

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 Alcoholism and Substance Abuse Services

NOTICE OF ADOPTION

Behavioral Health Organizations

I.D. No. ASA-03-12-00007-A

Filing No. 218

Filing Date: 2012-03-12

Effective Date: 2012-03-28

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

Action taken: Addition of Part 801 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.07, 19.09, 19.21, 19.40, 22.07, 32.01, 32.02, 32.07, 33.16, 33.23 and 33.25; Social Services Law, section 365-m; and L. 2011, ch. 59, section 111(t)

Subject: Behavioral Health Organizations.

Purpose: To ensure compliance by OASAS certified providers regarding their obligations in relation to Behavioral Health Organizations.

Text or summary was published in the January 18, 2012 issue of the Register, I.D. No. ASA-03-12-00007-EP.

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

Text of rule and any required statements and analyses may be obtained from: Sara Osborne, NYS Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: SaraOsborne@oasas.ny.gov

Assessment of Public Comment

The agency received no public comment.

Department of Audit and Control

NOTICE OF ADOPTION

Authorizing Alternative Proofs for Audit by the Comptroller for Payments Made by the State

I.D. No. AAC-31-11-00005-A

Filing No. 245

Filing Date: 2012-03-15

Effective Date: 2012-04-01

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

Action taken: Repeal of Parts 6 and 21; addition of section 3.13 and new Part 6 to Title 2 NYCRR.

Statutory authority: State Constitution art. V, section 1; State Finance Law, sections 8(14), 109, 109-a and 110

Subject: Authorizing alternative proofs for audit by the Comptroller for payments made by the State.

Purpose: To authorize the submission of electronic claims for payments by the State and to update the rates for overtime meal allowances.

Text or summary was published in the August 3, 2011 issue of the Register, I.D. No. AAC-31-11-00005-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Department of Corrections and Community Supervision

NOTICE OF ADOPTION

Entrance to a Correctional Facility, Visitation, Disciplinary Hearing, Superintendent Hearing, Minimum Provisions

I.D. No. CCS-24-11-00005-A

Filing No. 220

Filing Date: 2012-03-13

Effective Date: 2012-10-01

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

Action taken: Repeal of Part 200; amendment of sections 253.7, 254.7 and 1704.7; and addition of new Parts 200 and 201 to Title 7 NYCRR.

Statutory authority: Correction Law, sections 112, 137, 138 and 146

Subject: Entrance to a Correctional Facility, Visitation, Disciplinary Hearing, Superintendent Hearing, Minimum Provisions.

Purpose: To amend policies for the DOCCS Inmate Visitor Program and standards of inmate behavior.

Substance of final rule: The Department of Corrections and Community Supervision repeals Part 200 of Title 7 NYCRR and replaces it with a new Part 200 and adds a new Part 201 and amends Sections 253.7, 254.7, and 1704.7.

Part 200, formerly titled Visitation, which set forth the guidelines for the operation of the Department's visitor program, has been repealed and replaced by Part 200 Entrance to a Correctional Facility and Part 201 Visitation.

Part 200 Entrance to a Correctional Facility is added to provide the rules for persons, other than facility employees, seeking to enter a correctional facility. This sets forth policy, requirements and restrictions for both those seeking entrance and the staff tasked with ensuring the safety and the security of the facility.

200.1 Identification. This section defines and clarifies the acceptable forms of identification required for each person, including visitors and other persons not employed at the facility, seeking entrance to a correctional facility. Under the proposed rules, photographic identification will be required of all adult visitors. Failure to produce adequate identification shall result in the denial of entry.

This section also expands on the required procedures that, upon entering the gate area, visitors and other persons not employed at the facility are required to follow. It provides that each visitor is required to enter and leave by the same gate.

200.2 Search. This section provides that all persons entering a correctional facility are subject to search as a condition of entrance and that any visitor who refuses to comply with any required search procedure shall not be permitted entrance to that facility. This section sets forth the procedures for each type of search that may be required and establishes the effect of a visitor's failure to successfully pass those searches.

The justification and authorization for a consensual strip search of a visitor is outlined. The staff's professional and sensitive conduct during the search is emphasized. A strip search must be reported as an unusual incident. A visitor's refusal of a strip search will result in the denial of entry, but will not adversely impact future visits to the facility.

200.3 Unauthorized item/contraband. This section provides the department's detailed definition of contraband including the types of contraband, the discovery of which will result in confiscation and the contact of law enforcement. A list of items that are prohibited inside a correctional facility and instruction to visitors for declaring and storing such is provided.

Part 201 Visitation is added to provide a uniform manner of the operation of the inmate visitor program for visitors admitted to the facility, inmates participating in and department staff supervising the inmate visitor program. Visiting rules, including the types of misconduct and associated penalties, procedures for the imposition of visiting sanctions and procedures for appealing such sanctions are set forth.

