

RULE MAKING ACTIVITIES

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

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

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

Office of Children and Family Services

NOTICE OF ADOPTION

Prohibiting Use of Tobacco by Staff and Residents in Residential Programs Caring for Foster Children

I.D. No. CFS-18-10-00004-A

Filing No. 61

Filing Date: 2011-01-14

Effective Date: 2011-02-02

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

Action taken: Addition of section 441.23 to Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f) and 462(1)(a)

Subject: Prohibiting use of tobacco by staff and residents in residential programs caring for foster children.

Purpose: To prohibit the use of tobacco by staff and residents in residential programs caring for foster children.

Text or summary was published in the May 5, 2010 issue of the Register, I.D. No. CFS-18-10-00004-P.

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

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

Assessment of Public Comment

The Office of Children and Family Services (OCFS) received one comment from a voluntary authorized agency. The comment stated that, while

the agency understood and appreciated the need to regulate smoking by residents and staff, it had a concern with the prohibition against smoking by staff anywhere on facility grounds. The comment noted that on campus settings the regulation would require staff to go some distance to get completely off a facility campus. The extra time needed to get off campus would create workload coverage and time management problems for the agency. It also could lead to conflict with neighbors of the facility who might object to staff smoking on local streets. Finally, having to smoke on a public street could also be very embarrassing to staff.

OCFS considered the comment and consulted with the New York State Office of Alcoholism and Substance Abuse. Based on such consideration and consultation, the proposed regulation was not revised.

Education Department

EMERGENCY RULE MAKING

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-E

Filing No. 62

Filing Date: 2011-01-14

Effective Date: 2011-01-14

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

Action taken: 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)

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

Specific reasons underlying the finding of necessity: The proposed amendments to the Commissioner's regulations and the Rules of the Board of Regents implement statutory amendments to the Education Law that authorize the Department to issue waivers to certain entities 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 and psychologists to provide services within the scopes of practice of those professions.

The proposed regulations implement the provisions of Chapters 130 and 132, which became effective on June 18, 2010, by setting forth the requirements to be met by a qualified entity in order to receive a waiver. In order for the Department to develop, publish and review the applications required under the new law in a timely manner, the regulations were adopted on an emergency basis at the October 2010 meeting of the Board of Regents.

The first emergency action on these regulations expires on January 23,

2011. Emergency action is necessary at the January 2011 Board of Regents meeting in order to ensure that the rule remains continuously in effect until such time as it can be adopted as a permanent rule on February 2, 2010, after expiration of the 45-day public comment period for proposed rule makings prescribed in the State Administrative Procedure Act. Maintaining the regulations in continuous effect will enable the Department to finalize and publish applications necessary for issuing waivers authorized under the law in a timely manner.

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 emergency rule: 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.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-43-10-00010-P, Issue of October 27, 2010. The emergency rule will expire March 14, 2011.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Section 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 educational 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 recordkeeping 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.

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on October 27, 2010, the State Education Department received the following comments.

COMMENT: One commenter indicated that it holds thousands of operating certificates under Article 16 of the Mental Hygiene Law and that some of its chapters provide early intervention programs under Article 25 of the Public Health Law. The commenter asked for clarification as to whether the entity and/or its chapters will be held to require waivers to continue to operate individual programs NOT licensed pursuant to MHL Article 16 or PHL Articles 25 and 28?

RESPONSE: To the extent that the various programs you describe are operated under an appropriately issued operating certificate described in section 59.14(d) of the Commissioner's regulations, these programs would not require a waiver. If, however, the programs are not covered by a properly issued operating certificate, it would be necessary for the entity to obtain a waiver for these programs to continue to provide the services described in section 6503-a of the Education Law. Since the law does not

provide an exemption for programs under Article 25 of the Public Health Law, these programs would need to seek a waiver from the corporate practice prohibitions.

COMMENT: How does a corporation find out if it needs a waiver?

RESPONSE: The corporation should check the requirements in section 6503-a of the Education Law and section 59.14 of the Commissioner's regulations to determine if the entity meets the eligibility requirements for a waiver. If the entity still has concerns as to whether it needs a waiver, the entity may contact the State Board for Social Work.

COMMENT: A 100-year-old organization has been advised by its attorney that it may need to change its governing documents to include a provision about providing licensed services. Is this true?

RESPONSE: The entity may need to update its corporate purpose in its governing documents to include an authorization for the corporation to provide professional services. The entity should consult with its counsel to determine what, if any, appropriate revisions need to be made to such documents.

COMMENT: One commenter expressed support for the proposed amendment and interprets these provisions to exempt programs authorized under Article 28 of the Public Health Law and Article 31 of the Mental Hygiene Law from requiring all staff that provides social work, mental health practitioner, and psychotherapy services to be licensed and have asked for clarification as to whether they need to apply for a waiver.

RESPONSE: A waiver under Section 6503-a of the Education Law is not required for an entity with an operating certificate issued in accordance with Article 28 of the Public Health Law, or Article 16, 31, or 32 of the Mental Hygiene Law, provided the entity is acting within the scope of the operating certificate. However, section 6503-a of the Education Law and its implementing regulations do not provide for an exemption from licensure for individuals who are providing services that are restricted under the Education Law, including psychotherapy and services that are within the scope of practice of social workers, mental health practitioners, and psychologists.

A separate provision of Chapters 130 and 132 of the Laws of 2010 provides an exemption from licensure for only those individuals in programs that are regulated, funded, operated or approved by certain state agencies, including the Department of Health, the Office of Mental Health, and the Office for People with Developmental Disabilities, until July 1, 2013.

COMMENT: One commenter noted that the phrase "authorized persons" is in the proposed amendment and asked that we provide a definition so that they can fully understand who is being referenced?

RESPONSE: The Education Law restricts the practice of the profession to those licensed or otherwise authorized to practice under the law. Generally "authorized" persons would include students, interns and limited permit holders under appropriate supervision or persons otherwise exempt from licensure under Articles 153, 154 or 163 of the Education Law.

COMMENT: One commenter asked if the waiver supersedes the July 2013 date for the requirement that all staff providing social work, mental health practitioner and psychotherapy services be licensed?

RESPONSE: The waiver authorized under 6503-a of the Education Law does not provide an exemption from licensure for individuals; it provides an exemption from corporate practice restrictions for qualified not-for-profit and educational corporations.

COMMENT: One commenter indicated that it is pleased that the proposed regulations will allow its institutes to continue to provide services to the community as they have done for decades.

RESPONSE: SED appreciates the support.

COMMENT: Section 59.14(c)(3)(x)(c) requires the entity to attest 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 such professional services as authorized under this section." We assume that this includes those professionals who are not yet licensed to work independently such as Licensed Master Social Workers (LMSW), social work interns, psychology externs, interns, and post-doctoral fellows, and the other mental health professionals all working under appropriate professional supervision.

RESPONSE: The Education Law restricts the practice of the profession to those licensed or otherwise authorized under the law. While there are variations in the article that defines the practice of each profession, generally "authorized" persons would include students, interns and limited permit holders under appropriate supervision or persons otherwise exempt from licensure under Articles 153, 154 or 163 of the Education Law.

COMMENT: One commenter noted that an entity that has been issued a waiver must apply for a certificate for each setting at which professional services are provided and asked whether this means that a waiver certificate needs to be applied for, for each private office in which a licensed professional practices?

RESPONSE: Section 6503-a(1)(g) of the Education Law requires that an entity operating pursuant to a waiver display, at each site where profes-

sional services are provided to the public, a certificate of such waiver issued by the Department pursuant to this section, which shall contain the name of the entity and the address of the site. Such entities shall obtain from the Department additional certificates for each site at which professional services are provided to the public.

COMMENT: Once a psychotherapy institute gets a waiver, is it guaranteed to keep it no matter where it locates its treatment facilities? Would the State Education Department choose not to renew a waiver based on over-saturation of waivers in a particularly geographic area?

RESPONSE: The waiver is renewable every three years and may be suspended, annulled or revoked by the Board of Regents, in accordance with the Education Law and section 29.18 of the Rules of the Regents. There are currently no provisions in the law or the regulation that would allow the Department to decline to renew a waiver based on the number of waived entities within a specific geographic area.

COMMENT: The proposed regulations do not exempt child welfare preventive service agencies from applying for a waiver. The Office of Children and Family Services (OCFS) does not issue any operating certificate, license or other credential to not-for-profit agencies that provide preventive services. Therefore, these agencies would not fall within the exemption from the waiver requirement in 6503-a of the Education Law. The commenter asked that additional language be added to the regulations to exempt such preventive service providers.

RESPONSE: Section 6503-a of the Education Law is intended to ensure public protection by allowing certain not-for-profit and educational corporations to overcome the corporate practice prohibitions in the Education Law. The law, which authorizes such entities to continue to provide professional services by applying for a waiver of the corporate practice restrictions, does not provide the authority for the Department to exempt providers that do not have independent statutory authority to provide the professional services. Therefore, no change is necessary in the regulation.

COMMENT: One commenter indicated that it is incorporated under the New York Religious Corporations Law (RCL). The proposed regulations do not make clear whether the waiver provisions extend to not-for-profit religious corporations, including churches, that are incorporated under RCL, rather than under the Not-for-Profit Corporation Law (N-PCL) or the Education Law that are referenced in section 6503-a of the Education Law and the proposed regulations. The entity suggests that the regulations and the waiver application materials make clear the applicability of the waiver provisions to religious corporations established under the RCL so that RCL-incorporated entities will know how this new law applies to them.

RESPONSE: Section 6503-a(1)(a) of the Education Law and section 59.14(b)(1) of the Commissioner's regulations state a "not-for-profit corporation formed for charitable, educational, or religious purposes or other similar purposes deemed acceptable to the Department" is eligible for a waiver of the corporate practice prohibitions. While the law and regulations do not specifically reference religious corporations; the Religious Corporations Law treats those entities as Type B not-for-profit corporations. Accordingly, we agree with the commenter that these entities are eligible for waivers under section 6503-a of the Education Law.

COMMENT: It would be helpful if the regulations and related application materials make clear the degree of specificity that the State Education Department will be looking for in an entity's certificate of incorporation and what types of "other documentation" may be submitted to demonstrate that the entity has been authorized to provide the relevant services.

RESPONSE: In developing the application materials, the Department will provide clear and concise guidance on the requirements and process for entities to follow when applying for a waiver under section 6503-a of the Education Law. Therefore, no changes are necessary in the regulations.

EMERGENCY RULE MAKING

Amend Teacher Education Program Registration Requirements for Special Education and Special Education Certification Requirements

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

Filing No. 63

Filing Date: 2011-01-14

Effective Date: 2011-01-14

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

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

Statutory authority: Education Law, sections 207 (not subdivided), 305(1), (2) and 3004(1)

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

Specific reasons underlying the finding of necessity: 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) and (grades 7-12-specialist) certificate titles after February 1, 2011. A new students with disabilities (grades 7-12- generalist) certificate title will also 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.

