plan (ISP) that identifies AHRH services is deemed to include CH services. In addition, prior to August 1, 2011, the provider is allowed to deliver CH services in accordance with the AHRH Plan in lieu of the CH Plan.

- The fees for CH effective November 1, 2010, are the same as the fees for AHRH that are in effect on October 31, 2010.

- Providers are eligible for transitional hourly fees for CH for November and December 2010 if they met the criteria for receipt of the transitional hourly fee for 2010 for the AHRH services converted to CH.

- CH fees will be trended if there is a trend factor. Fees are not appealable.

- The Liability for Services regulations in 14 NYCRR Subpart 635-12 are affected as follows:

- The regulations amend Subpart 635-12 to include CH.

- The Liability for Services regulations define “preexisting services” and contain different requirements for “preexisting services” as opposed to “other than preexisting services.” The conversion of AHRH to CH on November 1, 2010, by itself will not change whether the services are considered “preexisting services” or “other than preexisting services.” Individuals who were receiving preexisting AHRH services prior to the conversion will be receiving preexisting CH services after the conversion if no other changes occurred that would affect the status.

- AHRH is maintained in the regulations. This means that for AHRH services that were delivered prior to the conversion, compliance is still required for activities such as payment, billing, and collection.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 635-10.4(b)(3) and 635-10.5(ab)(2).

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

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

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

The text of the regulations was amended to correct minor grammatical errors. These minor changes do not necessitate revision to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis for Small Business and Local Governments, Rural Area Flexibility Analysis or Job Impact Statement.

Assessment of Public Comment

OPWDD received one letter from a parent/advocate of an individual receiving OPWDD services and one letter from a provider association regarding the proposed regulations. The comments and OPWDD’s responses to each are as follows:

Comment: The parent/advocate commented that he would like to see an “annual medical evaluation” be required for persons receiving Community Habilitation (CH) services.

Response: OPWDD is not requiring an annual physical for an individual to receive CH services because CH is a habilitative service (i.e., a service designed to acquire and maintain those life skills that enable individuals to cope more effectively with their environments) and not a medical service. OPWDD notes, however, that medical considerations that impact the person’s habilitation services should be included in the person’s habilitation plan and Individualized Service Plan if appropriate. For example, if a pureed diet is medically necessary to prevent choking, this should be included in the habilitation plan.

OPWDD observes that in order to receive CH, an individual is required to be enrolled in the Home and Community Based Waiver. A requirement for enrollment in the waiver is the completion of an initial Level of Care Evaluation/Determination form. OPWDD notes that a physician’s evaluation is required for completion of that form.

The final regulations remain unchanged.

Comment: The provider association expressed concern regarding potential audit vulnerability when clinic services and CH services occur at the same time as allowed in the regulations. It expressed concern that the clinic service might be subject to a disallowance.

Response: The CH regulations (subparagraph 635-10.5(ab)(7)(v)) allow the CH service to be billed when the CH staff is with the individual at an appointment for a clinical service in order to facilitate the implementation of therapeutic methods and treatments and the need for the CH staff’s participation in the specified clinical service is described in the individual’s habilitation plan.

OPWDD considers that the proposed regulatory language already identifies the circumstances under which an agency may provide CH services concurrently with clinic services.

The final regulations remain unchanged.

Comment: The provider association noted that billable CH services cannot be delivered in a certified setting. The association advocates that billable CH services be permitted at certified sites when the certified program is not in session.

Response: The purpose of the CH service is to promote community integration for participants by providing habilitation activities and opportunities within the community at large, rather than in certified settings where people with developmental disabilities receive services; therefore CH services are delivered in community (non-certified) settings. OPWDD contends that permitting billable CH services to be delivered in certified settings will detract from achieving the goal of community integration.

The final regulations remain unchanged.

Comment: The provider association requested clarification on the health or safety standard for OPWDD approval of CH services for a person, and asked for clarification on how to document the standard.

Response: Paragraph 635-10.5(ab)(2) states that OPWDD approval of CH for a person is based on several factors, one of which is the need for CH services to protect the health or safety of the person or of his or her caregiver. Since CH is an HCBS Waiver service, this standard has been established in the context of the HCBS Waiver. Community Habilitation is part of an array of supports offered through the HCBS Waiver that allow a person to move to a less restrictive setting or that keep a person out of a more restrictive setting. The requirement that the CH services be needed to protect health or safety means that the CH services must, along with other services the person is receiving, allow the person to live in a home or community setting in safety and health. Put another way, it means that there would be negative consequences if the person did not receive supports offered by CH services (for example, the person might have to be placed in a more restrictive environment).

Comment: The provider association requested that OPWDD change regulatory language or issue a guidance document to clarify the transportation rule to prevent duplicate Medicaid billing.

Response: OPWDD plans to issue an administrative memorandum which will contain clarification on the billing of transportation time under the CH service in order to prevent duplicate Medicaid billing.

Comment: The provider association requested an example of a clinic visit which would be delivered at an OPWDD certified facility that is not a clinic.

Response: Article 16 clinic services may be delivered at certified clinic sites or “off-site.” “Off-site” clinic services may be delivered in a variety of locations, including sites certified by OPWDD for other purposes. While OPWDD anticipates that clinic visits will usually occur at the certified clinic site, it recognizes that on occasion it will be beneficial to deliver clinic services, and co-occurring CH services related to a clinic visit, at other certified sites. An example of such a site is a certified day habilitation site.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Corning’s Request to Discontinue the Regulatory Matrix

I.D. No. PSC-43-10-00013-P

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

Proposed Action: The Commission is considering whether to adopt, modify, or reject, in whole or in part, a request by Corning Natural Gas Corporation (Corning) for removal of the Regulatory Matrix.

Statutory authority: Public Service Law, section 65

Subject: Corning’s request to discontinue the Regulatory Matrix.

Purpose: To review Corning’s request to discontinue the Regulatory Matrix.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, a request by Corning Natural Gas Corporation for removal of the Regulatory Matrix.

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.

(08-G-1137SP4)

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

Petition for the Submetering of Electricity

I.D. No. PSC-43-10-00014-P

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

Proposed Action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Union Grove Associates, LLC to submeter electricity at Rev. Fletcher C. Crawford Housing, 1468 Hoe Avenue, located in Bronx, 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 Union Grove Associates, LLC, to submeter electricity at 1468 Hoe Avenue, Bronx, NY.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Union Grove Associates, LLC to submeter electricity at Rev. Fletcher C. Crawford Housing, 1468 Hoe Avenue, Bronx, New York, located in the territory of Consolidated Edison Company of New York, Inc.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: 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-0489SP1)

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

Waiver of Gas Tariff Provision

I.D. No. PSC-43-10-00015-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 the petition of E. Tetz & Sons, Inc. for a waiver of gas tariff provisions of Orange and Rockland Utilities, Inc.

Statutory authority: Public Service Law, sections 2, 5 and 65

Subject: Waiver of Gas Tariff provision.

Purpose: To allow a customer a waiver from Orange and Rockland's 10-day supply requirement.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, the petition of E. Tetz & Sons, Inc. (Tetz) a gas customer of Orange and Rockland Utilities, Inc. (O&R). Tetz seeks a waiver from O&R's tariff requirement that an interruptible customer maintain a 10-day supply of back up fuel for the entirety of the winter heating season. Tetz maintains that because its business is in limited or suspended operation during the winter season, alternative arrangements should be considered sufficient for safety and reliability and, therefore, a waiver is justified.