201.1 Purpose. This section provides that appropriate participation in the Department of Corrections and Community Supervision inmate visiting program provides inmates under custody the opportunity to maintain relationships with persons from the outside in order to offer emotional support in adjusting to the prison environment and to promote better community adjustment upon release.

201.2 Procedures. This section outlines the procedures and limitations for the inmate visiting program, including procedures for first-time visitors, the visitor record, cross-visiting and visitors under 18 years of age.

This section also sets forth restrictions for persons on probation or parole, inmates on temporary release, persons with pending or past criminal proceedings, former inmates and former employees who must have prior permission to be allowed to visit. This section also addresses visits to hospitalized inmates.

In addition, this section provides that no inmate is to be visited against his or her will. This section also includes an overview of visiting times established for visiting at maximum, medium, minimum, and work release facilities.

201.3 Guidelines. This section provides that inmates and their authorized visitors abide by the established visiting rules and regulations, posted facility rules and the instructions given by staff. This section sets forth rules including procedures for leaving the visiting room, the exchange of items, leaving packages for the inmate, consumption of food, using lavatories, unacceptable attire and acceptable physical contact during visits. The rules regarding unacceptable attire have been expanded for clarification purposes and to stress that clothing containing metal may cause metal detectors to alert.

201.4 Termination, term of suspension and indefinite suspension. This section provides that a Superintendent may deny, limit, suspend for a term or indefinitely suspend the visitation privileges of any visitor if the Super-

intendent has reasonable cause to believe that such action is necessary to maintain the safety, security and good order of the facility. It is noted that a loss of visiting privileges may be imposed for an inmate pursuant to the procedures for implementing the standards of inmate behavior under Chapter V of Title 7.

This section provides the standards and the procedures that must be followed by facility staff to enforce visiting rules and for the termination of a visit. The Superintendent is authorized to limit either an inmate or a visitor to non-contact visiting as an alternative to a term of suspension or indefinite suspension of all visiting privileges. Procedures for the imposition of a term of suspension or indefinite suspension are provided. The types and effects of those penalties are outlined, as well as the procedures for notifying the visitors and inmates of the imposition of a visiting sanction and of the available review mechanism. When a visitor is subject to a suspension for a term of less than six months, he or she may appeal in writing to the Commissioner within 60 days and a written decision shall be issued within 45 days of receipt of the appeal. When a visitor is subject to a suspension for a term of over six months or an indefinite suspension, he or she may appeal in writing or by requesting a hearing. This section sets forth the types and effects of visiting penalties and contains a chart detailing types of misconduct, the initial response following an incident of misconduct and the maximum penalties authorized for each offense. A visiting penalty imposed with respect to the visiting privileges of any visitor applies at all Department facilities to all inmates visited. A visiting penalty also precludes participation in the family reunion and special events programs.

201.5 Visitor appeal and hearings. This section outlines the process to be followed when a visitor requests a hearing to appeal from a suspension of visiting privileges for a term of six months or more, including an indefinite suspension of visiting privileges. A hearing officer from outside the correctional facility is appointed and the visitor may be represented by counsel. Procedures for the presentation of witnesses and other evidence are provided, including authority for the hearing officer to determine whether such witnesses or evidence are material, not redundant, and will not jeopardize the safety, security and good order of the facility, or correctional goals. Hearings are electronically recorded and a written decision is to be issued within 60 days of the hearing. The visitor may appeal to the commissioner within 60 days and a written decision is to be issued within 60 days of the filing of an appeal.

201.6 Reconsideration of suspension in excess of two years. This section provides that if a visitor or inmate's visiting privileges have been suspended for a term over two years or indefinitely suspended, that person may request a reconsideration any time after it has been in effect for one year and annually thereafter. The request is made to the Superintendent of the facility housing the inmate to be visited. The Superintendent evaluates the request and advises the visitor and inmate of the result in writing. If the suspension remains in place without modification for five years, the Superintendent's denial or a request for reconsideration may be appealed to the Commissioner's designee in the fifth year and every five years thereafter.

253.7 Dispositions and mandatory surcharge has been revised to clarify that visiting privileges may not be withheld as the result of a disciplinary hearing, commonly referred to as a Tier II hearing in the Department's three-tiered disciplinary system.

254.7 Dispositions and mandatory disciplinary surcharge has been revised to permit the suspension of an inmate's visiting privileges as the result of a Superintendent's hearing, commonly referred to as a Tier III hearing in the Department's three-tiered disciplinary system. Under the proposed rules, an inmate's visiting privileges may be suspended if an inmate is found guilty of misconduct "as a result of the inmate's presence or conduct in connection with a visiting, family reunion or special events program, or processing before or after participation in such program." Visiting sanctions are available for a wide variety of categories of serious misconduct. Where the conduct is only between the inmate and a visitor, the sanction may be limited to that inmate's ability to receive visits from that visitor. Where the conduct involves other persons, including committing a sexual act where other visitors may witness such misconduct, a visiting sanction would preclude the inmate from all visits for the specified term. Similarly, conduct involving the smuggling of money, alcohol, marijuana, narcotics and other dangerous drugs, weapons, and escape paraphernalia would authorize the hearing officer to suspend visiting privileges with all visitors. Visiting sanctions under this subparagraph fall within the limits set forth in the penalty chart set forth at section 201.4(e).