Emergency action is necessary at the January 2011 Board of Regents meeting in order to ensure that the rule remains continuously in effect until such time as it can be revised and adopted as a permanent rule, after expiration of the 30-day public comment period for revised rule makings prescribed in the State Administrative Procedure Act.

Emergency action is also needed to provide teaching candidates with sufficient time to complete the requirements for the special education generalist and specialist certificate titles in grades 5-9 and

the special education specialist certificate title in grades 7-12 before the Department phases out individual evaluation for these certificate titles.

Subject: Amend teacher education program registration requirements for special education and special education certification requirements.

Purpose: Restructure the adolescence level special education certificate structure to fill the need for special education teachers.

Substance of emergency rule: 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 (b) 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 (b) 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 September 1, 2014 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 area 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 area 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.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-43-10-00011-P, Issue of October 26, 2010. The emergency rule will expire March 14, 2011.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Section 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 through 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 educa-

tion 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 amendment 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.

NOTICE OF ADOPTION

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-A**Filing No.** 70**Filing Date:** 2011-01-18**Effective Date:** 2011-02-02

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

Action taken: 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 Chapters 130 and 132 of the Laws of 2010.

Text or summary was published in the October 27, 2010 issue of the Register, I.D. No. EDU-43-10-00010-P.

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

Text of rule and any required statements and analyses may be obtained

from: Chris Moore, NYS Education Department, 89 Washington Avenue, Rm. 148, Albany, NY 12234, (518) 473-8296, email: cmooore@mail.nysed.gov

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on October 27, 2010, the State Education Department received the following comments.

COMMENT: One commenter indicated that it holds thousands of operating certificates under Article 16 of the Mental Hygiene Law and that some of its chapters provide early intervention programs under Article 25 of the Public Health Law. The commenter asked for clarification as to whether the entity and/or its chapters will be held to require waivers to continue to operate individual programs NOT licensed pursuant to MHL Article 16 or PHL Articles 25 and 28?

RESPONSE: To the extent that the various programs you describe are operated under an appropriately issued operating certificate described in section 59.14(d) of the Commissioner's regulations, these programs would not require a waiver. If, however, the programs are not covered by a properly issued operating certificate, it would be necessary for the entity to obtain a waiver for these programs to continue to provide the services described in section 6503-a of the Education Law. Since the law does not provide an exemption for programs under Article 25 of the Public Health Law, these programs would need to seek a waiver from the corporate practice prohibitions.

COMMENT: How does a corporation find out if it needs a waiver?

RESPONSE: The corporation should check the requirements in section 6503-a of the Education Law and section 59.14 of the Commissioner's regulations to determine if the entity meets the eligibility requirements for a waiver. If the entity still has concerns as to whether it needs a waiver, the entity may contact the State Board for Social Work.

COMMENT: A 100-year-old organization has been advised by its attorney that it may need to change its governing documents to include a provision about providing licensed services. Is this true?

RESPONSE: The entity may need to update its corporate purpose in its governing documents to include an authorization for the corporation to provide professional services. The entity should consult with its counsel to determine what, if any, appropriate revisions need to be made to such documents.

COMMENT: One commenter expressed support for the proposed amendment and interprets these provisions to exempt programs authorized under Article 28 of the Public Health Law and Article 31 of the Mental Hygiene Law from requiring all staff that provides social work, mental health practitioner, and psychotherapy services to be licensed and have asked for clarification as to whether they need to apply for a waiver.

RESPONSE: A waiver under Section 6503-a of the Education Law is not required for an entity with an operating certificate issued in accordance with Article 28 of the Public Health Law, or Article 16, 31, or 32 of the Mental Hygiene Law, provided the entity is acting within the scope of the operating certificate. However, section 6503-a of the Education Law and its implementing regulations do not provide for an exemption from licensure for individuals who are providing services that are restricted under the Education Law, including psychotherapy and services that are within the scope of practice of social workers, mental health practitioners, and psychologists.

A separate provision of Chapters 130 and 132 of the Laws of 2010 provides an exemption from licensure for only those individuals in programs that are regulated, funded, operated or approved by certain state agencies, including the Department of Health, the Office of Mental Health, and the Office for People with Developmental Disabilities, until July 1, 2013.

COMMENT: One commenter noted that the phrase "authorized persons" is in the proposed amendment and asked that we provide a definition so that they can fully understand who is being referenced?

RESPONSE: The Education Law restricts the practice of the profession to those licensed or otherwise authorized to practice under the law. Generally "authorized" persons would include students, interns and limited permit holders under appropriate supervision or persons otherwise exempt from licensure under Articles 153, 154 or 163 of the Education Law.

COMMENT: One commenter asked if the waiver supersedes the July 2013 date for the requirement that all staff providing social work, mental health practitioner and psychotherapy services be licensed?

RESPONSE: The waiver authorized under 6503-a of the Education Law does not provide an exemption from licensure for individuals; it provides an exemption from corporate practice restrictions for qualified not-for-profit and educational corporations.

COMMENT: One commenter indicated that it is pleased that the proposed regulations will allow its institutes to continue to provide services to the community as they have done for decades.

RESPONSE: SED appreciates the support.

COMMENT: Section 59.14(c)(3)(x)(c) requires the entity to attest 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 such professional services as authorized under this section." We assume that this includes those professionals who are not yet licensed to work independently such as Licensed Master Social Workers (LMSW), social work interns, psychology externs, interns, and post-doctoral fellows, and the other mental health professionals all working under appropriate professional supervision.

RESPONSE: The Education Law restricts the practice of the profession to those licensed or otherwise authorized under the law. While there are variations in the article that defines the practice of each profession, generally "authorized" persons would include students, interns and limited permit holders under appropriate supervision or persons otherwise exempt from licensure under Articles 153, 154 or 163 of the Education Law.

COMMENT: One commenter noted that an entity that has been issued a waiver must apply for a certificate for each setting at which professional services are provided and asked whether this means that a waiver certificate needs to be applied for, for each private office in which a licensed professional practices?

RESPONSE: Section 6503-a(1)(g) of the Education Law requires that an entity operating pursuant to a waiver display, at each site where professional services are provided to the public, a certificate of such waiver issued by the Department pursuant to this section, which shall contain the name of the entity and the address of the site. Such entities shall obtain from the Department additional certificates for each site at which professional services are provided to the public.

COMMENT: Once a psychotherapy institute gets a waiver, is it guaranteed to keep it no matter where it locates its treatment facilities? Would the State Education Department choose not to renew a waiver based on over-saturation of waivers in a particularly geographic area?

RESPONSE: The waiver is renewable every three years and may be suspended, annulled or revoked by the Board of Regents, in accordance with the Education Law and section 29.18 of the Rules of the Regents. There are currently no provisions in the law or the regulation that would allow the Department to decline to renew a waiver based on the number of waived entities within a specific geographic area.

COMMENT: The proposed regulations do not exempt child welfare preventive service agencies from applying for a waiver. The Office of Children and Family Services (OCFS) does not issue any operating certificate, license or other credential to not-for-profit agencies that provide preventive services. Therefore, these agencies would not fall within the exemption from the waiver requirement in 6503-a of the Education Law. The commenter asked that additional language be added to the regulations to exempt such preventive service providers.

RESPONSE: Section 6503-a of the Education Law is intended to ensure public protection by allowing certain not-for-profit and educational corporations to overcome the corporate practice prohibitions in the Education Law. The law, which authorizes such entities to continue to provide professional services by applying for a waiver of the corporate practice restrictions, does not provide the authority for the Department to exempt providers that do not have independent statutory authority to provide the professional services. Therefore, no change is necessary in the regulation.

COMMENT: One commenter indicated that it is incorporated under the New York Religious Corporations Law (RCL). The proposed regulations do not make clear whether the waiver provisions extend to not-for-profit religious corporations, including churches, that are incorporated under RCL, rather than under the Not-for-Profit Corporation Law (N-PCL) or the Education Law that are referenced in section 6503-a of the Education Law and the proposed regulations. The entity suggests that the regulations and the waiver application materials make clear the applicability of the waiver provisions to religious corporations established under the RCL so that RCL-incorporated entities will know how this new law applies to them.

RESPONSE: Section 6503-a(1)(a) of the Education Law and section 59.14(b)(1) of the Commissioner's regulations state a "not-for-profit corporation formed for charitable, educational, or religious purposes or other similar purposes deemed acceptable to the Department" is eligible for a waiver of the corporate practice prohibitions. While the law and regulations do not specifically reference religious corporations; the Religious Corporations Law treats those entities as Type B not-for-profit corporations. Accordingly, we agree with the commenter that these entities are eligible for waivers under section 6503-a of the Education Law.

COMMENT: It would be helpful if the regulations and related application materials make clear the degree of specificity that the State Education Department will be looking for in an entity's certificate of incorporation and what types of "other documentation" may be submitted to demonstrate that the entity has been authorized to provide the relevant services.

RESPONSE: In developing the application materials, the Department will provide clear and concise guidance on the requirements and process for entities to follow when applying for a waiver under section 6503-a of the Education Law. Therefore, no changes are necessary in the regulations.

NOTICE OF ADOPTION

Teacher Tenure Determinations

I.D. No. EDU-43-10-00012-A

Filing No. 69

Filing Date: 2011-01-18

Effective Date: 2011-02-02

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

Action taken: Repeal of 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 or summary was published in: the October 27, 2010 issue of the Register, I.D. No. EDU-43-10-00012-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Department of Health

EMERGENCY RULE MAKING

Hospital Inpatient Reimbursement

I.D. No. HLT-49-10-00008-E

Filing No. 68

Filing Date: 2011-01-18

Effective Date: 2011-01-18

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

Action taken: Amendment of Subpart 86-1 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2803, 2807, 2807-c, 2807-k, 3612 and 3614

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

Specific reasons underlying the finding of necessity: It is necessary to issue the proposed regulations on an emergency basis in order to meet the statutory timeframes prescribed by Chapter 58 of the Laws of 2009 related to implementing a new hospital inpatient reimbursement system based on All-Patient-Refined-Diagnosis-Related-Groups (APR-DRGs). The APR-DRG methodology addresses the inadequacies of the current system by using an updated and more reliable cost base and a patient classification system that incorporates patient severity of illness and risk of mortality subclasses, reflecting the variable costs associated with each individual patient being treated. Paragraph (b) of subdivision 35 of section 2807-c of the Public Health Law (as added by Section 2 of Part C of Chapter 58 of the Laws of 2009) specifically provides the Commissioner of Health with authority to issue emergency regulations in order to compute hospital inpatient rates in accordance with the new methodology by December 1, 2009.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of associated Medicaid State Plan amendments and assure there are no delays in implementation of this new reimbursement system that is a cornerstone to health care reform.

Subject: Hospital Inpatient Reimbursement.

Purpose: Modifies current reimbursement for hospital inpatient services due to the implementation of APR DRGs and rebasing of hospital inpatient rates.