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-G-0482SP1)

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

Utility Access to Ducts, Conduit Facilities and Utility Poles

I.D. No. PSC-43-10-00016-P

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

Proposed Action: The Commission may consider the Complaint of Optical Communications Group, Inc. against Verizon New York Inc. for Alleged Failure to Provide Lawful Access to Ducts, Conduit Facilities and Utility Poles.

Statutory authority: Public Service Law, section 94

Subject: Utility Access to Ducts, Conduit Facilities and Utility Poles.

Purpose: To review the complaint from Optical Communications Group.

Substance of proposed rule: The Commission is considering the complaint of Optical Communications Group, Inc. against Verizon New York Inc. for alleged failure to provide access to ducts, conduit facilities and utility poles. The Commission is considering whether all utilities should adopt procedures designed to remedy the issues raised by Optical Communications or 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.

(10-01917SP1)

Department of State

NOTICE OF ADOPTION

Code of Ethics and Standards of Practice for Home Inspectors

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

Filing No. 1056

Filing Date: 2010-10-12

Effective Date: 2010-10-27

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

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

Statutory authority: Real Property Law, section 444-c

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

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

Substance of final rule: 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.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 197-4.1, 197-4.2(b), 197-4.3, 197-5.1, 197-4.2(a) and 197-5.8(d).

Text of 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

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

Changes made to the rule as proposed do not necessitate revisions to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

Assessment of Public Comment

The Department received 15 comments on the proposed regulation. The Department and Home Inspection Advisory Council considered each comment. Several comments called the Department's attention to typographical and other non-substantive errors. In adopting the regulations, these errors were corrected.

Other comments requested more substantive revisions. These comments were considered and, when necessary, discussed with the Home Inspection Advisory Council. One such comment asked that the contract disclaimer found in section 197-4.2 be revised. After discussing this comment with the Home Inspection Council, the Department revised the comment to add requested clarification.

Another comment requested that section 197-5.3 be amended to require home inspectors to report on when systems and components were unsafe or near the end of their service lives. The Department received another comment that requested that home inspectors be required to report on erosion control and earth stabilization methods. The Home Inspection Council felt that such reports would not be within the scope of a home inspection and, accordingly, the suggested revisions were not made.

The Department received six public comments on section 197-5.8(c). In substance, these comments argued that there are times when it is difficult or impossible to determine whether the water disposal system and water supply are public or private. After discussing these comments with the Home Inspection Council, the regulations have been revised to permit home inspectors to report when 'unknown' when the source of a property's water supply or waste disposal system cannot be determined.

Another comment received by the Department asked that the Standards of Practice be revised to not require home inspectors to remove suspended tile ceilings. The Home Inspection Council felt, however, that there would be times when it would be appropriate to remove suspended tile ceilings to check for evidence of leaks and other damage. Accordingly, the suggested revision was not made.

Department of Taxation and Finance

EMERGENCY RULE MAKING

Assistance Program to Encourage Local Governments to Reassess on a Cyclical Basis

I.D. No. TAF-43-10-00004-E

Filing No. 1044

Filing Date: 2010-10-06

Effective Date: 2010-10-06

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

Action taken: Addition of Subpart 201-3 to Title 9 NYCRR.

Statutory authority: Real Property Tax Law, sections 202(1), (1)(k) and 1573(1)(a); and L. 2010, ch. 56, parts W and Y

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

Specific reasons underlying the finding of necessity: The amendments to Real Property Tax Law section 1573 enacted by Chapter 56 take effect immediately and apply to the 2010 assessment rolls for municipalities with a taxable status date on or after 3/1/2010. These rolls are now final and the assistance payments for the 2010 rolls must be made before the end of the current fiscal year. Emergency rules are needed to implement the program and to insure that the payments can be made.

Subject: Assistance Program to encourage local governments to reassess on a cyclical basis.

Purpose: To provide rules to implement the statutory authorized assistance to local governments to encourage a cycle of reassessments.

Text of emergency rule: A new subpart 201-3 is added to such regulations to read as follows:

Subpart 201-3 ASSESSMENT ROLLS WITH TAXABLE STATUS DATES OCCURRING ON OR AFTER 3/1/2010

Section 201-3.1 Applicability. *The provisions of this Subpart shall pertain to applicants for state assistance for purposes of assessment rolls with taxable status dates occurring on or after 3/1/2010 pursuant to section 1573(1) and (2) of the Real Property Tax Law, as amended by Chapter 56 of the Laws of 2010, Part Y.*

Section 201-3.2 Plan to be filed for state assistance

(a) *A written plan containing the reappraisal schedule and the reinspection schedule for the applicant must be received no later than 120 days prior to the filing date of the tentative assessment roll implementing the first reappraisal in that plan. The plan must be signed by the chief executive officer of the assessing unit and the assessor. For plans involving a coordinated assessment program, the assessor may file a single plan providing that it contains the signatures of the chief executive officer of each member municipality.*

(b) *In accordance with an approved plan, state assistance shall be payable in an amount not to exceed five dollars per parcel for an assessment roll upon which a reassessment is implemented, and not to exceed two dollars per parcel for an assessment roll upon which a reassessment is not implemented. The amount payable on a per parcel basis shall exclude parcels which are wholly exempt or assessed by the state.*

Section 201-3.3 State standards for quality assessment administration.

The standards for quality assessment administration are:

(a) In reassessment years.

(1) The reassessment must:

(i) *be conducted pursuant to a plan for cyclical reassessment of not less than four years,*

(ii) *provide for the reappraisal of all parcels in the first and last year of the plan,*

(iii) *provide for a reappraisal of all parcels at least once every four years; and*

(iv) *collect inventory data at least once every six years.*

(2) *Reappraisal means developing and reviewing a new determination of market value for each parcel, based upon current data, by the appropriate use of one or more of the three accepted approaches to value (cost, market, or income).*

(3) *Review of the appraisal values consists of a visit to each property, and includes a review of the recorded inventory, examination and analysis of the appraisal estimates, and determination and documentation of a final appraised value. An office review may be substituted if appraisers have collected data or reinspected the property characteristics data as part of the reappraisal, or if the review utilizes oblique aerial, orthophoto, or street-level photography that was taken within three years of the reappraisal. In special assessing units an office review may be substituted if the property characteristics data has been systematically collected from other governmental sources.*

(b) *Annually. The assessor or the chairman of the board of assessors has filed a signed statement verifying that the following actions were taken in accordance with the statute or rule:*

(1) *Parcels on the data file have complete and accurate inventories as of taxable status date,*

(2) *Pertinent sales data on the data file is complete and accurate,*

(3) *Parcels on the assessment roll filed pursuant to Article 15-C of the Real Property Tax Law have valid property tax exemption codes,*

(4) *The final assessment roll meets the requirements of Part 190 of this Title,*

(5) *The assessor's report meets the requirements of Part 193 of this Title and is reconciled by the Office of Real Property Tax Services,*

(6) *Data files required pursuant to Article 15-C of the Real Property Tax Law and Part 190 of this Title are filed in accordance with Section 1590 of the Real Property Tax Law,*

(7) *Sales corrections required by Part 191 of this Title are received in an Office of Real Property Tax Services approved computerized format. Transactions are received on a timely basis,*

(8) Notice of assessment inventory was published as required by section 501 of the Real Property Tax Law.