A number of additional procedural safeguards are included in this rule. Any disposition imposing a loss of visiting privileges with all visitors for two years or more is forwarded to the Superintendent for a discretionary review under section 254.9. Where the sanction is an indefinite suspension of the inmate's visiting privileges, the visiting sanction will be reviewed by the director of special housing and inmate disciplinary program even if the inmate does not appeal. A disciplinary loss of visiting privileges over two years, including an indefinite suspension, is subject to the request for

reconsideration procedures set forth at section 201.6. In any case where the hearing officer can impose a loss of visiting privileges; he or she may choose to limit the inmate to noncontact visiting as an alternative.

Section 254.7(a)(1)(iv) provides that an inmate's visiting privileges may be suspended for drug related offenses or for refusing to cooperate with urinalysis testing procedures. These sanctions are authorized without respect to the location of the misconduct. A first offense may be punished by up to 6 months loss of visiting privileges. A second or subsequent offense may be punished by up to one year loss of visiting privileges.

1704.7 Correspondence and visiting has been revised to clarify the limitations on visiting for an inmate confined to a cell or room for more than 30 days, and that further restriction may be imposed under Part 201, Chapter V or section 302.2(i)(1) of Title 7 NYCRR.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 200.1, 200.2, 200.3, 201.3, 201.4 and 201.6.

Text of rule and any required statements and analyses may be obtained from: Maureen E. Boll, Deputy Commissioner and Counsel, NYS Department of Corrections and Community Supervision, 1220 Washington Avenue - State Campus - Building 2, Albany, NY 12226-2050, (518) 457-4951, email: Rules@Doccs.ny.gov

Revised Regulatory Impact Statement

1. Statutory Authority

Correction Law §§ 112, 137, 138, 146. Correction Law § 112 vests the Commissioner of the Department of Corrections and Community Supervision with the superintendence, management and control of the correctional facilities in the department and of the inmates confined therein, and of all matters relating to the government, discipline, policing, contracts and fiscal concerns thereof.

Correction Law § 137(2) provides that the Commissioner shall provide such measures as he or she may deem necessary or appropriate for the safety, security and control of correctional facilities and the maintenance of order therein.

Correction Law § 138 requires that all institutional rules and regulations defining and prohibiting inmates misconduct shall be published and posted, and that such rules shall be specified and precise giving all inmates actual notice of the conduct prohibited, as well as the range of disciplinary sanctions that can be imposed for a violation of each rule.

Correction Law § 146 vests certain officials with the authority to visit correctional facilities at their pleasure and provides that no other person not otherwise authorized by law shall be permitted to enter a correctional facility except by authority of the Commissioner of the Department of Corrections and Community Supervision under such regulations as he or she shall prescribe.

2. Legislative Objective

By vesting the Commissioner with the rulemaking authority, the legislature intended the Commissioner to promulgate such rules and regulations as he may deem necessary or appropriate for the safety, security and control of correctional facilities and the maintenance of order therein. Visitation greatly enhances an inmate's ability to be successful upon release from custody when the privilege is used to maintain a positive relationship. Appropriately disciplining the few inmates who violate the visiting room rules will enhance the benefits to the many who use their visiting privileges in a positive way.

In accordance with Correction Law §§ 137 and 138, the legislature intended the Commissioner to promulgate rules as he may deem necessary or appropriate for the safety, security and control of correctional facilities and the maintenance of order therein. The suspension of an inmate's visiting privileges is necessary and appropriate as a management technique to enforce rules prohibiting the use, possession and exchange of drugs within the State's correctional facilities.

3. Needs and Benefits

Overview

The Commissioner has the authority to prescribe regulations under which persons may be permitted to enter a correctional facility. Correction Law § 146 provides in pertinent part "The following persons shall be authorized to visit at pleasure all correctional facilities: the governor and lieutenant-governor, commissioner of general services, secretary of state, comptroller and attorney-general, members of the commission of correction, members of the legislature, judges of the court of appeals, supreme court and county judges, district attorneys and every minister of the gospel having charge of a congregation in the town wherein any such facility is situated. No other person not otherwise authorized by law shall be permitted to enter a correctional facility except by authority of the commissioner of correction under such regulations as the commissioner shall prescribe."

The Department's current visitation policies are the result of litigation initiated in 1981 in a class action lawsuit. The Court found that the Department's regulations created a liberty interest in visitation and the Department negotiated the Kozlowski consent decree, which was approved in May 1983. The settlement set forth the visiting regulations,

which were adopted as Part 200 of Title 7 in February 1986. Those regulations have been in effect since that date with only a few modifications to the penalty provisions in 1989.