Substance of emergency rule: The amendments to sections 86-1.2 through 86-1.89 of Title 10 (Health) NYCRR are required to implement a new payment methodology for certain hospital inpatient fee-for-service Medicaid services based on All Patient Refined-Diagnostic Related Groups (APR-DRGs). The new payment methodology proposed by these amendments provides a more transparent and simplified reimbursement system that drives reimbursement consistent with efficiency, quality and public health priorities. It develops one statewide operating base rate using an updated and more reliable cost base rather than current regional and peer group operating base rates which were determined by using extremely outdated costs. The APR-DRG payment system will incorporate patient severity of illness and risk of mortality subclasses to better match patient resource utilization and provide a more precise method for equitable reimbursement.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a

notice of proposed rule making, I.D. No. HLT-49-10-00008-P, Issue of December 8, 2010. The emergency rule will expire March 18, 2011.

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

Regulatory Impact Statement

Statutory Authority:

The requirement to implement a modernized Medicaid reimbursement system for hospital inpatient services based upon 2005 base year operating costs pursuant to regulations is set forth in section 2807-c(35) of the Public Health Law. In addition, section 2807-c(4)(e-2) of the Public Health Law requires new per diem rates of reimbursement be implemented for certain exempt units and hospitals based on updated reported operating costs. Section 2807-k(5-b)(a)(ii) and (iv); and (b)(i), (iv) and (v) requires schedules of payment to be set forth in regulations for supplemental indigent care distributions made to certain eligible hospitals.

Legislative Objectives:

After numerous discussions between the Executive, Legislature, hospital associations and other key stakeholders, the Legislature chose to create a new, modernized reimbursement methodology for the State's Medicaid hospital inpatient system. Pursuant to statute, the APR-DRG methodology was chosen as the new reimbursement system for these services.

Needs and Benefits:

The proposed regulations implement the provisions of Public Health Law section 2807-c(35) which requires a new hospital inpatient reimbursement system based on APR-DRGs and rebased costs. This methodology provides a more transparent and simplified reimbursement system that drives reimbursement consistent with efficiency, quality and public health priorities. This new payment methodology will also allow the Department to publish hospital rates more timely, and provide hospitals with greater predictability of their income streams.

The current reimbursement system for hospital inpatient services is extremely outdated, and does not effectively serve the interests of patients, providers, or the Medicaid system. Not only does the system's overall reimbursement greatly exceed the cost of providing such services, the methodology for allocating payments does not appropriately reflect the acuity of the patient, the quality of service, or the efficiency of the hospital. Over the years the current system has accrued numerous groupings, weightings, adjustments, and add-ons that have ultimately distorted the health care delivery system.

Per diem rates of payment by governmental agencies for inpatient services provided by a general hospital or a distinct unit of a general hospital for services in accord with physical medical rehabilitation and chemical dependency rehabilitation; services provided by critical access hospitals; inpatient services provided by specialty long term acute care hospitals; and services provided by facilities designated by the federal department of health and human services as exempt acute care children's hospitals are also developed using an outdated cost base which does not properly reflect current costs incurred for providing such services.

The APR-DRG methodology addresses the inadequacies of the current system by using an updated and more reliable cost base and a patient classification system that incorporates patient severity of illness and risk of mortality subclasses, reflecting the variable costs associated with each individual patient being treated. Utilizing an updated and more precise cost base will have the effect of reducing the total amount of Medicaid reimbursement paid to hospitals for inpatient services, which is found to be significantly overpaid. Accordingly, the State would be able to, consistent with budgetary constraints, reinvest these savings in primary and preventive care and other traditionally under-paid ambulatory care services in order to improve the quality of patient care, ensure adequate access to these services, and avoid more costly inpatient admissions.

COSTS:

Costs to State Government:

Section 2807-c(35) of the Public Health Law requires that the rates

of payment for hospital inpatient services result in a net state wide decrease in aggregate Medicaid payments of no less than \$75 million for the period December 1, 2009 through March 31, 2010 and no less than \$225 million for the period April 1, 2010 through March 31, 2011. Effective for annual periods beginning January 1, 2010, distributions to hospitals for indigent care pool DSH payments will be made as follows: \$269.5 million will be distributed to hospitals, excluding major public hospitals, on a regional basis and within the amounts available for each region, to compensate each eligible hospital's proportional share of unmet need for calendar year 2007; \$25 million will be distributed to hospitals, excluding major publics, having Medicaid discharges of 40% or greater as determined from date reported in the 2007 Institutional Cost Report. The distributions will be proportionately distributed based on each eligible facility's uninsured losses to such losses of all the eligible facilities; \$16 million will be proportionately distributed to non-teaching hospitals based on each eligible facility's uninsured losses to such losses for all non-teaching hospitals statewide.

Costs of Local Government:

There will be no additional cost to local governments as a result of these amendments because local districts' share of Medicaid costs is statutorily capped.

Costs to the Department of Health:

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

Local Government Mandates:

There are no local government mandates.

Paperwork:

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

Duplication:

These regulations do not duplicate existing State and Federal regulations.

Alternatives:

No significant alternatives are available. The Department is required by the Public Health Law sections 2807-c(4)(e-2) and (35); 2807-k(5-b)(a)(ii) and (iv); and (b)(i), (iv), and (v) to promulgate implementing regulations.

Federal Standards:

This amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

Compliance Schedule:

The proposed amendment establishes the new APR-DRG reimbursement methodology for discharges on or after December 1, 2009; there is no period of time necessary for regulated parties to achieve compliance.

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments:

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

In aggregate, health care providers subject to this regulation will see a decrease in average per discharge Medicaid funding, but this is not anticipated for all affected providers.

This rule will have no direct effect on Local Governments.

Compliance Requirements:

No new reporting, recordkeeping or other compliance requirements are being imposed as a result of these rules. Affected health care providers will bill Medicaid using procedure codes and ICD-9 codes approved by the American Medical Association, as is currently required. Some billing rate codes will change, but this will have a minimal impact on providers.

The rule should have no direct effect on Local Governments.

Professional Services:

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

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. As a result of these amendments to 86-1.2 through 86-1.89 there will be an anticipated decrease in statewide aggregate hospital Medicaid revenues for hospital inpatient services. Revenues will shift among individual hospitals.

Economic and Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are technologically feasible because it requires the use of existing technology. The overall economic impact to comply with the requirements of this regulation is expected to be minimal.

Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements. The Legislature considered various alternatives for creating a new Medicaid hospital inpatient reimbursement methodology; however, the enacted budget adopted the APR-DRG methodology.

Small Business and Local Government Participation:

Draft regulations, prior to filing with the Secretary of State, were shared with industry associations representing hospitals and comments were solicited from all affected parties. Informational briefings were held with such associations.

Rural Area Flexibility Analysis

Effect on Rural Areas:

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

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

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

Professional Services:

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

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements. The Legislature considered various alternatives for creating a new Medicaid fee-for-service reimbursement methodology; however, the enacted budget adopted the APR-DRG methodology.

Rural Area Participation:

Draft regulations, prior to filing with the Secretary of State, were shared with the industry associations representing hospitals and comments were solicited from all affected parties. Such associations include members from rural areas.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rules, that they will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations revise the reimbursement system for inpatient hospital services. The proposed regulations have no implications for job opportunities.

**EMERGENCY
RULE MAKING**

Chemical Analyses of Blood, Urine, Breath or Saliva for Alcoholic Content

I.D. No. HLT-05-11-00003-E

Filing No. 67

Filing Date: 2011-01-18

Effective Date: 2011-01-18

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

Action taken: Amendment of Part 59 of Title 10 NYCRR.

Statutory authority: Vehicle and Traffic Law, section 1194(4)(c); and Environmental Conservation Law, section 11-1205(6)

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

Specific reasons underlying the finding of necessity: This amendment to Part 59 is being filed as an emergency action because immediate adoption is necessary to avoid a conflict between Part 59 as it currently exists and an emergency action filed by the Division of Probation and Correctional Alternatives (DPCA) to implement Chapter 496 of the Laws of 2009 (Leandra’s Law). This law mandates use of ignition interlock devices for all individuals sentenced for Driving While Intoxicated (DWI) misdemeanor or felony offenses, and is expected to result in more widespread use of ignition interlock devices. Since the Department of Health will continue to set standards for and certify devices to make them eligible for use in NYS, the Department has a vested interest in ensuring success of this initiative. Leandra’s Law also greatly expanded DPCA’s role in ignition interlock oversight, and DPCA has incorporated certain regulatory provisions that are in existing Part 59 in its new Title 9 NYCRR Part 358, consistent with DPCA’s mandate for oversight of the installation, use and servicing of ignition interlock devices. If this amendment to Part 59 does not become effective contemporaneously with DPCA’s Part 358, a seamless transfer of responsibility would not take place, and regulated parties would be exposed to contradictory requirements, leading to confusion and non-compliance. It is also noteworthy that the timely transfer of responsibility between agencies ensures that statutory deadlines for implementing an important statewide public safety initiative are met.

In addition, this amendment would enable law enforcement agencies to use breath alcohol testing devices identified in the recently published March 11, 2010 list of devices approved by the federal National Highway Traffic Safety Administration. Existing Part 59 references a 2007 list and must be updated now that a new list is available. The federal and State lists of approved breath testing devices need be identical to avoid legal challenges and preclude inadmissibility of evidence, and to ensure effective enforcement of the law against driving while intoxicated.

Subject: Chemical Analyses of Blood, Urine, Breath or Saliva for Alcoholic Content.

Purpose: Update technical standards for blood and breath alcohol testing conducted by law enforcement.

Substance of emergency rule: This proposed amendment to Part 59 updates standards, reflects changes in nomenclature and technology, and provides clarification of provisions pertinent to alcohol determinations of breath, blood and other body fluids, and certification of ignition interlock devices used for enforcement of Vehicle and Traffic Law.

The Section 59.1 definition for the term techniques and methods is amended to include saliva, which itself is defined in a new subdivision (k). The definition of testing laboratory is revised to clarify the Department's requirements. A definition for calibration is added. Section 59.2 is modified to introduce current terminology, specifically blood alcohol concentration (BAC). The rule clarifies that urine may be used as a specimen, and its analysis requires controls and blanks similar to those used for analyses of blood. This amendment removes the list of persons authorized to draw blood and eliminates technical specifications not required for analytical accuracy. Section 59.2 is further modified to revise the acceptable range for the alcohol reference standard used for calibration verification of instruments for both breath and blood analysis. This section and others now provide for a 0.08 grams/100 ml (w/v) reference standard. This proposal also requires that units for alcohol determinations of blood and urine be expressed as blood alcohol concentration (BAC), meaning percent weight per volume, rather than the outdated terminology of grams percent.

Section 59.3 is modified in several places to address saliva as a potential specimen. The proficiency testing performance criteria for renewal of a permit for the chemical analysis of blood, urine and saliva are clarified. "Competence" is replaced with "proficiency" throughout the section. In Section 59.4, outdated NYS-specific criteria for breath testing instruments are replaced with documentation that the model has been accepted by the U.S. Department of Transportation/National Highway Traffic Safety Administration (NHTSA) as an evidential breath alcohol measurement device. The proposed amendment includes the list of NHTSA-approved breath measurement instruments published in the Federal Register on March 11, 2010 to remove any possible ambiguity about the fact that devices listed therein, including the Alcotest 9510 manufactured by Draeger Safety, Inc., are fully approved by the Department of Health. The training agencies' responsibilities for instrument maintenance, including the establishment of a calibration cycle, and records retention are clarified.