(9) Notice of tentative assessment roll was published as required by section 506 of the Real Property Tax Law.

(10) Assessment change notices were sent as required by section 510 of the Real Property Tax Law.

(11) Assessment disclosure notices as required by section 511 of the Real Property Tax Law are sent and required meetings have been held.

(12) The tentative assessment roll was posted on the Internet as required by section 511 of the Real Property Tax Law.

(13) Notice of final assessment roll was published as required by section 516 of the Real Property Tax Law.

(14) Renewal forms for the senior citizens' exemptions were sent as required by section 467 of the Real Property Tax Law.

(15) Notices of denial for the STAR exemptions were sent as required by section 425 of the Real Property Tax Law.

(16) The uniform percentage appears on the tentative assessment roll or in instances where a tentative assessment roll is not printed, a sign that contains the uniform percentage is posted in a conspicuous location.

(17) In a reassessment year, all parcels were reappraised and reviewed in accordance with the Assessing Unit's plan, and

(18) The Assessing Unit has a method to collect or reinspect all parcels at least once every six years in accordance with section 201-3.3(a) of this Subchapter.

Section 201-3.4 Application for state assistance.

(a) A written application for state assistance must be filed with the Office of Real Property Tax Services annually. Applications must be filed no later than 90 days after the filing of the final assessment roll for which state assistance is applied.

(b) A written application for state assistance must be signed by the chief executive officer of the assessing unit and the assessor. For purposes of this section assessor means the assessor or the chairman of the board of assessors or the county director where the county is assessing on behalf of a city or town assessing unit or the assessor of a consolidated assessing unit or coordinated assessment program or the Chairman of the Board of Directors of a consolidated assessing unit.

(c) For applications involving a coordinated assessment program, the assessor may file a single application, providing that it contains the signatures of the Chief Executive Officer of each member municipality.

Section 201-3.5 Review of Application.

(a) The Office of Real Property Tax Services shall adopt procedures that contain acceptable performance indicators of substantial compliance with standards contained in section 201-3.2 of this Subpart, including ranges of acceptable performance determined in accordance with nationally recognized standards. Office of Real Property Tax Services staff will review applications in accordance with such procedures.

(b) The determination made pursuant to the procedures for the applicable full value measurement as provided in 9 NYCRR 186-2.15 shall be conclusive as to whether a reassessment occurred and a uniform percentage of value was attained.

(c) An applicant must provide assessment roll, inventory, sales files and the corresponding libraries in an Office of Real Property Tax Services approved computerized format. The files must be supplied with the data files submitted pursuant to Article 15-C of the Real Property Tax Law.

(d) In determining compliance, facts and conditions are assumed as of the final roll date for the assessment roll for which state assistance is requested, unless otherwise stated.

(e) Upon approval, Office of Real Property Tax Services staff shall certify the amount of state assistance payable pursuant to this Part.

(f) For computing the amount of state assistance payable pursuant to this Part, the number of parcels are obtained from the data files submitted pursuant to Article 15-C of the Real Property Tax Law.

(g) Upon disapproval, Office of Real Property Tax Services staff will notify the applicant of the disapproval and the reason for the disapproval. The assessing unit shall have 30 days from the date of the mailing of the notification to appeal this denial to the Deputy Commissioner of the Division of Real Property Tax Services.

(h) Applications for state assistance made pursuant to section 1573 of the Real Property Tax Law are subject to audit. A state-wide verification process with detailed audits of randomly selected individual assessing units will be conducted annually before payments are certified.

(i) Where an applicant receives payment as a result of a false or erroneous statement on the application, or any other act of omission or commission on the part of the applicant, such that the recipient would otherwise have been considered ineligible to receive such payment, the recipient shall be required to refund the improper payment to the state.

Section 201-3.6. Transition provisions for 2010 assessment rolls.

(a) For purposes of assessment rolls completed in 2010, the applicant will be deemed to meet the reappraisal requirement of section 201-3.2 of this Subpart if a reassessment was implemented pursuant to a six-year plan filed in compliance with Subpart 201-2 of this Part.

(b) Notwithstanding the provisions of section 201-3.2(a) and 201-3.4(a) of this Subpart, for purposes of assessment rolls completed in 2010, a plan and an application may be filed no later than 60 days after the effective date of these rules.

(c) For applications involving a coordinated assessment program, a participant municipality shall be eligible for state assistance if it meets the state standards for quality assessment administration as outlined in 201-2.2 of this subpart, notwithstanding the failure of another participant municipality to qualify.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires January 3, 2011.

Text of rule and any required statements and analyses may be obtained from: John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W. A. Harriman Campus, Albany, NY 12227, (518) 457-2254, email: tax_regulations@tax.state.ny.us

Regulatory Impact Statement

1. Statutory Authority: Real Property Tax Law, sections 201(1), 202(1)(k), and 1573(1)(a). Section 201(1) of Real Property Tax Law, assumption of responsibilities by the Department of Taxation and Finance, provides that certain functions, powers and duties of the State Board of Real Property Services are considered functions, powers and duties of the Commissioner of Taxation and Finance. Section 202(1)(k) of the Real Property Tax Law authorizes the Commissioner of Taxation and Finance in relation to real property tax administration to adopt such rules not inconsistent with law, as may be necessary for the exercise of his or her powers and the performance of his or her duties. Section 1573 of the Real Property Tax Law provides that the assessing units must satisfy standards of quality assessment administration to qualify for assistance, as established pursuant to regulations promulgated by the commissioner. Part W of Chapter 56 of the Laws of 2010 added section 201(1) and amended section 202(1) and Part Y of Chapter 56 of the Laws of 2010 amended section 1573.

2. Legislative Objectives: The rule is being proposed pursuant to such authority to administer statutory amendments made by Part Y of Chapter 56 of the Laws of 2010 to restructure the State's reassessment assistance program to better encourage local governments to maintain updated property assessments on a regular cycle within available funding levels.

3. Needs and Benefits: Under the previous reassessment assistance program, a local assessing unit could receive assistance for conducting a full value reassessment without making any commitment to reassess again. Assessment equity can quickly deteriorate if not actively maintained. Recent amendments to section 1573 of the Real Property Tax Law have changed the reassessment assistance program so that to receive assistance, an assessing unit would have to adopt a multi-year plan of at least four years that calls for a full value reassessment to be completed in the first and last years of the plan, thereby establishing a reassessment cycle of the local government's own choosing.

The purpose of these amendments is to make necessary regulatory changes related to the implementation of these provisions and to assure that the funds for the assistance program are effectively managed. This rule provides: plan requirements, the state standards for quality assessment administration that must be satisfied by the assessing unit to qualify for state assistance, requirements for applications for state assistance, and transitional rules for 2010 assessment rolls.

4. Costs:

(a) Costs to regulated persons: None - there are no regulated persons; the regulated parties are the local governments.