The Department successfully sought to vacate the Kozlowski consent decree pursuant to the terms of the Prison Litigation Reform Act (PLRA). In a decision filed November 26, 2001, the Court granted the Department's motion and terminated the consent decree, finding that the consent decree must be terminated, because it did not meet the requirements of the PLRA. The Court based its decision in large part upon the United States Supreme Court's decision in *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989), finding that "the Supreme Court has held that there is no federally created liberty interest in visitation, [and] therefore this consent decree extends beyond what the federal Constitution requires." *Kozlowski v. Coughlin*, 2001 WL 1506010, *4. The Plaintiffs' filed an appeal to the Second Circuit Court of Appeals, however, that appeal was withdrawn with leave to re-file based on the Department's agreement to promulgate new regulations. Since that time, the Department has conducted research and evaluated numerous variations on the rules before reaching the current proposal.

The United States Supreme Court again addressed visitation in *Overton v. Bazzetta*, 539 U.S. 126 (2003). This decision was the result of challenges to significant limitations placed on visitation by the Michigan Department of Corrections. The Court recognized that "withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose." *Overton*, at 134.

For many years, prior to the 2001 ruling terminating the consent decree, the Department sought authority to change the visiting regulations noting that they were inadequate to deal with certain incidents of extreme violence that sometimes occur in the Department's visiting rooms. These visiting rooms may be the only place where the perpetrator has access to the victim, whether the victim is another inmate, a staff member or a visitor. This is also the setting where members of the public, including children, may be forced to witness inmate misconduct or fall victim to it. Further, the Department has sought the authority to use the suspension of an inmate's visiting privileges as a management technique to enforce rules prohibiting the use, possession and exchange of drugs within the State's correctional facilities.

Despite these problems, the Department continues to recognize the importance of visitation for the vast majority of the inmates committed to the Department and their visitors. Visitation remains the best way for inmates to maintain their relationships with the family and friends. When used to maintain a positive relationship, visitation greatly enhances the inmate's ability to be successful upon release from custody. Appropriately disciplining the few who violate the visiting room rules will only enhance the benefits to the many who use their visiting privileges in a positive way.

Thus, the Department proposes changes to the regulations governing visitation and the standards of inmate behavior that will appropriately balance the above-referenced concerns. These changes permit the exercise of meaningful visitation sanctions against an inmate or visitor who chooses to violate specified rules. Visitation related sanctions may be imposed on an inmate through the existing procedures of a Superintendent's Hearing under the existing disciplinary process as set forth in Chapter V of Title 7. Before a visitation sanction may be imposed, the inmate is entitled to a hearing. If the disciplinary disposition is against the inmate, the inmate will have the right to appeal to the Commissioner's designee to hear such appeals and to challenge the entire disciplinary disposition, including any visitation related sanction.

In those cases where a visitor is issued a decision imposing a visitation sanction, he or she will continue to be entitled to notice of the reason for the sanction, the length of the sanction, copies of the documentation concerning the charges, and an appeal to the Commissioner's designee. Where the sanction is a term of suspension for six months or more, or an indefinite suspension, the visitor will still be entitled to a hearing upon request.

Finally, in a case where either an inmate's or a visitor's visiting privileges are suspended for a term of more than two years or indefinitely suspended, that person will continue to have the ability to request reconsideration of the suspension over two years on an annual basis. If the suspension remains in effect, the denial of a request for reconsideration may be appealed to the Commissioner's designee during the fifth year and every five years thereafter if necessary.

Ultimately, it is the intent of these changes to provide inmates and their visitors with the opportunity to enjoy visitation in a safe environment.

Statement of Changes

Part 200 Entrance to a Correctional Facility is added to provide the rules for persons, other than facility employees, seeking to enter a correctional facility. This sets forth policy, requirements and restrictions for

both those seeking entrance and the staff tasked with ensuring their safety and the security of the facility.

200.1 Identification. This section defines and clarifies the acceptable forms of identification required for each person, including visitors and other persons not employed at the facility, seeking entrance to a correctional facility. Under the proposed rules, photographic identification will be required of all adult visitors.

This section also expands on the required procedures that, upon entering the gate area, visitors and other persons not employed at the facility are required to follow. The proposed rules provide procedures for verifying the identification of a person upon entrance to the correctional facility and upon leaving the correctional facility.

200.2 Search. This section provides that all persons entering a correctional facility are subject to search as a condition of entrance and that any visitor who refuses to comply with any required search procedure shall not be permitted entrance to that facility. This section sets forth the procedures for each type of search that may be required and establishes the effect of a visitor's failure to successfully pass those searches.

200.3 Unauthorized item/contraband. This section provides the department's definition of contraband including the types of contraband, the discovery of which will result in confiscation and the contact of law enforcement. A list of items that are prohibited inside a correctional facility and instruction to visitors for declaring and storing such items is provided.