The Section 59.5 two-hour time frame for specimen collection is eliminated, and the requirement for certain techniques and methods to be a component of each training agency's curriculum and to be put to use by the analyst is clarified. The requirement for observation of a subject prior to collection of a breath sample has been clarified. Minor technical changes have been made to Section 59.6.

This proposal would reduce the hours spent in initial training for a breath analyst permit as specified in Section 59.7, from 32 hours required to 24 hours, and require training agencies to develop learning objectives. The minimum time for hands-on training with breath analysis instruments is reduced from ten to six hours. Revised Section 59.7 establishes an application window of 120 calendar days preceding the permit's expiration date. The Section also clarifies that a permit expires and is void when not renewed, but that the Commissioner of Health may extend the permit expiration date for 30 calendar days, during which period the permit remains valid. The amendment makes clear that failure to renew in accordance with time frames established in the regulation results in the permit becoming void, which then requires the analyst to participate in the 24-hour initial/comprehensive training course. Section 59.7, as revised, requires training agencies to submit information on training sessions and participant lists to the Department of Health in a format designated by the Commissioner.

Section 59.9, as amended, provides for an effective period of four years for technical supervisor certification, an increase of two years. The responsibilities of a technical supervisor have been modified to reflect current practice. Notably, the duty to conduct field inspections has been eliminated, as has the responsibility to provide expert testimony, since the recognition of expertise is a role of the court. Revised Section 59.9 clarifies that a technical supervisor may delegate certain tasks, including instrument maintenance and preparation of chemicals used in testing, to a person not qualified as a supervisor, provided the work product is reviewed and found acceptable. A new sentence at the end of the section codifies long-standing Department policy that suspension or revocation of an operator's permit held by a supervisor triggers suspension or revocation of the person's certification as a technical supervisor.

Existing Sections 59.10 and 59.11 are repealed, and replaced with two new sections that provide criteria, respectively, for certification for ignition interlock devices and for testing of such devices by independent laboratories. The existing reference to a seven-county pilot study of ignition interlock devices is removed, and outdated performance standards for devices are replaced with NHTSA standards. Existing provisions for the application process, manufacturer interaction with testing laboratories, and discontinuance of certification remain in effect. New Section 59.10 requires the manufacturer to provide contact information, including identification of a person to respond to Department inquiries, and requires the manufacturer to furnish a certificate stating that the company issuing the requisite liability coverage will notify the Department at least 30 days prior to cancellation of the policy before the expiration date. Section 59.10 also makes clear the Department's requirement that the manufacturer must

demonstrate, through arrangements with a testing laboratory, that the device meets the NHTSA model specifications when calibrated to a set point of 0.025% BAC; and stipulates that only devices that employ fuel cell technology or another technology with demonstrated comparable accuracy and specificity are eligible for certification.

New Section 59.11 specifies the minimal elements of a testing laboratory report and requires such report to be submitted directly to the Department. In both new sections, a reference to "circumvention" has been added with each occurrence of the word "tampering," to recognize that these are both prohibited in Vehicle and Traffic Law Section 1198.

Existing Section 59.12 is repealed. New Section 59.12 establishes requirements for continued ignition interlock certification. New Section 59.12 requires a manufacturer to notify the Department of any operational modification to a certified device, and to obtain express approval for its continued use, as modified, under the existing certification. The definition of operational modification and the process for reporting modifications has been moved from Section 59.10 to Section 59.12. A new requirement is added that the manufacturer notify the Department of each renewal of insurance coverage, each change of issuing company, and each change in liability limits. The section requires manufacturers to supply to installation/service providers a sufficient number of labels with text that conforms to the text mandated by statute. The vast majority of the section's other requirements, including reporting and labeling requirements and manufacturer-service provider interactions, have been eliminated from Section 59.12; most have been incorporated into a new 9 NYCRR Part 358 being promulgated by the Division of Probation and Correctional Alternatives (DPCA) contemporaneously with this regulation in response to the anticipated August 2010 implementation of the ignition interlock provisions of Leandra's Law (L. 2009, Ch. 496). New Section 59.12 establishes a process for periodic renewal to ensure that information on file with the Department is current. The application form has been removed from the regulation, as it will be available electronically.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 17, 2011.

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

Summary of Regulatory Impact Statement

Statutory Authority:

The New York State (NYS) Vehicle and Traffic Law, Section 1194(4)(c), and Department of Environmental Conservation Law, Section 11-1205(6), authorize the Commissioner of Health to adopt regulations concerning methods of testing breath and body fluids for alcohol content. NYS Vehicle and Traffic Law, Section 1198(6) authorizes the Commissioner of Health to promulgate regulations setting standards for use of ignition interlock devices.

Legislative Objectives:

This amendment is consistent with the legislative objective of ensuring effective enforcement of laws against driving while intoxicated (DWI). This proposal is consistent with Chapter 669 of the Laws of 2007, which authorized statewide use of ignition interlock devices, and Chapter 496 of the Laws of 2009 (Leandra's Law), which mandates that every person sentenced for any DWI offense, must have an ignition interlock device installed as a requirement for conditional discharge or probation.

Needs and Benefits:

Part 59 establishes standards for chemical tests on blood, breath, and urine for the presence of alcohol, for purposes of detecting unacceptable levels of alcohol in persons. Courts rely on Part 59 provisions daily in adjudicating alcohol-related offenses; the State's correctional alternatives program relies on effective operation of ignition interlock devices to prevent repeat offenders from driving while impaired by alcohol. The existing regulation must be updated, as it is inconsistent with existing DWI statutes, as well as current and anticipated usage of ignition interlock devices.

The specificity of Section 59.2 standards for collecting, handling and analyzing a specimen for blood alcohol analysis has prevented convictions even though the defendant was driving while intoxicated. This amendment would delete the list of persons authorized to draw blood, as the listing could present a legal conflict with similar provisions in Vehicle and Traffic Law Section 1194(4)(a) and Public Health Law Section 3703. This amendment would eliminate technical specifications for the collection of blood within a two-hour timeframe, and use of a clean and sterile syringe and anticoagulant, and require that alcohol units be expressed as blood alcohol concentration, rather than the outdated terminology of grams percent. The reference standard for calibration verification of breath and blood analysis instruments has been changed to a standard greater than or

equal to 0.08 grams/100 ml, consistent with the Vehicle and Traffic Law provision that sets 0.08% weight per volume (w/v) alcohol in blood as the threshold for certain DWI sanctions. The amendment describes criteria for revocation or nonrenewal of a blood alcohol analysis permit based on unsuccessful proficiency testing (PT) performance or failure to participate in PT challenges.

Section 59.4 affords training agencies the flexibility of establishing retention times for records, as these may vary by record type and potential use in a legal proceeding; delegation of recordkeeping activities is authorized. Section 59.4, as revised, stipulates the commissioner's approval of breath measurement devices for use in NYS provided the device has been accepted by the National Highway Traffic Safety Administration (NHTSA). The revised section includes the list of NHTSA-approved breath measurement instruments published in the Federal Register on March 11, 2010 to remove any possible ambiguity about the fact that devices listed therein, including the Alcotest 9510 manufactured by Draeger Safety Inc., are fully approved by the Department of Health. The requirement in Section 59.5 for conducting breath analysis within two hours of arrest or a positive breath alcohol screening test has been removed. The requisite for test subject observation prior to testing has been clarified, as the existing provision for continuous observation carries the risk of unintended and unnecessarily specific interpretation, thus jeopardizing successful DWI prosecution. The reference to operational checklists, which are no longer used, has been eliminated. The requirement for certain techniques and methods to be a component of each training agency's curriculum and to be put into use by analysts is clarified.

This proposal would reduce from 32 to 24 hours the time trainees must spend in initial training. The reduction from 10 to six hours in hands-on use of instruments is reasonable given the decreasing complexity of instrumentation overall, and the trend towards use of one device model within a jurisdiction. Training agencies would be required to identify learning objectives and design examinations in keeping with objectives. The outdated term equilibrators has been deleted, as breath analyzers no longer need to counter a matrix effect from use of simulator solutions. As modified, the rule requires retraining to renew a BTO permit take place via a course designed to refresh applicants' recall of formal training material, such as including mechanisms to assess proficiency and measure retained knowledge. The proposal stipulates that retraining must occur within the 120 days prior to permit expiration, to eliminate overlap within the two-year BTO cycle. This amendment would afford, at the Commissioner's discretion, a 30-day extension in permit expiration date, in an effort to avoid the potential legal dilemma of administrative permit lapses due to paperwork processing delays. Operators whose permits are voided are required to participate successfully in another initial certification course before a new BTO permit may be issued, to demonstrate that recall and competency have been maintained.

The effective period for a technical supervisor's certification has been increased from two to four years. Supervisor responsibilities have been detailed; and supervisors are permitted to delegate certain tasks, provided they review the work product to ensure the designee's performance meets expectations. A reference to field inspection of instruments by supervisors has been modified to reflect the current practice of remote calibration checks. Provision of expert testimony has also been deleted from the list of supervisor's responsibilities, since the process of qualifying subject matter experts rests with the court.

Existing Section 59.10 is repealed. New Section 59.10 retains many existing ignition interlock certification criteria, rearranged for ease of comprehension. The reference to a seven-county pilot study for ignition interlock devices has been eliminated, as Chapter 669 of the Laws of 2007 amended the Vehicle and Traffic Law to expand the study into a statewide program. New Section 59.10 requires the manufacturer to identify a person to respond to Department inquiries, and requires the manufacturer to furnish a certificate stating that the company issuing the requisite liability coverage will notify the Department at least 30 days prior to cancelling a policy before the expiration date. New Section 59.10 also makes clear that the manufacturer must demonstrate, through arrangements with a testing laboratory, that the device meets the NHTSA model specifications when calibrated to a set point of 0.025% BAC; and stipulates that only devices that employ fuel cell technology or another technology with demonstrated comparable accuracy and specificity are eligible for certification, thus ensuring deployment of state-of-the-art equipment.

Existing Section 59.11 is repealed. New Section 59.11 replaces New York State-specific criteria for certification of interlock devices with NHTSA standards, as the NYS standards, codified in 1990, are less encompassing than federal standards. Submission of testing agency credentials with each application for device approval is no longer required. New Section 59.11 details requirements for certification of the testing laboratory, the laboratory's responsibilities in the device approval process, and the minimum components of a testing laboratory report. In both new Section 59.10 and 59.11 a reference to "circumvention" has been added

with each occurrence of the word "tampering," to recognize that these are distinct Vehicle and Traffic Law violations.