(b) Costs to the State and its local governments including this agency: Section 1573 of the Real Property Tax Law was amended by Chapter 56 of the Laws of 2010 to provide a new assistance program to local governments to encourage reassessments. Participation in the assistance program is purely voluntary; no local government is required to conduct a reassessment or to apply for the assistance.

Chapter 55 of the Laws of 2010 contained an appropriation of \$6,900,000. This level of funding reflects a \$1,350,000 reduction from the 2009-10 budget. The effect will be limited in 2010 as there are provisions in the rules to provide assistance for revaluations conducted in 2010 according to the provisions of the previous program. In future years some local governments which had received assistance of \$5 per parcel for annual reassessments will only receive assistance of \$2 per parcel for the years between reassessments.

(c) Information and methodology: The appropriation figures were determined by the Division of Budget and Chapter 55 of the Laws of 2010.

5. Local Government Mandates: None. Participation in this assistance program is purely voluntary; no local government is required to conduct a reassessment or to apply for the assistance.

6. Paperwork: If the local government elects to participate in this assistance program, a written plan and application are prescribed by the rule along with statutorily required documentation.

7. Duplication: There are no conflicting state or federal requirements.
8. Alternatives: There were no significant alternatives to consider. The special transitional provisions of the rule were needed to implement this new program because this law became effective after most municipalities filed their tentative assessment rolls and would have otherwise failed to qualify for the program.
9. Federal Standards: There are no federal regulations concerning this subject.
10. Compliance Schedule: The compliance schedule for a local government that elects to participate in the assistance program is specifically set forth in the rule.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Business and Local Governments is not being submitted with the rule because the rule will not impose any adverse economic impact or any reporting, recordkeeping, or other compliance requirements on small business or local governments. Section 1573 of the Real Property Tax Law was amended by Chapter 56 of the Laws of 2010 to provide a new assistance program to local governments to encourage reassessments. Participation in the assistance program is purely voluntary; no local government is required to conduct a reassessment or to apply for the assistance. The proposed rules are the administrative structure to implement the statutorily authorized assistance program.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this rule because it will not impose any adverse impact on rural areas or any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. Section 1573 of the Real Property Tax Law was amended by Chapter 56 of the Laws of 2010 to provide a new assistance program to local governments to encourage reassessments. Participation in the assistance program is purely voluntary; no local government is required to conduct a reassessment or to apply for the assistance. The proposed rules are the administrative structure to implement the statutorily authorized assistance program.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no impact on jobs and employment opportunities. Section 1573 of the Real Property Tax Law was amended by Chapter 56 of the Laws of 2010 to provide a new assistance program to local governments to encourage reassessments. Participation in the assistance program is purely voluntary; no local government is required to conduct a reassessment or to apply for the assistance. The proposed rules are the administrative structure to implement the statutorily authorized assistance program.

Section 317.3 establishes the minimum requirements to qualify as a group self-insurer as, among other things homogeneity, a minimum of four members with an aggregate net worth of at least \$3,000,000.00, annual contributions which exceed \$1,500,000.00, and no more than 500 members. If a group self-insurer fails to meet the minimum qualifications the Chair must be immediately notified.

Section 317.4 sets forth the application requirements for the authorization of a new group self-insurer. A new group self-insurer must meet the minimum qualifications and submit an application that includes, among other things, the application form, a payroll report for the prior fiscal year for each member and in the aggregate for the group, a report identifying the projected rate of contributions and assessments to be paid by each member for the first year and the manner in which they were calculated, a description of the safety plan proposed for the group, a description of the underwriting standards, an executed application for participation for each employer member, all documents governing the operation of the group, a list of the trustees, and a list of the key agents.

Section 317.5 establishes the need to list all trustees and notify the Chair of any changes in trustees. In addition, this section sets the minimum trustee requirements, trustee responsibilities, standard of care for trustees, number and terms of trustees and trustee compensation.

Section 317.6 sets forth the requirement to retain the services of key agents, specifically a group administrator and third party administrator, who are properly licensed and the duties of such agents. This section further sets forth the rules governing the identification of the key agents, submission of the contractual agreements, approval of such agreements, including a list of inappropriate provisions, and the disclosure of all related party relationships between the key agents.

Section 317.7 defines when a conflict of interest exists and prohibitions regarding relationships between key agents and the group self-insurer.

Section 317.8 sets forth the documents that govern the operation of a group self-insurer and the minimum provisions that must be contained within such documents. The governing documents are the declaration of trust, by-laws and participation agreement.

Section 317.9 explains the homogeneity requirement for members of a group self-insurer, defines the terms "qualifying payroll", "standard exception codes" and "acceptable payroll classification code", requires the Chair to establish and maintain a list of acceptable payroll classification codes for each of the major industries for which a group self-insurance trust exists and each group to establish its homogeneity standard, advises that there will be an annual verification of a group's homogeneity and members who do not meet the homogeneity standard must be terminated.

Section 317.10 sets forth the responsibilities of members of group self-insurers. The greatest responsibility is that each member is jointly and severally responsible for all liabilities of the group self-insurer as provided by Workers' Compensation Law § 50(3-a) during its period of membership. Members must comply with all responsibilities set forth in the group self-insurer's governing documents, provide the group administrator with accurate contact information, reapply if they undergo any change in their legal status.

Section 317.11 sets forth the provisions governing the addition of new members to a group self-insurer, involuntary termination of a member from a group and cancellation by a member from the group self-insurer.

Section 317.12 governs the contribution year funding of group self-insurers. This section requires groups to maintain a dedicated trust fund that meets the funding requirements in § 317.13. Groups must achieve the integrity of the trust fund through the collection of adequate member contributions for each fund year. This section also requires all groups to have a fund year that coincides with the calendar year and to submit rate plans that must be approved by the Chair sixty days prior to the fund year. The group must report to the Chair the operating results of each fund year and the rates charged an employer member. If rates are inadequate the Chair may mandate that the group modify the rates as the he or she directs.

Section 317.13 sets forth the funding requirements for group self-insurers. Specifically, groups must maintain a regulatory funding po-

Workers' Compensation Board

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Group Self-Insurance

I.D. No. WCB-43-10-00006-P

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

Proposed Action: Repeal of Part 317 and addition of new Part 317 to Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 50(3-a) and 117

Subject: Group Self-Insurance.

Purpose: To provide guidelines regarding the qualifications for group self-insurers and the parameters within which they may operate.

Substance of proposed rule (Full text is posted at the following State website: www.wcb.state.ny.us): The proposed change repeals Part 317 governing group self-insurance and adopts a new Part 317, governing group self-insurance.

Section 317.1 sets forth the purpose of this Part to establish application procedures, qualifications and responsibilities for any group of employers which desires to become, or which has been approved to operate as, a group self-insurer.

Section 317.2 provides definitions of terms used in Part 317.

sition with acceptable assets as described in § 317.14 of at least 100% of its total liabilities, as described in § 317.15, including the claims reserve presented in the actuarial opinion on unpaid claims estimates with a 20% risk margin prescribed by the Chair. Groups which fail to meet this regulatory funding position for specific fund years or in the aggregate or both shall be deemed under funded.