Part 201 Visitation is added to provide a uniform manner of the operation of the inmate visitor program for visitors admitted to the facility, inmates participating in, and department staff supervising the inmate visitor program. Visiting rules, including the types of misconduct and associated penalties detailed, procedures for the imposition of visiting sanctions, and procedures for appealing such sanctions are set forth.

201.1 Purpose. This section provides that appropriate participation in the New York State Department of Corrections and Community Supervision inmate visitor program provides inmate under custody the opportunity to maintain relationships with persons from the outside in order to offer emotional support in adjusting to the prison environment and to promote better community adjustment upon release.

201.2 Procedures. This section is derived from existing section 200.2(a). The proposed rules maintain many of the pre-existing procedures and limitations. Rules for first-time visitors have been simplified. Procedures for visitors under 18 years of age have been revised. The rules governing the potential denial of visiting privileges for persons with a pending or past criminal proceeding have been modified to disqualify a person with charges related to conduct at a correctional facility or involving an inmate, such as promoting prison contraband, from visiting until the charges are resolved.

201.3 Guidelines. This section provides that inmates and their authorized visitors abide by the established visiting rules and regulations, posted facility rules, and the instructions given by staff. This section discusses those rules including leaving the visiting room, the exchange of items, leaving packages for the inmate, consumption of food, using lavatories, acceptable attire, and physical contact during visits.

201.4 Termination, term of suspension and indefinite suspension. This section provides that a superintendent may deny, limit, suspend for a term or indefinitely suspend the visitation privileges of any visitor if the superintendent has reasonable cause to believe that such action is necessary to maintain the safety, security, and good order of the facility. The standards and the procedures that must be followed by facility staff to implement visiting restrictions and their responsibilities after a penalty is imposed are provided. The types and effects of those penalties are outlined, as well as the procedures for notifying the visitors and inmates of the imposition of a visiting sanction of the available review mechanism. Under the proposed rule, only the visitor may appeal his or her visitation penalty. This section contains a chart detailing types of misconduct and the penalties for a first offense and the maximum penalties for each offense. A reference is also included to the procedures under Chapter V of this Title whereby a loss of visiting privileges may be imposed on an inmate pursuant to the procedures for implementing the standards of inmate behavior.

201.5 Visitor appeal hearings. This section outlines the process to be followed when a visitor requests a hearing to appeal from a suspension of visiting privileges for a term of six months or more, including an indefinite suspension of visiting privileges. The procedures are derived from the existing hearing procedures set forth at section 200.5(c)(2) - (9). Under the proposed rules, a written decision must be issued within 60 days of the hearing.

201.6 Reconsideration of Suspension in Excess of Two Years. This section is derived from existing section 200.5(d). Under this section, any visitor or inmate whose visiting privileges have been suspended for a term over two years or indefinitely suspended may request a reconsideration or modification to the sanction after 1 year and annually thereafter. The request is made to the superintendent of the facility housing the inmate to

be visited. The superintendent evaluates the request and advises the visitor and inmate of the result in writing. If the suspension remains in place without modification for five years, the superintendent's denial or a request for reconsideration may be appealed to the Commissioner's designee in the fifth year and every five years thereafter.

Section 253.7 has been revised to clarify that visiting privileges may not be withheld as the result of a disciplinary hearing, commonly referred to as a Tier II hearing in the Department's three-tiered disciplinary system.

Section 254.7 has been revised to permit the suspension of an inmate's visiting privileges as the result of a superintendent's hearing, commonly referred to as a Tier III hearing in the Department's three-tiered disciplinary system. Under the proposed rules, an inmate's visiting privileges may be suspended if an inmate is found guilty of misconduct "as a result of the inmate's presence or conduct in connection with a visiting, family reunion or special events program, or processing before or after participation in such program." Visiting sanctions are available for a wide variety of categories of serious misconduct. Where the conduct is only between the inmate and a visitor, the sanction may be limited to that inmate's ability to receive visits from that visitor. Where the conduct involves other persons, including committing a sexual act where other visitors may witness such misconduct, a visiting sanction would preclude the inmate from all visits for the specified term. Similarly, conduct involving the smuggling of money, alcohol, marijuana, narcotics and other dangerous drugs, weapons, and escape paraphernalia would authorize the hearing officer to suspend visiting privileges with all visitors. Visiting sanctions under this subparagraph fall within the limits set forth in the penalty chart set forth at section 201.4(e).

A number of additional procedural safeguards have been added to this rule as well. Any disposition imposing a loss of visiting privileges with all visitors for two years or more is automatically forwarded to the superintendent for a discretionary review under section 254.9. Where the sanction is an indefinite suspension of the inmate's visiting privileges, the visiting sanction will be reviewed by the director of special housing and inmate disciplinary program even if the inmate does not appeal. A disciplinary loss of visiting privileges over two years, including an indefinite suspension, is entitled subject to the request for reconsideration procedures set forth at section 201.6. In any case where the hearing officer can impose a loss of visiting privileges; he or she may choose to limit the inmate to noncontact visiting as an alternative.