Existing Section 59.12 is repealed. New Section 59.12 establishes requirements for continued ignition interlock certification. New Section 59.12 requires a manufacturer to notify the Department of any operational modification to a certified device, and to obtain approval for continued use, as modified, under the existing certification. The definition of operational modification and the process for reporting modifications has been moved to Section 59.12. The amendment codifies a currently implicit requirement that manufacturers notify the Department of changes to insurance coverage. The text required for the warning label is revised to conform to the text mandated by statute. The section requires the manufacturers to supply a sufficient number of labels to installation/service providers. The vast majority of the section's other requirements, including reporting and labeling requirements and manufacturer-service provider interactions, have been eliminated from Section 59.12; most have been incorporated into a new 9 NYCRR Part 358 being promulgated by the Division of Probation and Correctional Alternatives (DPCA) to implement the ignition interlock provisions of Leandra's Law. New Section 59.12 establishes a process for periodic renewal to ensure that information on file with the Department is current. The application form for device certification has been removed from the regulation, and will be available electronically.

COSTS:

Costs to Private Regulated Parties:

The requirements of this regulation applicable to ignition interlock manufacturers and installation/service providers impose no new costs on these private regulated parties. The newly codified requirement that manufacturers notify the Department of changes to insurance coverage may be accomplished electronically at no cost to the manufacturer. The renewal of certification form/attestation may be electronically submitted.

Costs to State Government:

Affected State agencies other than the Department of Health, i.e., the State Police, the Division of Criminal Justice Services (DCJS), and DPCA, would incur minimal additional costs as a result of adoption of this amendment, as the amendment relaxes, clarifies or codifies practices already implemented. The State Police and DCJS, as training agencies, may realize cost savings from the proposed reduced duration of the breath analyst certification course, from 32 to 24 hours.

Costs to Local Government:

The Nassau County, Suffolk County and New York City Police Departments, which are local-government training agencies, would incur either no to minimal additional costs as a result of this amendment's adoption, as the amendment relaxes, clarifies or codifies processes already in place. These training agencies may realize cost savings from the proposed reduced duration of the breath analyst certification course, from 32 to 24 hours, which represents one full day that officers need not be absent from the work pool.

Prosecutorial units of local government may experience cost savings resulting from this amendment's deletion of specific requirements for specimen collection that, historically, have been challenged successfully by defense attorneys.

Costs to the Department of Health:

Adoption of this regulation would impose minimal additional costs on the Department. Implementation of a renewal process for the six manufacturers that currently hold ignition interlock certifications will use existing resources and result in minimal additional work load. Regulated parties will be provided with the text of the final adopted rule by electronic mail.

Local Government Mandates:

This regulation does not impose any new mandate on any county, city, town, village, school district, fire district or other special district.

Paperwork:

The proposal to extend, from two to four years, the effective period of breath analyzer supervisor permits will reduce paperwork, as will deletion of the requirement for quarterly reporting to multiple agencies of ignition interlock use data. This amendment's emphasis on learning goals rather than course structure would allow for paperwork reduction, as recertification courses would be adaptable to online distance learning modules. Manufacturers are encouraged to utilize electronic means of communication for required notifications and certificate renewals.

Duplication:

Part 59 as amended would be consistent with, but not duplicate, federal standards for approval of breath alcohol evidentiary devices as promulgated by the NHTSA.

Alternative Approaches:

At the present time, there are no acceptable alternatives to pursuing adoption of the amendment as written. The major stakeholders have reached agreement that inability to move forward with the changes as proposed would likely impede DWI enforcement and prosecutorial activities in NYS. The clarifications and updates in this amendment are required

to keep the regulation current with law enforcement practices and changes to laws governing ignition interlock programs and evidence-gathering protocols related to DWI prosecutions, as well as technological advances in the devices themselves.

Federal Standards:

The proposed rule does not exceed any minimum standards of the federal government; it references sources for information on federally approved devices, and is consistent with federal standards for ignition interlock and breathalyzer device approval.

Compliance Schedule:

Regulated parties should be able to comply with these regulations effective upon filing with the Secretary of State.

Regulatory Flexibility Analysis

No Regulatory Flexibility Analysis is required pursuant to Section 202-b(3)(b) of the State Administrative Procedure Act. The proposed amendment does not impose any adverse economic impact on small businesses or local governments, and does not impose reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Rural Area Flexibility Analysis

No Rural Area Flexibility Analysis is required pursuant to Section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose any reporting, recordkeeping or other compliance requirements on regulated parties in rural areas.

Job Impact Statement

A Job Impact Statement is not required because it is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs and employment opportunities.

Insurance Department

EMERGENCY RULE MAKING

Standards for the Management of the New York State Retirement Systems

I.D. No. INS-11-10-00002-E

Filing No. 64

Filing Date: 2011-01-18

Effective Date: 2011-01-18

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

Action taken: Amendment of Part 136 (Regulation 85) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 314, 7401(a) and 7402(n)

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

Specific reasons underlying the finding of necessity: The Second Amendment to Regulation 85 (11 NYCRR 136), effective November 19, 2008, established new standards of behavior with regard to investment of the Common Retirement Fund's assets, conflicts of interest, and procurement. In addition, it created new audit and actuarial committees, and greatly strengthened the investment advisory committee. The Second Amendment also set high ethical standards, strengthened internal controls and governance, enhanced the operational transparency of the Fund, and strengthened supervision by the Insurance Department.

Nevertheless, recent events surrounding how placement agents conduct business on behalf of their clients with regard to the Fund compel the Superintendent to conclude that the mere strengthening of the Fund's control environment is insufficient to protect the integrity of the state employees' retirement systems. Rather, only an immediate ban on the use of placement agents will ensure sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments.

This regulation was previously promulgated on an emergency basis on June 18, 2009, September 16, 2009, January 5, 2010, April 2, 2010, May 28, 2010, July 29, 2010, September 23, 2010 and November 19, 2010. A public hearing was held on April 28, 2010. Comments were

received from two entities recommending that the total ban on the use of placement agents be modified. The Department will continue to assess the comments that have been received and any others that may be submitted.

Regulation No. 85 needs to remain effective for the general welfare.

Subject: Standards for the management of the New York State Retirement Systems.

Purpose: To ban the use of placement agents by investment advisors engaged by the state employees retirement system.

Text of emergency rule: Section 136-2.2 is amended to read as follows:

§ 136-2.2 Definitions.

The following words and phrases, as used in this Subpart, unless a different meaning is plainly required by the context, shall have the following meanings:

[(a) Retirement system shall mean the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System.]

[(b) Fund shall mean the New York State Common Retirement Fund, a fund in the custody of the Comptroller as trustee, established pursuant to Section 422 of the Retirement and Social Security Law, which holds the assets of the retirement system.]

[(c)](a) Comptroller shall mean the Comptroller of the State of New York in his capacity as administrative head of the Retirement System and the sole trustee of the [fund] Fund.

[(d) OSC shall mean the Office of the State Comptroller.]

[(e)](b) Consultant or advisor shall mean any person (other than an OSC employee) or entity retained by the [fund] Fund to provide technical or professional services to the [fund] Fund relating to investments by the [fund] Fund, including outside investment counsel and litigation counsel, custodians, administrators, broker-dealers, and persons or entities that identify investment objectives and risks, assist in the selection of [money] investment managers, securities, or other investments, or monitor investment performance.

(c) Family member shall mean any person living in the same household as the Comptroller, and any person related to the Comptroller within the third degree of consanguinity or affinity.

(d) Fund shall mean the New York State Common Retirement Fund, a fund in the custody of the Comptroller as trustee, established pursuant to Section 422 of the Retirement and Social Security Law ("RSSL"), which holds the assets of the Retirement System.

[f] (e) Investment manager shall mean any person (other than an OSC employee) or entity engaged by the Fund in the management of part or all of an investment portfolio of the [fund] Fund. "Management" shall include, but is not limited to, analysis of portfolio holdings, and the purchase, sale, and lending thereof. For the purposes hereof, any investment made by the Fund pursuant to RSSL § 177(7) shall be deemed to be the investment of the Fund in such investment entity (rather than in the assets of such investment entity).

(f) Investment policy statement shall mean a written document that, consistent with law, sets forth a framework for the investment program of the Fund.

(g) OSC shall mean the Office of the State Comptroller.

[(g)] (h) Placement agent or intermediary shall mean any person or entity, including registered lobbyists, directly or indirectly engaged and compensated by an investment manager (other than [an] a regular employee of the investment manager) to promote investments to or solicit investment by [assist the investment manager in obtaining investments by the fund, or otherwise doing business with] the [fund] Fund, whether compensated on a flat fee, a contingent fee, or any other basis. Regular employees of an investment manager are excluded from this definition unless they are employed principally for the purpose of securing or influencing the decision to secure a particular transaction or investment by the Fund. [obtaining investments or providing other intermediary services with respect to the fund.] For purpose of this paragraph, the term "employee" shall include any person who would qualify as an employee under the federal Internal Revenue Code of 1986, as amended, but shall not include a person hired, retained or engaged by an investment manager to secure or influence the decision to secure a particular transaction or investment by the Fund.

[(h) Investment policy statement shall mean a written document that, consistent with law, sets forth a framework for the investment program of the fund.]

[(i) Third party administrator shall mean any person or entity that contractually provides administrative services to the retirement system, including receiving and recording employer and employee contributions, maintaining eligibility rosters, verifying eligibility for benefits or paying benefits and maintaining any other retirement system records. Administrative services do not include services provided to the fund relating to fund investments.]

[(i) *Retirement System shall mean the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System.*

[(j) *Third party administrator shall mean any person or entity that contractually provides administrative services to the Retirement System, including receiving and recording employer and employee contributions, maintaining eligibility rosters, verifying eligibility for benefits, paying benefits or maintaining any other Retirement System records. "Administrative services" do not include services provided to the Fund relating to Fund investments.*

[(j)] [(k) Unaffiliated Person shall mean any person other than: (1) the Comptroller or a family member of the Comptroller, (2) an officer or employee of OSC, (3) an individual or entity doing business with OSC or the [fund] *Fund*, or (4) an individual or entity that has a substantial financial interest in an entity doing business with OSC or the [fund] *Fund*. For the purpose of this paragraph, the term "substantial financial interest" shall mean the control of the entity, whereby "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of the entity, whether through the ownership of voting securities, by contract (except a commercial contract for goods or non-management services) or otherwise; but no individual shall be deemed to control an entity solely by reason of his being an officer or director of such entity. Control shall be presumed to exist if any individual directly or indirectly owns, controls or holds with the power to vote ten percent or more of the voting securities of such entity.

[(k) Family member shall mean any person living in the same household as the Comptroller, and any person related to the Comptroller within the third degree of consanguinity or affinity.]