Section 317.14 requires the group self-insurer, its trustees, its group administrator, claims administrator and other key agents to preserve the integrity, strength and liquidity of the group's assets. This section identifies prohibited uses of group assets and provides that only admitted assets, as described, will be used to determine the group's regulatory funding position. Admitted assets include cash and cash equivalents, interest receivable, excess insurance receivables and recoverables and investments that meet the listed standards.

Section 317.15 identifies and governs liabilities of the group. Specifically, this section requires all groups to establish and maintain actuarially sound loss reserves that comply with the standards in this section. For example, such claim reserves must be supported by the actuarial report filed annual by the group. This section also provides that distributions that are eligible for payment are considered a liability for purposes of the group's regulatory funding level.

Section 317.16 governs when and how distributions of dividends may be made to members of a group.

Section 317.17 sets forth the insurance coverage that must be obtained and maintained. For example, every group self-insurer must file with the Chair evidence that it has obtained a blanket fidelity bond or fidelity insurance policy coverage for the theft, disappearance or destruction of money, securities or other property of the group. Additionally, the group must file with the Chair proof that its key agents have obtained professional liability coverage for errors and acts of omission.

Section 317.18 requires groups to obtain excess insurance to reduce the exposure of the group for workers' compensation claims and employer liability and file proof of such insurance with the Chair. The maximum retention levels will be set by the Chair.

Section 317.19 requires each group to deposit with the Chair securities, cash, surety bonds, and/or irrevocable letters of credit in an amount set by the Chair as security. This section sets forth the factors considered in determining the amount of deposit, which includes the group's regulatory funding position. In addition, the section requires an annual evaluation of the security deposit, details the form of the deposit, states that the security deposit is excluded from the calculation of the group's assets, governs when the Chair may draw on the deposit and the penalty for failing to file the deposit.

Section 317.20 details the reporting requirements for group self-insurers, including the filing of annual reports regarding regulatory funding status, compliance with the minimum requirements to be a group, funding year analysis, audited financial statements and actuarial report and opinion. In addition, the group must annual provide a written report to the members.

Section 317.21 requires the Chair to post specific information about the groups on the Workers' Compensation Board's website.

Section 317.22 sets forth the standards for marketing materials and the solicitation of members and the sanctions for failing to adhere to such standards.

Section 317.23 provides that the Chair shall have free access to all records of the group self-insurer, shall evaluate at least once every three years a group's compliance with the financial and regulatory requirements, its claims handling and operations and business practices. In addition the Chair may require reports to be prepared by independent professionals.

Section 317.24 details the terms and procedures applicable to under funded groups, such as the limitation on new members, the submission of a plan to correct the situation, the appointment of an outside monitor, an independent examination of the group and additional security deposits. This section also governs deficit assessments and the failure to restore financial integrity to the group.

Section 317.25 sets forth the process for voluntary and involuntary termination of a group self-insurer.

Section 317.26 governs the dissolution of a terminated group self-insurer, including when the group continues to administer the claims and when the Chair must assume claims handling and assessments to pay the obligations of the group.

Section 317.27 provides that Part 317 does not apply to groups whose members are all municipalities.

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

Summary of Regulatory Impact Statement

1. Statutory authority: Workers' Compensation Law (WCL) § 117 authorizes the Chair to make reasonable regulations consistent with the provisions of the workers' compensation law and the labor law.

WCL § 50(3-a), as amended by Chapter 139 of the Laws of 2008, authorizes the Chair to approve group self-insurance arrangements, strictly regulate them to ensure their financial stability and to promulgate rules and regulations in order to implement this subdivision. Specific authority is granted to the Chair to adopt regulations establishing the investments and unrestricted cash permitted and requiring further financial standards beyond those in statute.

2. Legislative objectives: Between January 2006 and April 2008, the Chair was forced to close and assume responsibility for 12 group self-insured trusts. To pay the benefits to injured workers whose employers belonged to these trusts, the Chair was forced to levy assessments pursuant to WCL § 50(5)(g) [formerly § 50(5)(f)] on all individual self-insured employers and group self-insurers. Due to the number of insolvent trusts and the size of the assessments necessary to fund the claims, legislation was passed [Chapter 139 of the Laws of 2008] to ensure the payment of workers' compensation claims, provide relief to the employers and groups being assessed and to grant the Chair greater and stricter authority to regulate group self-insurers. The proposed rule implements statutory requirements that the group provide to the chair satisfactory proof of its financial ability to pay workers' compensation benefits and deposit security in an amount determined by the Chair to secure the group's liability to pay compensation.

3. Needs and benefits: The purpose of this rule is to establish application procedures, qualifications and responsibilities for group self-insurers so they remain financially stable and solvent to pay the workers' compensation claims of the employees of the employer members.

The current regulations governing group self-insurers were adopted in 2001. In the years since, the Chair and staff discovered inadequacies in the existing regulations and began discussions with the group self-insurance industry about changes to them. However, before any changes were proposed, critical solvency issues arose regarding a number of the groups.

In 2006 the Chair began revoking the authorization to self-insurer from groups that were significantly under funded and were either unable to charge rates that enabled the group to collect sufficient funds to cover the claims for that year or collect the amounts projected under a deficit assessment. Between 2006 and 2008, 15 groups were forced to close by the Chair, another 17 groups closed voluntarily, and the Chair was forced to assume control of 12 groups in order to take over the administration and payment of claims. The Chair only assumes control of a group when it is unable to properly administer its liabilities or it does not have twelve months worth of liquid assets available to pay the claims of injured workers or both. To fund the claims of the groups without sufficient assets, the Chair assessed the members of the closed groups directly. However, the amounts collected were not always sufficient to pay the claims. When a closed group had only six months worth of assets, the Chair deemed it insolvent and imposed assessments on all private individually self insured employers and group self-insurers.

As of August 2009, the Chair has assessed the members of insolvent groups approximately \$228,317,277.00. Between April 1, 2008, and March 31, 2009, the Chair paid \$26,000,000.00 for workers' compen-

sation claims of employees of members of the insolvent groups. The source of the \$26,000,000.00 to pay the claims was the assessments on all private individually self-insured employers and solvent group self-insurers. For fiscal year April 1, 2009, through March 31, 2010, the Chair estimates that \$56,000,000.00 will be needed to pay the claims of insolvent groups. However, the Chair was able to offset the assessment of \$56 million by borrowing \$40 million from the Uninsured Employers Fund pursuant WCL § 50-a. This section authorized the Chair to borrow up to \$52 million from the Uninsured Employers Fund before April 1, 2009.

The need to close groups and then assume the administration and payment of their claims highlights the need to reform the regulation of group self-insurers. It is vital that group self-insurance arrangements be properly managed and regulated so they have the resources to provide workers' compensation benefits to the injured employees of the group members. Further, insolvent groups result in costly deficit assessments on the group members, many of which are small businesses with limited resources, and assessments on all private individual and group self-insurers to ensure that injured workers receive the benefits they are entitled to under the law.

To address the need for reform, WCL § 50 (3-a) was amended in 2008 to impose stricter statutory requirements for group self-insurers and to provide the Chair with greater regulatory authority. This rule implements these amendments by: requiring increased capitalization, a constant 100% funding status, and contributions adequate to pay the fully developed actuarially calculated claim costs and expenses for the fund year, strictly defining assets and liabilities, requiring detailed annual financial and actuarial reports, prior submission and approval of contribution rate plans, and independent examinations of the group.