Section 254.7(a)(1)(iv) provides that an inmate's visiting privileges may be suspended for drug related offenses or for refusing to cooperate with urinalysis testing procedures. These sanctions are authorized without respect to the location of the misconduct. A first offense may be punished by up to 6 months loss of visiting privileges. A second or subsequent offense may be punished by up to 1 year loss of visiting privileges.

Section 1704.7 has been revised to clarify the limitations on visiting for an inmate confined to a cell or room for more than 30 days, and that further restriction may be imposed under Part 201, Chapter V or section 302.2(i)(1) of Title 7 NYCRR.

4. Costs

a. To agency, state and local government: No discernable costs are anticipated.

b. Cost to private regulated parties: None. The proposed rule changes do not impose any costs on any private regulated parties.

c. This cost analysis is based upon the fact that the rule changes merely clarify and expand upon previously established rules regarding the inmate visiting program. No additional procedures or new staff are necessary to implement the proposed changes.

5. Paperwork

There are no new reports, forms or paperwork that would be required as a result of amending these rules.

6. Local Government Mandates

There are no new mandates imposed upon local governments by these proposals. The proposed amendments do not apply to local governments.

7. Duplication

These proposed amendments do not duplicate any existing State or Federal requirement.

8. Alternatives

The Department has considered a number of alternatives to preserve maximum visitation privileges for the vast majority of the inmates committed to the Department and their visitors in recognition of the fact that visitation remains the best way for inmates to maintain their relationships with the family and friends when such privileges are used to maintain a positive relationship. The Department seeks to change the visiting regulations in that they have been inadequate to deal with certain incidents of extreme violence and other types of misconduct that sometimes occur in the Department's visiting rooms and to permit the Department to use the suspension of an inmate's visiting privileges as a management technique to enforce rules prohibiting the use, possession and exchange of drugs within the State's correctional facilities. The proposed rules also set forth

uniform entrance procedures for all persons not employed by the Department seeking to enter a Department facility.

The Department considered various alternatives to the proposed rules for available visitation related dispositions upon a determination of guilt following a superintendent's hearing under section 254.7. In order to balance the Department's needs to 1) address serious visit related misconduct; 2) the abuse of drugs in the Department's Correctional Facilities and 3) make it clear that a lengthy suspension of visiting privileges is seen as a significant penalty, the Department added a number of procedural protections to section 254.7.

The proposed rules allow for a sanction involving the loss of visiting privileges for a wide-range of visit-related misconduct. These sanctions may involve a loss of visiting privileges with specified visitors where the misconduct involved only the inmate and those visitors. Where the misconduct was not limited to a specified visitor or visitors (such as an assault on a staff member or another inmate) and for certain types of misconduct where, in the Department's judgment, other persons such as staff or other visitors are effected (sexual conduct in the presence of other visitors and their children, smuggling of contraband such as drugs, weapons, etc.), the sanction will involve a loss of all visiting privileges.

To ensure the appropriate use of these new penalties, any disposition imposing a loss of visiting privileges with all visitors for two years or more is automatically forwarded to the superintendent for a discretionary review under section 254.9. Where the sanction is an indefinite suspension of the inmate's visiting privileges, the visiting sanction will be reviewed by the director of special housing and inmate disciplinary program even if the inmate does not appeal. The hearing officer also has the discretion to limit an inmate to noncontact visiting in lieu of suspending all visiting privileges.

The proposed rules also authorize visiting sanctions for certain types of inmate misconduct that is not directly related to visitation. Although the Department considered making such sanctions available for a wide-range of serious misconduct, it concluded that at this juncture visiting sanctions would be made available only for misconduct involving drug use, drug possession and urinalysis testing procedures. Also, rather than leaving the length of the penalties completely within the discretion of the hearing officer, sanctions are limited to 6 months for a first offense and 1 year for any repeat offense.

During the drafting process, and in connection with ongoing matters related to the Kozlowski litigation, the Department shared a draft of the proposed rules with Prisoners' Legal Services of New York (PLS). PLS in turn shared the draft with the Legal Aid Society, Prisoners' Rights Project. The two organizations submitted joint comments by letter dated September 13, 2010. On November 3, 2010, several representatives of PLS and Legal Aid participated in a meeting with the Department to discuss the proposed rules.

The primary concerns noted involved the attorneys and others having difficulty clearing metal detector searches, concerns regarding the substance detection/Ion Scan testing, the authorized visit related penalties and the availability of central office review for "revocations", and the authorization under the inmate disciplinary rules of a suspension of all visitation privileges when conduct is not limited to a single visitor. Many of these concerns were freely discussed at the meeting. Although some of the concerns were determined to be the result of a difference in philosophy, the Department has made a number of revisions to the proposed rule based upon the comments and the discussions.