Section 136-2.4(d) is amended to read as follows:

(d) Placement agents or intermediaries: In order to preserve the independence and integrity of the [fund] *Fund*, to [address] *preclude* potential conflicts of interest, and to assist the Comptroller in fulfilling his or her duties as a fiduciary to the [fund] *Fund*, [the Comptroller shall maintain a reporting and review system that must be followed whenever the fund] *the Fund shall not* [engages, hires, invests with, or commits] *engage, hire, invest with or commit* to[,] an outside investment manager who is using the services of a placement agent or intermediary to assist the investment manager in obtaining investments by the [fund] *Fund*. [, or otherwise doing business with the fund. The Comptroller shall require investment managers to disclose to the Comptroller and to his or her designee payments made to any such placement agent or intermediary. The reporting and review system shall be set forth in written guidelines and such guidelines shall be published on the OSC public website.]

Section 136-2.5 (g) is amended to read as follows:

(g) The Comptroller shall:

(1) file with the superintendent an annual statement in the format prescribed by Section 307 of the Insurance Law, including the [retirement system's] *Retirement System's* financial statement, together with an opinion of an independent certified public accountant on the financial statement;

(2) file with the superintendent the Comprehensive Annual Financial Report within the time prescribed by law, but no later than the time it is published on the OSC public website;

(3) disclose on the OSC public website, on at least an annual basis, all fees paid by the [fund] *Fund* to investment managers, consultants or advisors, and third party administrators;

[(4) disclose on the OSC public website, on at least an annual

basis, instances where an investment manager has paid a fee to a placement agent or intermediary;]

[(5)](4) disclose on the OSC public website the [fund's] *Fund's* investment policies and procedures; and

[(6)](5) require fiduciary and conflict of interest reviews of the [fund] *Fund* every three years by a qualified unaffiliated person.

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. INS-11-10-00002-P, Issue of March 17, 2010. The emergency rule will expire March 18, 2011.

Text of rule and any required statements and analyses may be obtained from: Andrew Mais, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5257, email: amais@ins.state.ny.us

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for promulgation of this rule derives from sections 201, 301, 314, 7401(a), and 7402(n) of the Insurance Law.

Sections 201 and 301 of the Insurance Law authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, and to prescribe regulations interpreting the Insurance Law.

Section 314 vests the Superintendent with the authority to promulgate standards with respect to administrative efficiency, discharge of fiduciary responsibilities, investment policies and financial soundness of the public retirement and pension systems of the State of New York, and to make an examination into the affairs of every system at least once every five years in accordance with sections 310, 311 and 312 of the Insurance Law. The implementation of the standards is necessarily through the promulgation of regulations.

As confirmed by the Court of Appeals in *Matter of Dinallo v. DiNapoli*, 9 N.Y. 3d 94 (2007), the Superintendent functions in two distinct capacities. The first is as regulator of the insurance industry. The second is as a statutory receiver of financially distressed insurance entities. Article 74 of the Insurance Law sets forth the Superintendent's role and responsibilities in this latter capacity.

Section 7401(a) sets forth the entities, including the public retirement systems, to which Article 74 applies.

Section 7402(n) provides that it is a ground for rehabilitation if an entity subject to Article 74 has failed or refused to take such steps as may be necessary to remove from office any officer or director whom the Superintendent has found, after appropriate notice and hearing, to be a dishonest or untrustworthy person.

2. Legislative objectives: Section 314 of the Insurance Law authorizes the Superintendent to promulgate and amend, after consultation with the respective administrative heads of public retirement and pension systems and after a public hearing, standards with respect to the public retirement and pension systems of the State of New York.

This amendment, which in effect bans the use of an investment tool that has been found to be untrustworthy, is consistent with the public policy objectives that the Legislature sought to advance in enacting Section 314, which provides the Superintendent with the powers to promulgate standards to protect the New York State Common Retirement Fund (the "Fund").

3. Needs and benefits: The Second Amendment to Regulation 85 (11 NYCRR 136), effective November 19, 2008, established new standards with regard to investment of the assets of the New York State Common Retirement Fund ("the Fund"), conflicts of interest and procurement. In addition, the Second Amendment created new audit and actuarial committees, and greatly strengthened the investment advisory committee. The Second Amendment also set high ethical standards, strengthened internal controls and governance, enhanced the operational transparency of the Fund, and strengthened supervision by the Insurance Department.

Nevertheless, recent allegations regarding "pay to play" practices, whereby politically connected individuals reportedly sold access to investment opportunities with the Fund, compel the Superintendent to conclude that the mere strengthening of the Fund's control environment is insufficient to protect the integrity of the state employees' retirement systems. The Third Amendment to Regulation 85 will adopt

an immediate ban on the use of placement agents to ensure sufficient protection of the Fund's members and beneficiaries, and safeguard the integrity of the Fund's investments. Further, the amendment defines "placement agent or intermediary" in a manner that both thwarts evasion of the ban while ensuring that such ban not extend to persons otherwise acting lawfully on behalf of investment managers.

4. Costs: The rule does not impose any additional requirements on the Comptroller, and no additional costs are expected to result from the implementation of the ban imposed by this amendment. There are no costs to the Insurance Department or other state government agencies or local governments. Investment managers, consultants and advisors who provide services to the Fund, which are required to discontinue the use of placement agents in connection with investment services they provide to the Fund, may lose opportunities to do business with the Fund.

5. Local government mandates: The amendment imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: No additional paperwork should result from the prohibition imposed by the amendment.

7. Duplication: This amendment will not duplicate any existing state or federal rule.

8. Alternatives: The Superintendent considered other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. The Department considered limiting the ban to include intent on the part of the party using placement agents, or defining "placement agent" in more general terms.

In developing the rule, the Superintendent and State Comptroller not only consulted with one another, but also briefed representatives of: (1) New York State and New York City Public Employee Unions; (2) New York City Retirement and Pension Funds; (3) the Borough Presidents of the five counties of New York City; and (4) officials of the New York City Mayor's Office, Comptroller's Office and Finance Department. These entities agreed with the concerns expressed by the Department and intend to explore remedies most appropriate to the pension funds that they represent.

Initially, the Superintendent concluded that only an immediate total ban on the use of placement agents could provide sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments. The proposed rule was published in the State Register on March 17, 2010. A Public Hearing was held on April 28, 2010. The following comments were received:

Blackstone Group, a global investment manager and financial advisor, wrote to oppose the proposed ban on the use of placement agents by investment advisors engaged by the New York State Common Retirement Fund ("The Fund"). It stated that the rule would lessen the number of investment opportunities brought before the Fund, adversely affect small, medium-sized and women- and minority-owned investment firms seeking to do business with the Fund, and adversely affect a number of New York-headquartered financial institutions doing business as placement agents.

Blackstone suggested the inclusion of the following provisions in the rule instead:

- A ban on political contributions by any employee of any placement agent seeking to do business with the fund;
- A requirement that any placement agent seeking to do business with the Fund be registered as a broker dealer with the SEC and ensure that its professionals have passed the appropriate Series qualifications administered by Financial Industry Regulatory Authority ("FINRA");
- A requirement that any placement agent seeking to do business in New York register with the Insurance Department; and
- A requirement that any placement agent representing an investment manager before the Fund fully disclose the contractual arrangement between it and the manager, including the fee arrangement and the scope of services to be provided.

The Securities Industry and Financial Markets Association ("SIFMA"), representing hundreds of securities firms, banks, and asset managers, commented that the proposed rule (1) inadvertently

limits the access of smaller fund managers to the Fund; (2) restricts the number and types of advisers that could be utilized by the Fund; (3) creates an inherent conflict between federal and state law that would make it impossible to do business with the Fund while complying with both; and (4) adds duplicative regulation in an area already substantially regulated at the state level and that is primed for further federal regulation through the imminent imposition of a federal pay-to-play regime on all registered broker-dealers acting as placement agents. In addition, SIFMA provided language that it believes would be consistent with the existing federal requirements on the use of placement agents. SIFMA requested that the Department either exclude from the proposed rule those placement agents who are registered as broker-dealers under the Securities Exchange Act of 1934 or delay the enactment of the proposed rule until the federal and state placement agent initiatives are finalized.

The Department does not have jurisdiction over placement agents, which makes it difficult to implement and enforce requirements on them. The Superintendent did consider other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. The Department considered limiting the ban to include intent on the part of the party using placement agents, or defining "placement agent" in more general terms. At the time, the Superintendent concluded that only an immediate, total ban on the use of placement agents could provide sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments.

9. Federal standards: The Securities and Exchange Commission issued a "Pay-To-Play" regulation for financial advisors on July 1, 2010, which may have an impact on the issues addressed in the proposed rule.

10. Compliance schedule: The emergency adoption of this regulation on June 18, 2009 ensured that the ban would become enforceable immediately. The ban needs to remain in effect on an emergency basis until such time as the amended regulation can be made permanent.

Regulatory Flexibility Analysis

1. Effect of the rule: This amendment strengthens standards for the management of the New York State and Local Employees' Retirement System and New York State and Local Police and Fire Retirement System (collectively, "the Retirement System"), and the New York State Common Retirement Fund ("the Fund").

The Second Amendment to Regulation 85 (11 NYCRR 136), effective November 19, 2008, established new standards with regard to investment of the assets of the New York State Common Retirement Fund ("the Fund"), conflicts of interest and procurement. In addition, the Second Amendment created new audit and actuarial committees, and greatly strengthened the investment advisory committee. The Second Amendment also set high ethical standards, strengthened internal controls and governance, enhanced the operational transparency of the Fund, and strengthened supervision by the Insurance Department.

Nevertheless, recent allegations regarding "pay to play" practices, whereby politically connected individuals reportedly sold access to investment opportunities with the Fund, compel the Superintendent to conclude that the mere strengthening of the Fund's control environment is insufficient to protect the integrity of the state employees' retirement systems. The Third Amendment to Regulation 85 will adopt an immediate ban on the use of placement agents to ensure sufficient protection of the Fund's members and beneficiaries, and safeguard the integrity of the Fund's investments. Further, the amendment defines "placement agent or intermediary" in a manner that both thwarts evasion of the ban while ensuring that such ban not extend to persons otherwise acting lawfully on behalf of investment managers.

These standards are intended to assure that the conduct of the business of the Retirement System and the Fund, and of the State Comptroller (as administrative head of the Retirement System and as sole trustee of the Fund), are consistent with the principles specified in the rule. Most among all affected parties, the State Comptroller, as a fiduciary whose responsibilities are clarified and broadened, is impacted by the amendment. The State Comptroller is not a "small business"

as defined in section 102(8) of the State Administrative Procedure Act.

This amendment will affect investment managers and other intermediaries (other than OSC employees) who provide technical or professional services to the Fund related to Fund investments. The proposal will prohibit investment managers from using the services of a placement agent unless such agent is a regular employee of the investment manager and is acting in a broader capacity than just providing specific investment advice to the Fund. In addition, the amendment is also directed to placement agents, who as a result of this proposal, will no longer be engaged directly or indirectly by investment managers that do business with the Fund. Some investment managers and placement agents may come within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act, because they are independently owned and operated, and employ 100 or fewer individuals.