4. Costs:

a. Costs to the regulated parties for implementation and continued compliance with the proposed rule may include additional costs for qualified actuaries and certified public accountants due to the additional reporting requirements regarding the group self-insurers' financial health, claims reserves and contribution rating plans. There may be some expense associated with the requirement to hire a licensed group administrator to manage the group. In addition, the cost to hire a licensed group administrator may be more than the current cost due to the license requirements and the requirement that the group administrator, as well as all other key agents, obtain and maintain professional liability coverage. The requirement to hold an annual membership meeting will impose some costs on the groups as all members must receive written notice at least sixty days before the meeting. Additionally, the chair may also engage attorneys, actuaries, certified public accountants and other qualified persons to assist in the evaluation of a group's compliance with the financial and regulatory requirements, its claims handling, operations and business practices, which must be performed once every three years. Pursuant to WCL § 50 (3-a) (2) (c) the costs of engaging such professionals shall be borne by the group under examination. Some group self-insurers may also need to secure additional excess insurance in order to comply with these regulations.

b. There is no anticipated cost to the state or local governments for the implementation and continuation of the proposed rule. Group self-insurers which are solely comprised of local governments are not subject to the proposed rule. There are no local governments who are members of a group that is not solely comprised of local governments. The Workers' Compensation Board may incur minimal costs from complying with the requirement to make available on its website and in writing upon request information about group self-insurers, however this requirement is mandated by WCL § 50 (3-a) (5) (d) (2). The Chair will likely need additional resources to fully implement the proposed rules which would mean additional costs. These costs would be billed back to the self-insurance community.

c. As noted in paragraphs a and b above, there are additional costs associated with the proposed rule. These costs cannot be estimated as they depend on the existing operations of each group self-insurer, including how many trustee meetings they current hold, whether they have meetings with their members and the extent of the reports they current prepare and file.

5. Local government mandates: This rule does not apply to groups that are solely comprised of local governments. There are no local governments that are members of groups that are not comprised solely of local governments.

6. Paperwork: This proposed rule requires groups to submit to the Board: documentation pertaining to the employer's eligibility to qualify, application forms, participation and trust agreements, bylaws, copies of contracts with licensed group administrators, licensed third party administrators and other key agents, annual financial and actuarial documentation, annual contribution rating plan, and annual member payroll reports.

Most of the reporting, form and other paperwork requirements in the proposed regulation exist in the current Part 317 or are required by statute [WCL § 50 (3-a)]. The proposed rule provides more detail about the content of the required reports and in many cases requires the use of a form prescribed by the Chair. Some of the reporting and form requirements are not in the current regulations but have been required by the Chair. Specifically, the existing regulations do not require the filing of a contribution rating plan by each group prior to the start of the fund year, but for the past two years the Chair has required such a submission.

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

8. Alternatives: The most significant alternative approach considered was to not adopt new regulations. This approach was rejected because the law imposed new, strict requirements on groups that are not part of or conflict with the existing Part 317. In addition, it is clear that the existing regulations are not sufficient to properly regulate group self-insurance.

Some alternatives were considered regarding provisions in the proposed rule. Currently and in the original draft of the proposed rule, there is no prohibition on the group administrator and the third party administrator being the same entity. Based upon concerns about conflicts of interest and issues with such relationships in a few of the groups that have defaulted, the Chair amended the draft to require these two key agents be separate entities. However, the Chair allows such relationships for existing groups to continue.

During the outreach conducted while drafting the proposed regulations, a number of existing group administrators and others requested that the contribution year funding requirements be eliminated. The Chair declined to remove these provisions because they are necessary in light of the joint and several liability of the members. As all members of a group are liable for the claims incurred by the group for the year or years for which they are a member, it is important that all the members pay sufficient contributions to cover the claims incurred in such year or years. Because of the joint and several liability of group members, the Chair declined to include the suggestion that surplus from one year be used to offset a deficit in another year other than to allow offsets for members participating in both the surplus and deficit years.

Another suggestion was to include assets of a group pledged as collateral for the security deposit held by the Chair in the calculation of the group's funding status. The Chair declined to include such assets in the definition of admitted assets as they are required in addition to the assets maintained in the trust and many are not unrestricted. If the group defaults so the Chair liquidates the security deposit, these assets would be seized by the insurance company issuing the bond or the bank issuing the letter of credit. Including such assets in the definition would result in inadequate funding for the groups and violate WCL § 50 (3-a) (2) (b) which requires assets to be unrestricted cash and investments.

Finally, it was suggested that the Chair eliminate some of the reporting requirements or reduce the detail in the reports. The Chair declined to accept these comments because WCL § 50 (3-a) mandates the reports required in the regulations and requires that such reports provide all of the information necessary for the Chair to determine a groups funding status and if it is properly functioning.

9. Federal standards: There are no federal standards applicable to this rule.

10. Compliance schedule: Existing group self-insurers, their actuar-

ies, attorneys, accountants, group administrators, third party administrators and other key agents will be able to achieve full compliance with the rule by December 31, 2010, when all of its provisions are applicable. Employers who wish to form new groups will be able to achieve compliance immediately.

Regulatory Flexibility Analysis

1. Effect of rule: This rule will not affect any local governments as the regulation specifically provides that it does not apply to group self-insurers who are comprised solely of local governments. All local governments that are members of group self-insurers are members of groups that are comprised solely of local governments.

There are currently 4,449 employers who are members of group self-insured programs. These employers come from most of the industry sectors in the state and many meet the definition of small employers. The 32 active group self-insured trusts to which these members belong meet the definition of small employer. Six of the groups are self administered while the remaining groups are managed by sixteen group administrators. In addition, the groups hire third party administrators, actuaries, accountants, lawyers, independent medical examiners and entities that derive income from independent medical examinations and other agents to provide claims services, financial, actuarial, rate plan and other reports, and to prepare trust documentation such as by-laws, participation agreements and declaration of trust. Many of these entities are small employers.

2. Compliance requirements: This rule requires groups to submit to the Board: documentation pertaining to the employer's eligibility to qualify, application forms, participation and trust agreements, bylaws, copies of contracts with licensed group administrators, licensed third party administrators and other key agents, annual financial and actuarial documentation, annual contribution rating plan, and annual member payroll reports.

Most of the reporting, form and other paperwork requirements in the proposed regulation exist in the current Part 317. The proposed rule provides more detail about the content of the required reports and in many cases requires the use of a form prescribed by the Chair. Some of the reporting and form requirements are not in the current regulations but have been required by the Chair. Specifically, the existing regulations do not require the filing of a contribution rating plan by each group prior to the start of the fund year, but for the past two years the Chair has required such a submission.

Further, much of the reporting and form requirements are required by statute. Workers' Compensation Law (WCL) § 50 (3-a) (2) (b) provides that the Chair shall require each group to file reports at least annually which consist of at least audited financial statements, actuarial opinions, payroll information and contribution year analysis. All of these reports are necessary to show that the group is fully funded, which this subparagraph defines as unrestricted cash and investments, permitted by regulations of the Chair, of at least 100% of the total liabilities of the group. If a group's assets are not 100% of the total liabilities, it is under funded and the regulation requires the group to file a plan for achieving fully funded status in a timely manner. WCL § 50 (3-a) (2) (b) provides that a group that is not fully funded is deemed under funded and is required to submit a plan for achieving fully funded status.