The current proposal clarifies that certain types of garments, such as underwire bras and clothing containing metal studs, are likely to set off metal detectors resulting in the potential that a more intrusive search will be necessary before visitation will be permitted. With respect to the concerns on attorney visits, the rule has been modified to clarify that the front gate staff should consult with the superintendent before requesting that the attorney consent to a more intrusive search.

In the draft rule, the Department utilized 60 days for all appeal timeframes. PLS and Legal Aid suggested that this was too long to decide an appeal on a suspension of visiting privileges for a term of less than 6 months. The Department, PLS and Legal Aid discussed the matter and concluded that 45 days was a reasonable time frame for issuing a written decision reviewing a suspension of visiting privileges for a term of less than 6 months.

In an effort to ease concerns over the potential for the increased use of "revocations" of visiting privileges, a penalty authorized under the current rule, which is available for more categories of misconduct under the proposed rule, the Department has redrafted the penalty to provide for the "indefinite suspension" of visiting privileges. Under either the originally proposed revocation or an indefinite suspension, the visitor may apply to the superintendent for modification of the penalty on an annual basis. As a result of the discussion with PLS and the Legal Aid Society, the Department created the additional opportunity to appeal the denial of such a request for reconsideration every five years by writing to the Commissioner.

9. Federal Standards

The proposed rules are consistent with United State Supreme Court precedent in *Overton v. Bazzetta*, 539 U.S. 126 (2003) and *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) analyzing visitation privileges in the prison context.

10. Compliance Schedule

The Department of Corrections and Community Supervision will achieve compliance with the proposed rules over a period of six months following adoption.

Revised Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on small businesses or local governments. This proposal amends policies and standards of behavior for the Department of Corrections and Community Supervision inmate visitor program.

Revised Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. This proposal amends policies and standards of behavior for the Department of Corrections and Community Supervision inmate visitor program.

Revised Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal merely amends policies and standards of behavior for the Department of Corrections and Community Supervision inmate visitor program.

Assessment of Public Comment

The Department received comments from two members of the Legislature, the New York Civil Liberties Union (NYCLU), the New York State Defenders Association (NYSDA), and joint comments from the Prisoners' Rights Project of the Legal Aid Society of New York and Prisoners' Legal Services of New York (PRP/PLS).

Assemblyman Aubry expressed concern that eliminating the penalty chart would result in the maximum penalty being imposed for first time infractions. Assemblyman Lavine commented that the range of penalties for each violation is increased creating a risk of "increasing arbitrary decision-making." He suggested adopting a graduated schedule of recommended sanctions. The Department intends to adopt recommended sanction guidelines, while preserving the discretion to impose the maximum penalty for egregious cases for a first act of misconduct when appropriate.

Assemblyman Lavine commented on the deletion of "all visitors shall be provided with written notification of the visiting rules and regulations; however, it will be considered sufficient notice if such rules and regulations are conspicuously posted" from the regulation. In response, a non-substantive revision is being made to section 201.3(a) adding "the department shall maintain on its website the full text of Parts 200 and 201." The Department will also conduct an educational campaign for staff, offenders and current visitors prior to the October 1, 2012 effective date.

Assemblyman Aubry noted that the new penalty chart does not reference non-contact visitation. The proposed rule provides discretion to use a non-contact visiting limitation at any time a term of suspension or indefinite suspension is authorized.

Assemblyman Aubry cautioned that we not "reach the point where all shu inmates also lack visits because the Indefinite Suspension of Visiting Privileges has become as routine as the suspension of packages and commissary." The proposed rules only permit an Indefinite Suspension of an offender's Visiting Privileges for specific types of misconduct committed in connection with the visiting program.

Assemblyman Aubry expressed concern with the revision to the search procedures deleting language that permitted a visitor to voluntarily remove items that may have triggered a metal detector. The revision responds to situations when it is inappropriate for the visitor to remove the item in the visitor processing area, such as an item of clothing containing metal buckles or a piece of body jewelry. This revision ensures that proper protocols are followed to prevent indecent exposure, and to ensure proper documentation of searches.

The New York Civil Liberties Union (NYCLU) focused on the use of the Ion Scanner for visitor screening. The regulation strikes the appropriate balance between necessary security screenings and the interests of persons seeking to enter a correctional facility. Non-contact visitation or more intrusive searches will not detect well-hidden contraband, prevent that contraband from being passed to an inmate, or sufficiently deter visitors from attempting to smuggle drugs into the facility.

Ion Scan equipment is operated by staff that have been properly trained in the use of the equipment and appropriate steps are taken to address the concern of "false positives". NYCLU referenced the misconception that certain medications may cause "false positives". Even though this com-

mon misconception has been disproved, when a visitor asserts that a positive result was caused by prescribed medication, the Department consults with the manufacturer to determine whether the result could be from the medication. In virtually every case, the prescribed medication could not have caused the positive test result.