The amendment bans the use of placement agents in connection with investments by the Fund. This may adversely affect the business of placement agents, who will lose opportunities to earn profits in connection with investments by the Fund. Nevertheless, as a result of recent allegations regarding "pay to play" practices, whereby politically connected individuals reportedly sold access to investment opportunities with the Fund, the Superintendent has concluded that an immediate ban on the use of placement agents is necessary to protect the Fund's members and beneficiaries and to safeguard the integrity of the Fund's investments.

This amendment will not impose any adverse compliance requirements or result in any adverse impacts on local governments. The basis for this finding is that this amendment is directed at the State Comptroller; employees of the Office of State Comptroller; and investment managers, placement agents, consultant or advisors - none of which are local governments.

2. Compliance requirements: None.

3. Professional services: Investment managers, consultants and advisors who provide services to the fund, and are required to discontinue the use of placement agents in connection with investment services they provide to the Fund, may need to employ other professional services.

4. Compliance costs: The rule does not impose any additional requirements on the Comptroller, and no additional costs are expected to result from the implementation of the ban imposed by this amendment. There are no costs to the Insurance Department or other state government agencies or local governments. However, investment managers, consultants and advisors who provide services to the fund, which are required to discontinue the use of placement agents in connection with investment services they provide to the Fund, may lose opportunities to do business with the Fund.

5. Economic and technological feasibility: The rule does not impose any economic and technological requirements on affected parties, except for placement agents who will lose the opportunity to earn profits in connection with investments by the Fund.

6. Minimizing adverse impact: The costs to placement agents are lost opportunities to earn profits in connection with investments by the Fund. The Superintendent considered other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. But in the end, the Superintendent concluded that only an immediate total ban on the use of placement agents could provide sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments.

7. Small business and local government participation: In developing the rule, the Superintendent and State Comptroller not only consulted with one another, but also briefed representatives of: (1) New York State and New York City Public Employee Unions; (2) New York City Retirement and Pension Funds; (3) the Borough Presidents of the five counties of New York City; and (4) officials of the New York City Mayor's Office, Comptroller's Office and Finance Department.

A public hearing was held on April 28, 2010. Comments were received from two entities recommending that the total ban on the use

of placement agents be modified. The Department will continue to assess the comments that have been received and any others that may be submitted.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Investment managers, placement agents, consultants or advisors that do business in rural areas as defined under State Administrative Procedure Act Section 102(13) will be affected by this proposal. The amendment bans the use of placement agents in connection with investments by the New York State Common Retirement Fund ("the Fund"), which may adversely affect the business of placement agents and of other entities that utilize placement agents and are involved in Fund investments.

2. Reporting, recordkeeping and other compliance requirements, and professional services: This amendment will not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas, with the exception of requiring investment managers, consultants and advisors who provide services to the fund to discontinue the use of placement agents.

3. Costs: The costs to placement agents are lost opportunities to earn profits in connection with investments by the Fund.

4. Minimizing adverse impact: The amendment does not adversely impact rural areas.

5. Rural area participation: A public hearing was held on April 28, 2010. Comments were received from two entities recommending that the total ban on the use of placement agents be modified. The Department will continue to assess the comments that have been received and any others that may be submitted.

Job Impact Statement

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. The amendment bans investment managers from using placement agents in connection with investments by the New York State Common Retirement Fund ("the Fund"). The amendment may adversely affect the business of placement agents, who could lose the opportunity to earn profits in connection with investments by the Fund. Nevertheless, in view of recent events about how placement agents conduct business on behalf of their clients with regard to the Fund, the Superintendent has concluded that an immediate ban on the use of placement agents is necessary to protect the Fund's members and beneficiaries, and to safeguard the integrity of the Fund's investments.

Assessment of Public Comment

Comments that were received as a result of the Public Hearing held on April 28, 2010:

Blackstone Group, a global investment manager and financial advisor, wrote to oppose the proposed ban on the use of placement agents by investment advisors engaged by the New York State Common Retirement Fund ("The Fund"). It stated that the rule would lessen the number of investment opportunities brought before the Fund, adversely affect small, medium-sized and women- and minority-owned investment firms seeking to do business with the Fund, and adversely affect a number of New York-headquartered financial institutions doing business as placement agents.

Blackstone suggested the inclusion of the following provisions in the rule instead:

- A ban on political contributions by any employee of any placement agent seeking to do business with the fund;
- A requirement that any placement agent seeking to do business with the Fund be registered as a broker dealer with the SEC and ensure that its professionals have passed the appropriate Series qualifications administered by Financial Industry Regulatory Authority ("FINRA");
- A requirement that any placement agent seeking to do business in New York register with the Insurance Department; and
- A requirement that any placement agent representing an investment manager before the Fund fully disclose the contractual arrangement between it and the manager, including the fee arrangement and the scope of services to be provided.

The Securities Industry and Financial Markets Association ("SIFMA"), representing hundreds of securities firms, banks, and asset managers, commented that the proposed rule (1) inadvertently limits the access of smaller fund managers to the Fund; (2) restricts

the number and types of advisers that could be utilized by the Fund; (3) creates an inherent conflict between federal and state law that would make it impossible to do business with the Fund while complying with both; and (4) adds duplicative regulation in an area already substantially regulated at the state level and that is primed for further federal regulation through the imminent imposition of a federal pay-to-play regime on all registered broker-dealers acting as placement agents. In addition, SIFMA provided language that it believes would be consistent with the existing federal requirements on the use of placement agents. SIFMA requested that the Department either exclude from the proposed rule those placement agents who are registered as broker-dealers under the Securities Exchange Act of 1934 or delay the enactment of the proposed rule until the federal and state placement agent initiatives are finalized.

The Department does not have jurisdiction over placement agents, which makes it difficult to implement and enforce requirements on them. The Superintendent did consider other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. The Department considered limiting the ban to include intent on the part of the party using placement agents, or defining "placement agent" in more general terms. At the time, the Superintendent concluded that only an immediate, total ban on the use of placement agents could provide sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments.

The Department met with representatives from SIFMA on June 28th to gain further understanding of some of the issues raised in opposition to the proposed rule. We subsequently requested additional information from SIFMA. SIFMA provided the Department with additional information based upon actions taken and/or contemplated by pension fund regulators in other States. The Department will continue to assess the comments that have been received and any other information that may be submitted.

The Department is also evaluating the extent to which its proposed rule conforms with the Securities and Exchange Commission's "Pay-To-Play" regulation for financial advisors that was issued on July 1, 2010. This regulation is effective on September 13, 2010, with full compliance by March 14, 2011 for all affected investment advisers.

We are continuing to research best practices in use with large U.S. public pension funds before any further action will be taken with regards to the proposed rule. A number of policies/practices being researched include limits on the amount of business that may be placed through any single placement agent, and the feasibility of monetary penalties for investment managers/advisors who seek to circumvent procedures that are established to mitigate the risk of undue influence by politically connected persons.

Office of Mental Health

NOTICE OF ADOPTION

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

I.D. No. OMH-45-10-00006-A

Filing No. 57

Filing Date: 2011-01-12

Effective Date: 2011-02-02

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

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

Statutory authority: Mental Hygiene Law, sections 7.09 and 43.02

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

Purpose: To carve out the cost of eligible pharmaceuticals from the per diem reimbursement rate for Residential Treatment Facilities.

Text or summary was published in the November 10, 2010 issue of the Register, I.D. No. OMH-45-10-00006-P.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Standards Pertaining to Payment for Hospitals Licensed by the Office of Mental Health

I.D. No. OMH-46-10-00017-A

Filing No. 58

Filing Date: 2011-01-13

Effective Date: 2011-02-02

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

Action taken: Amendment of Part 574 of Title 14 NYCRR.

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

Subject: Standards Pertaining to Payment for Hospitals Licensed by the Office of Mental Health.

Purpose: Make minor technical corrections to existing regulation and use "person-first" language.

Text or summary was published in the November 17, 2010 issue of the Register, I.D. No. OMH-46-10-00017-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Office of Parks, Recreation and Historic Preservation

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Navigation of Vessels, Conduct of Regattas and Placement of Navigation Aids and Floating Objects on Navigable Waters

I.D. No. PKR-05-11-00001-P

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

Proposed Action: This is a consensus rule making to repeal Appendix I-1 and Part 445; add new Part 445; and amend sections 377.1, 447.2, 447.3 and Part 448 of Title 9 NYCRR.

Statutory authority: Parks, Recreation and Historic Preservation Law, section 3.09(8); Navigation Law, sections 34, 34-a, 35, 35-a, 35-b, 36, 37, 41, 41(b), 43, 43(3), 45 and 46-aaaa

Subject: Navigation of vessels, conduct of regattas and placement of navigation aids and floating objects on navigable waters.

Purpose: To update obsolete state navigation rules or conform them to the U.S. Coast Guard Inland Navigation Rules.

Substance of proposed rule (Full text is posted at the following State website: www.nysparks.com): The Office of Parks, Recreation and Historic Preservation (OPRHP) is amending Title 9 NYCRR to update rules that address activities of its Bureau of Marine Services as follows:

Section 377.1(j) Regulated activities.

This section that pertains to the operation of vessels on Cuba Lake in Allegany County is repealed since the Office of Parks, Recreation and Historic Preservation (State Parks) no longer has jurisdiction over this Lake. The remaining subdivisions in this section are renumbered.

Part 445 Navigation of Vessels on the Navigable Waters of New York State and on the Tidewaters Bordering on or Lying within the Boundaries of Nassau and Suffolk Counties.

This outdated Part is repealed and a new Part 445 is added that incorporates by reference the Inland Navigation Rules of the U.S. Coast Guard at 33 CFR Parts 83-90. The Inland Navigation Rules pertain to the following topics: navigation lights; day shapes; whistle signals; conduct of vessels in restricted visibility; conduct of vessels in sight of each other; positioning and technical details of lights and shapes; additional signals for fishing vessels fishing in close proximity; technical details of sound and signal appliances; distress signals and pilot rules.

Part 447 Conduct of Regattas.

Amendments to this section clarify that:

1. proof of insurance is not required;
2. the sponsor of a regatta must also notify the appropriate law enforcement entity with jurisdiction over the water body;
3. a sponsor of a racing shell regatta must notify State Parks of the event at least 30 days in advance on forms supplied by the Bureau of Marine Services; and
4. navigation inspectors must escort commercial and recreational traffic through the course.

Section 448.1 Definitions.

The archaic reference to and definition of "fishing buoy" is deleted since placement of these buoys is not regulated. And, the definition of "divers flag" is expanded to also encompass the international code flag "A".

Section 448.2 Aids to Navigation.

The colors, shapes, numbering and lettering for aids to navigation are updated to conform to the U.S. Coast Guard's requirements.

Section 448.3 Special Anchorage Areas.

This section is updated to clarify that white flashing lights must be installed on buoys in special anchorage areas.

Section 448.4 Floating Objects.

Gender neutral language is inserted in this section and the commissioner's discretion to require that floating objects (mooring buoys, bathing beach markers, swimming floats, speed zone markers or other objects with no navigational significance) be placed according to one of the methods described by the New York State Office of General Services in its regulation at 9 NYCRR Section 274.5. Also, the floating objects must bear the State Parks decal. Finally, State Parks' discretion to require that floating objects placed 100 feet from shore bear a white light is clarified.