The requirement that an application for a new member be on a Chair prescribed form is mandated by WCL § 50 (3-a) (2) (g). Other reports, forms or paperwork requirements in the proposed regulation required by statute include but are not limited to: the requirement for a participation agreement in which the member acknowledges their joint and several obligation [WCL § 50 (3-a) (2) (g)]; the filing of a notice of termination by the group on a prescribed form in the office of the Chair or sent by certified or registered letter, return receipt requested and also served in like manner on the member [WCL § 50 (3-a) (3)]; notice of any change in the officers, directors, trustees, group administrator or third party administrator must be given to the chair within 10 days [WCL § 50 (3-a) (4)]; the provision of an annual report with specified content by the group administrator to all members of the group and the Chair [WCL § 50 (3-a) (5)(d)(1)]; the requirement that the Chair post on the Board's website and available upon written request specific information about the groups [WCL § 50 (3-a)

(5)(d)(2)]; the requirement that the group submit to the Chair for approval copies of any agreement or contract with its group administrator, third party administrator, accountant, or actuary at least 30 days before it is effective; [WCL § 50 (3-a) (5) (g)]; and the requirement that the group file with the Chair no later than 60 days before the start of the fund year a rating plan supported by an actuarial rate study prepared by an independent, qualified actuary [WCL § 50 (3-a) (6)].

3. Professional services: Group self-insurers will be required to hire the services of licensed group administrators, licensed third party administrators, lawyers, actuaries and accountants in order to comply with this rule. Under the existing rule, groups are already required to hire such entities. The proposed regulation requires that groups only hire group administrators licensed by the Chair, as required by WCL § 50 (3-a) (5).

It is not expected that group administrators, actuaries, accountants, lawyers or third-party administrators will need to hire any professional services.

4. Compliance costs: Costs to the groups for implementation and continued compliance with the proposed rule may include additional costs for qualified actuaries and certified public accountants due to the additional reporting requirements regarding group self-insurers' financial health, claims reserves and contribution rating plans. There may be some expense associated with the requirement to hire a licensed group administrator to manage the group. Currently, there are six groups that are self administered. These groups will need to either hire a licensed group administrator or obtain a group administrator's license from the Chair. In addition, the cost to hire a licensed group administrator may be more than the current cost due to the license requirements and the requirement that the group administrator, as well as all other key agents, obtain and maintain professional liability coverage. There may be some additional expense associated with the requirement to hold four trustee meetings a year. This expense can be offset by holding three of meeting through a conference call as only one of these meetings must be in person. The requirement to hold an annual membership meeting will impose some costs on the groups as all members must receive written notice at least sixty days before the meeting. The chair may also engage attorneys, actuaries, certified public accountants and other qualified persons to assist in the evaluation of a group's compliance with the financial and regulatory requirements, its claims handling, operations and business practices, which must be performed once every three years. Pursuant to WCL § 50 (3-a) (2) (c) the costs of engaging such professionals shall be borne by the group under examination. Further, based upon the security deposit standards set forth in this proposed rule, some group self-insurers may experience an increase in the amount of the security which they are required to post with the chair. Some group self-insurers may also need to secure additional excess insurance in order to comply with these regulations.

The proposed rule does not impose any additional costs on third party administrators, actuaries, accountants or lawyers and actually might increase their revenue due to the additional services they will need to provide to the groups. Group administrators will incur additional costs for licensing. However, they may also increase their revenue due to the additional services they may provide.

5. Economic and technological feasibility: It will be economically and technologically feasible for group self-insurers, including those consisting of small businesses, to comply with this rule.

6. Minimizing adverse impact: To the extent that participation in group self-insurance arrangements is voluntary, any adverse impact is already minimized. In addition, most of the requirements in the proposed rule are derived from mandates in WCL § 50 (3-a) which are intended to assure the solvency of the group so that it can pay the required benefits to injured workers.

Currently and in the original draft of the proposed rule, there is no prohibition on the group administrator and the third party administrator being the same entity. Based upon concerns about conflicts of interest and issues with such relationships in a few of the groups that have defaulted, the Chair amended the draft to require these two key agents be separate entities.

During the outreach conducted while drafting the proposed regula-

tions, a number of existing group administrators and others requested that the contribution year funding requirements be eliminated. The Chair declined to remove these provisions because they are necessary in light of the joint and several liability of the members. As all members of a group are liable for the claims incurred by the group for the year or years for which they are a member, it is important that all the members pay sufficient contributions to cover the claims incurred in such year or years. Because of the joint and several liability of group members, the Chair declined to include the suggestion that surplus from one year be used to offset a deficit in another year.

Another suggestion was to include in the calculation of the group's funding status assets of a group pledged as collateral for the security deposit held by the Chair. The Chair declined to include such assets in the definition of admitted assets as they are not unrestricted and if the group defaults so the Chair liquidates the security deposit, these assets would be seized by the insurance company issuing the bond or the bank issuing the letter of credit. Including such assets in the definition would result in inadequate funding for the groups and violate WCL § 50 (3-a) (2) (b) which requires assets to be unrestricted cash and investments.

Finally, it was suggested that the Chair eliminate some of the reporting requirements or reduce the detail in the reports. The Chair declined to accept these comments because WCL § 50 (3-a) mandates the reports required in the regulations and requires that such reports provide all of the information necessary for the Chair to determine a group's funding status and if it is properly functioning.

7. Small business and local government participation: Local governments did not participate in the drafting of this rule as it does not apply to them. The Chair sought the participation of small businesses in the drafting of this rule by providing early drafts to and meeting with the Group Self-Insurance Advisory Committee, the Group Self-Insurance Association of New York (GSIANY), any groups that are not members of GSIANY, any group administrators who are not members of GSIANY, and the Task Force on Group Self-Insurance. Members of the Group Self-Insurance Advisory Committee are six individuals who are members and trustees of six different groups and three group administrators. The members of the Task Force on Group Self-Insurance include designees of the Chair, Superintendent of Insurance and Commissioner of Labor, a representative each of the AFL-CIO and the Business Council of New York State, a representative of individual self-insured employers, a representative of claimants, a group administrator and a member/trustee of a group.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The rule applies to all private entities in all rural areas of the state which participate or are eligible to participate in plans for group self-insurance. In addition it applies to group administrators, third party administrators, accountants, actuaries, and lawyers in rural areas that may be hired by group self-insurers to provide services. Currently there are 32 active groups in New York with 4,449 members. While six of the groups are self-administered, the remainder has hired one of 16 group administrators.

2. Reporting, recordkeeping and other compliance requirements; and professional services: Participation in group self-insurance is voluntary. This proposed rule requires groups to submit to the Board: documentation pertaining to the employer's eligibility to qualify, application forms, participation and trust agreements, bylaws, copies of contracts with licensed group administrators, licensed third party administrators and other key agents, annual financial and actuarial documentation, annual contribution rating plan, and annual member payroll reports.

Most of the reporting, form and other paperwork requirements in the proposed regulation exist in the current Part 317. The proposed rule provides more detail about the content of the required reports and in many cases requires the use of a form prescribed by the Chair. Some of the reporting and form requirements are not in the current regulations but have been required by the Chair. Specifically, the existing regulations do not require the filing of a contribution rating plan by each group prior to the start of the fund year, but for the past two years the Chair has required such a submission.

Further, much of the reporting and form requirements are required by statute. Workers' Compensation Law (WCL) § 50 (3-a) (2) (b) provides that the Chair shall require each group to file reports at least annually which consist of at least audited financial statements, actuarial opinions, payroll information and contribution year analysis. All of these reports are necessary to show that the group is fully funded, which this subparagraph defines as unrestricted cash and investments, permitted by regulations of the Chair, of at least 100% of the total liabilities of the group. If a group's assets are not 100% of the total liabilities, it is under funded and the regulation requires the group to file a plan for achieving fully funded status in a timely manner. WCL § 50 (3-a) (2) (b) provides that a group that is not fully funded is deemed under funded and is required to submit a plan for achieving fully funded status.

The requirement that an application for a new member be on a Chair prescribed form is mandated by WCL § 50 (3-a) (2) (g). Other reports, forms or paperwork requirements in the proposed regulation required by statute include: the requirement for a participation agreement in which the member acknowledges their joint and several obligation [WCL § 50 (3-a) (2) (g)]; the filing of a notice of termination by the group on a prescribed form in the office of the Chair or sent by certified or registered letter, return receipt requested and also served in like manner on the member [WCL § 50 (3-a) (3)]; notice of any change in the officers, directors, trustees, group administrator or third party administrator must be given to the chair within 10 days [WCL § 50 (3-a) (4)]; the provision of an annual report with specified content by the group administrator to all members of the group and the Chair [WCL § 50 (3-a) (5)(d)(1)]; the requirement that the Chair post on the Board's website and available upon written request specific information about the groups [WCL § 50 (3-a) (5)(d)(2)]; the requirement that the group submit to the Chair for approval copies of any agreement or contract with its group administrator, third party administrator, accountant, or actuary at least 30 days before it is effective; [WCL § 50 (3-a) (5) (g)]; and the requirement that the group file with the Chair no later than 60 days before the start of the fund year a rating plan supported by an actuarial rate study prepared by an independent, qualified actuary [WCL § 50 (3-a) (6)].

3. Costs: Costs to the groups for implementation and continued compliance with the proposed rule, including those groups located in rural areas, may include additional costs for qualified actuaries and certified public accountants due to the additional reporting requirements regarding group self-insurers' financial health, claims reserves and contribution rating plans. There may be some expense associated with the requirement to hire a licensed group administrator to manage the group. Currently, there are six groups that are self administered. These groups will need to either hire a licensed group administrator or obtain a group administrator's license from the Chair. In addition, the cost to hire a licensed group administrator may be more than the current cost due to the license requirements and the requirement that the group administrator, as well as all other key agents, obtain and maintain professional liability coverage. There may be some additional expense associated with the requirement to hold four trustee meetings a year. This expense can be offset by holding three of meeting through a conference call as only one of these meetings must be in person. The requirement to hold an annual membership meeting will impose some costs on the meeting as all members must receive written notice at least sixty days before the meeting. The chair may also engage attorneys, actuaries, certified public accountants and other qualified persons to assist in the evaluation of a group's compliance with the financial and regulatory requirements, its claims handling, operations and business practices, which must be performed once every three years. Pursuant to WCL § 50 (3-a) (2) (c) the costs of engaging such professionals shall be borne by the group under examination. Further, based upon the security deposit standards set forth in this proposed rule, some group self-insurers may experience an increase in the amount of the security which they are required to post with the chair. Some group self-insurers may also need to secure additional excess insurance in order to comply with these regulations.

The proposed rule does not impose any costs on group administrators, third party administrators, actuaries, accountants or lawyers and actually might increase their revenue due to the additional services they will need to provide to the groups.

4. Minimizing adverse impact: To the extent that participation in group self-insurance arrangements is voluntary, any adverse impact is already minimized. In addition, most of the requirements in the proposed rule are derived from mandates in WCL § 50 (3-a) which are intended to ensure the solvency of the group so that it can pay the required benefits to injured workers.

Currently and in the original draft of the proposed rule, there is no prohibition on the group administrator and the third party administrator being the same entity. Based upon concerns about conflicts of interest and issues with such relationships in a few of the groups that have defaulted, the Chair amended the draft to require these two key agents be separate entities. However, the Chair allows such relationships for existing groups to continue.

During the outreach conducted while drafting the proposed regulations, a number of existing group administrators and others requested that the contribution year funding requirements be eliminated. The Chair declined to remove these provisions because they are necessary in light of the joint and several liability of the members. As all members of a group are liable for the claims incurred by the group for the year or years for which they are a member, it is important that all the members pay sufficient contributions to cover the claims incurred in such year or years. Because of the joint and several liability of group members, the Chair declined to include the suggestion that surplus from one year be used to offset a deficit in another year.

Another suggestion was to include assets of a group pledged as collateral for the security deposit held by the Chair in the calculation of the group's funding status. The Chair declined to include such assets in the definition of admitted assets as they are restricted and if the group defaults so the Chair liquidates the security deposit, these assets would be seized by the insurance company issuing the bond or the bank issuing the letter of credit. Including such assets in the definition would result in inadequate funding for the groups and violate WCL § 50 (3-a) (2) (b) which requires assets to be unrestricted cash and investments.

Finally, it was suggested that the Chair eliminate some of the reporting requirements or reduce the detail in the reports. The Chair declined to accept these comments because WCL § 50 (3-a) mandates the reports required in the regulations and requires that such reports provide all of the information necessary for the Chair to determine a group's funding status and if it is properly functioning.

5. Rural area participation: The Chair sought the participation of the regulated parties from across the state, including rural areas, in the drafting of this rule by providing early drafts to and meeting with the Group Self-Insurance Advisory Committee, the Group Self Insurance Association of New York (GSIANY), any groups that are not members of GSIANY, any group administrators who are not members of GSIANY, and the Task Force on Group Self-Insurance. Members of the Group Self-Insurance Advisory Committee are six individuals who are members and trustees of six different groups and three group administrators. The members of the Task Force on Group Self-Insurance include designees of the Chair, Superintendent of Insurance and Commissioner of Labor, a representative each of the AFL-CIO and the Business Council of New York State, a representative of individual self-insured employers, a representative of claimants, a group administrator and a member/trustee of a group.

Job Impact Statement

The repeal and re-adoption of Part 317 implement the provisions of Chapter 139 of the Laws of 2008, which amended Workers' Compensation Law § 50 (3-a) to require full funded status of group self-insurers, the retention of licensed group administrators, and increased reporting to ensure the solvency such groups. Participation in a group self-insurer is voluntary on the part of an employer. The provisions in the rule that define and mandate a fully funded status are directly imposed by statute, which is also true for the increased reporting requirements. Such increased reporting requirements will require increased demand for the services of actuaries and accountants, which will not have an adverse impact on jobs. Further, the requirement that the group hire different entities as group administrators and third party administrators also is not an adverse affect on jobs. Groups were paying for these services separately, so this should not significantly increase costs. It is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs or employment, and therefore a job impact statement is not required.