Section 448.5 Special Markers.

Lettering and diamond symbols for special markers are clarified.

Section 448.7 Fishing Buoys.

This section is repealed because these buoys are not regulated by State Parks. Sections 448.8 and 448.9 are renumbered to 448.7 and 448.8. The diver's flag described in new Section 448.8 is expanded to encompass a rigid replica of the international code flag "A" not less than 1 meter in height that is visible all around.

Appendix I-1 Designated Agents.

Appendix I-1 created in 1997 contains outdated names and addresses of county sheriffs and local law enforcement entities and establishes them as agents of State Parks for purposes of enforcing Navigation Law Section 33-c. The controlling statute for this Appendix, however, pertains to regulation of sewage disposal and littering on waterways. It is enforced by the New York State Department of Environmental Conservation, not State Parks. The obsolete Appendix, therefore, is being repealed.

Text of proposed rule and any required statements and analyses may be obtained from: Kathleen L. Martens, Associate Counsel, NYS Office of Parks, Recreation and Historic Preservation, ESP, Agency Bldg. 1, 19th Floor, Albany, NY 12238, (518) 486-2921, email: rulemaking@oprhp.state.ny.us

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

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

Additional matter required by statute: The rule incorporates by reference the U.S. Coast Guard Inland Navigation Rules at 33 CFR 83-90.

Consensus Rule Making Determination

The Office of Parks, Recreation and Historic Preservation (OPRHP) is proposing to update its marine regulations adopted under the Navigation Law, incorporate the U.S. Coast Guard Inland Navigation Rules where appropriate, and codify existing policy. The topics covered by the regulations at 9 NYCRR Parts 377, 445, 447 and 448 include navigation of vessels, conduct of regattas and placement of navigation aids and floating objects on navigable waters. No one, therefore, is likely to object to the proposed rule changes.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because the rule is a technical amendment that updates navigation regulations or conforms

them to U.S. Coast Guard Inland Navigation Rules. It will not impact jobs and employment opportunities.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

List of State Parks, Parkways, State Land, Recreation Facilities and Historic Sites

I.D. No. PKR-05-11-00002-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 Part 384; and add new Part 384 to Title 9 NYCRR.

Statutory authority: Parks, Recreation and Historic Preservation Law, sections 3.09(8) and 13.03

Subject: List of State parks, parkways, state land, recreation facilities and historic sites.

Purpose: To update the list of state parks, parkways, state land, recreation facilities and historic sites.

Substance of proposed rule (Full text is posted at the following State website: www.nysparks.com): Under the proposed rule at 9 NYCRR Part 384 the Office of Parks, Recreation and Historic Preservation (OPRHP) is updating the list of state parks, historic sites, state land and recreation facilities as required by Section 13.03 of the Parks, Recreation and Historic Preservation Law. The entire list is available at <http://nysparks.com/inside-our-agency/rulemaking.aspx> and is summarized below:

Subpart 384-1 State parks (with or without campgrounds and cabins), parkways, boat launches, trails, recreation facilities and historic sites under the jurisdiction of the Office of Parks, Recreation and Historic Preservation outside the Adirondack and Catskill Parks.

- § 384.1 Niagara Region
- § 384.2 Allegany Region
- § 384.3 Genesee Region
- § 384.4 Finger Lakes Region
- § 384.5 Central New York Region
- § 384.6 Taconic Region
- § 384.7 Palisades Region
- § 384.8 Long Island Region
- § 384.9 Thousand Islands Region
- § 384.10 Saratoga-Capital District Region
- § 384.11 New York City Region

Subpart 384-2 State land, recreation facilities and historic sites under the jurisdiction of the Department of Environmental Conservation.

- § 384.12 Major Facilities
- § 384.13 Recreational Facilities Located within the Adirondacks and Managed by ORDA
- § 384.14 Historic Sites Located within the Adirondacks and Managed by OPRHP

- § 384.15 Campground and Picnic Areas
- § 384.16 Boat Launches at Campgrounds
- § 384.17 Boat Launches and Fishing Access Sites Located Outside of Campgrounds

§ 384.18 Other State Land by Geographic Area

- (a) Long Island
- (b) New York City
- (c) Lower Hudson Valley
- (d) Capital District
- (e) Eastern Adirondacks/Lake Champlain
- (f) Western Adirondacks/Upper Mohawk Valley/Eastern Lake Ontario
- (g) Central New York
- (h) Rochester/Western Finger Lakes
- (i) Western New York

Text of proposed rule and any required statements and analyses may be obtained from: Kathleen L. Martens, Associate Counsel, Office of Parks, Recreation and Historic Preservation, ESP, Agency Bldg. 1, 19th Floor, Albany, NY 12238, (518) 486-2921, email: rulemaking@oprhp.state.ny.us

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

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

Consensus Rule Making Determination

The Office of Parks, Recreation and Historic Preservation (OPRHP) is proposing to repeal and amend the list of state parks, historic sites, state land and recreational facilities under the jurisdictions of OPRHP and the Department of Environmental Conservation as required by Parks, Recreation and Historic Preservation Law Section 13.03. No one is likely to

object because the proposed regulation merely updates the list as required by statute.

Job Impact Statement

The existing rule proposed by the Office of Parks, Recreation and Historic Preservation at 9 NYCRR Part 384 that lists state parks, historic sites, state land and recreational facilities does not affect jobs or employment opportunities and the repeal and updating of the list would not affect jobs or employment opportunities.

Public Service Commission

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Major Electric Rate Filing

I.D. No. PSC-05-11-00006-P

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

Proposed Action: The Commission is considering a proposal filed by Orange and Rockland Utilities, Inc. to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service — P.S.C. No. 2 - Electricity.

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

Subject: Major electric rate filing.

Purpose: To consider a proposal to increase annual electric revenues by approximately \$61.7 million.

Public hearing(s) will be held at: 10:00 a.m. (Evidentiary Hearing)*, Feb. 2, 2011 and continuing daily as needed at Department of Public Service, Three Empire State Plaza, 3rd Fl., Hearing Rm., Albany, NY 12223.

*On occasion, there are requests to reschedule or postpone evidentiary hearing dates. If such a request is granted, notification of any subsequent scheduling changes will be available at the DPS website (www.dps.state.ny.us) under Case 10-E-0362.

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

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

Substance of proposed rule: The Commission is considering a proposal filed by Orange and Rockland Utilities, Inc. (O&R) which would increase its annual electric revenues by about \$61.7 million for the rate year ending June 30, 2012. This amount represents a 7.3% increase customer bills. However, due to the expiration of a temporary surcharge, reduced Revenue Decoupling Mechanism recoveries and the roll in to base rates of projected smart grid surcharge revenues, the net impact on customers in the first year is \$47.8 million (a 22% increase in delivery revenues). O&R also proposes options for a three-year rate proposal ending June 30, 2014. The proposed annual increase associated with O&R's three-year rate plan are \$51.0 million, \$17.5 million and \$9.7 million, respectively. If levelized, O&R's three-year rate plan results in annual increases of \$33.2 million, or about 13.5% annually as a percent of transmission and distribution revenues. The statutory suspension period for the proposed filing runs through June 26, 2011. The Commission may adopt in whole or in part or reject terms set forth in O&R's proposal, a multi-year rate plan, and/or other negotiated proposals.

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-0362SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Demand and Non-Demand Customer Qualifications

I.D. No. PSC-05-11-00004-P

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

Proposed Action: The Commission is considering a proposed tariff filing by the Green Island Power Authority to make various changes in its rates, charges, rules and regulations contained in its Schedule for Electric Service, PSC No. 1.

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

Subject: Demand and Non-Demand Customer Qualifications.

Purpose: To specify what qualifies a customer for as a demand or non-demand customer in SC No. 2 and SC No.2A.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by the Green Island Power Authority to add tariff language as to what qualifies a customer to be assigned to Service Classification No. 2 General Service - Demand Metered and Service Classification No. 2A General Service - Non-Demand Metered. The proposed filing has an effective date of March 1, 2011.

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.

(11-E-0020SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Refunding of Over-Earnings and Unauthorized Loans

I.D. No. PSC-05-11-00005-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 how to refund over-earnings resulting from temporary rates established for Sagamor Water Corp., and the unauthorized loans to two affiliated water companies (Hopewell Service Water Corp. and Devon Farms Water Works, Inc.).

Statutory authority: Public Service Law, sections 89-c, 89-f and 114

Subject: Refunding of over-earnings and unauthorized loans.

Purpose: To refund over-earnings and repay unauthorized loans.

Substance of proposed rule: In 2000, the Public Service Commission set initial rates for Sagamor Water Corp. (Sagamor or the company) on a temporary basis. The rates were to be reviewed after six months, but the company and Department of Public Service Staff (Staff) failed to do so. Staff discovered the failure in 2006 and commenced a review of the rates. Staff discovered that, because of a lower than projected capitalization rate, the company had been over-earning since 2000. Staff also learned that the company had used the excess revenues to make unauthorized loans to two related water companies, Hopewell Service Water Corp. (Hopewell) and Devon Farms Water Works, Inc. (Devon), as well as to an unregulated company. In an October 27, 2008 Order, the Commission ordered Sagamor to provide, within 90 days, a plan for returning the improperly loaned funds to Sagamor ratepayers.

Despite continued efforts by Staff, the company has not provided the required plan. On November 23, 2010, the Commission issued an Order to

Show Cause, requiring Sagamor, Hopewell and Devon to provide, within 30 days, plans to repay the money owed to Sagamor and its ratepayers. Although the companies' response was timely, it did not include a meaningful plan for repaying the money owed.

The Commission is now considering how best to restore the funds owed to Sagamor and its ratepayers.

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-W-0534SP1)

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

Norse Transfer of its Ownership of Gas Transportation Service Providers

I.D. No. PSC-05-11-00007-P

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

Proposed Action: The Commission is considering a petition from Norse Pipeline LLC (Norse) requesting approval of the transfer of its ownership of gas transportation service providers Norse Energy Holdings, Inc. and Nornew Energy Supply, Inc.

Statutory authority: Public Service Law, sections 2(11), 5(1)(b) and 70

Subject: Norse transfer of its ownership of gas transportation service providers.

Purpose: Consideration of Norse transfer of its ownership of gas transportation service providers.

Substance of proposed rule: The Public Service Commission is considering a petition from Norse Pipeline LLC requesting approval of the transfer of its ownership of gas transportation service providers Norse Energy Holdings, Inc. and Nornew Energy Supply, Inc. to Appalachian Transmission and Marketing LLC. The gas transportation assets subject to the transfer include a 320 mile gas gathering pipeline system located in Chautauqua and Cattaraugus Counties in New York, a 28 mile gas pipeline running from Mayville, New York to Jamestown, New York, and other gas transportation pipelines. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. 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.

(11-G-0004SP1)