The NYCLU was concerned that the regulation did not address "calibration" of the equipment. A non-substantive revision was made to section 200.2(e)(1) providing that "All substance abuse detection/ion scan staff shall use the thresholds established and approved by the deputy commissioner for correctional facilities to determine whether or not a test is positive."

The joint comments from PRP/PLS noted that stopping the introduction of drugs into facilities and curbing inappropriate physical contact in the Department's visiting rooms are important goals, but that the rules fail to adequately consider the countervailing goals of maintaining family and community ties.

The comments assert that targeted suspensions of visits between prisoners and their visitors should be used to address sexual misconduct. The Department believes a sexual act in the visiting room in the presence of other visitors and their children is abhorrent behavior. To curtail such conduct, it must be clear that the offender risks losing visits with more than just the offending visitor. The proposed rule provides that a visiting sanction will be between the offender and the visitor, unless others are subjected to exposure. The maximum penalty for Unacceptable Physical Conduct at section 201.4(e)(3) has been clarified to provide "A term of Suspension or Indefinite Suspension shall be limited to the involved visitor if the visitor was the only direct participant in the misconduct, however, if other visitors, in particular children, were subjected to exposure then the term of Suspension or Indefinite Suspension may be imposed with all visitors." Similar clarifying changes were made for sanctions involving the introduction of contraband money and alcohol.

PRP/PLS objected to the elimination of signature cards as an acceptable form of identification. This policy change may be difficult for some and DOCCS considered the potential costs. Forms of identification have changed significantly since the 1986 regulation was adopted. Today, the possession of verifiable photographic identification is a necessity. Requiring photographic identification for adult visitors is a necessary change and a first step toward enhancing the Department's visitor identification system.

PRP/PLS expressed concerns regarding the proposed ion scanner rules and noted that the rule text provides for a denial of up to 2 days where the penalty chart provides "Visit Denied for (2) calendar days". Non-substantive changes to section 200.2(e) and 201.4(e)(2)(ii) to match the penalty chart and delete the misleading phrase "up to" have been made.

PRP/PLS made several suggestions regarding strip search procedures. The Department will revise the consent to search form to clarify that the visitor need not consent to a strip search and that choosing not to consent will have no consequences beyond denial of the visit.

PRP/PLS suggested that DOCCS clarify that the visitor's identification is not considered contraband under section 200.3(a)(4). We believe the language is clear. The specified items are only contraband if they are passed to an offender. However, the inclusion of alcohol may be misleading. Therefore, a non-substantive change was made moving the word "alcohol" to the list of prohibited items under 200.3(c)(1). In response to comments from NYSDA, "business cards" was also removed from the list of items an inmate is prohibited from possessing.

PRP/PLS suggested that clear guidelines defining appropriate attire would avoid the imposition of divergent views on what is, or is not, acceptable. In order to address this concern, we clarified that shorts or skirts shorter than mid-thigh length are unacceptable.

PRP/PLS referenced section 201.4(d) regarding inmate suspensions and commented that "visit related misconduct" is not defined. Section 201.4(d) cross-references proposed section 254.7. Section 254.7(a)(1)(iii) provides that visit related misconduct is "improper conduct as a result of the inmate's presence or conduct in connection with a visiting, family reunion or special events program, or processing before or after participation in such program." Thus, the term is defined in the regulation authorizing a hearing officer to impose a loss of visiting privileges on an inmate.

PRP/PLS commented about their disagreement with the elimination of clearly defined escalating penalties. The Department will address the proper use of penalties through training and by creating recommended sanction guidelines. The rules caution that the penalties are intended as maximum penalties for egregious conduct. Further, a number of reviews and safeguards are in place to avoid an abuse of discretion.

PRP/PLS believes that a maximum penalty of indefinite suspension of all visits is too harsh for offenders and visitors who engage in intercourse, sodomy, or other sexual activity including masturbation. The Department wants to be clear; engaging in a sexual act during a visit or special event where other visitors and children may witness such misconduct will not be tolerated. We reject the suggestion that the maximum penalty is too harsh.

PRP/PLS suggested that the appeal from a denial of a request for reconsideration be available more often than every fifth year. Although the Department believes that permitting a second level of appeal every five years is sufficient, we recognize that the burden of permitting such reviews more frequently is likely to be minimal. Accordingly, the rule was revised to permit an appeal every three years.

PRP/PLS commented that section 254.7(a)(1)(iii)(b) addressing the difference between conduct involving a single visitor and that not limited to a single visitor is vague and undefined. In most cases, it is clear whether only a single visitor is involved. The Department has defined certain additional categories of misconduct as involving more than the single visitor: Misconduct involving Unacceptable Physical Conduct during which other visitors were subjected to exposure and misconduct involving an attempt to introduce money, alcohol, marijuana, narcotic and other dangerous drugs, any item which is readily capable of being used to cause death or serious injury, or any item which may be used to aid in escape.

PRP/PLS objected to amendments authorizing a loss of visiting privileges with all visitors sanctions for smuggling drugs and dangerous contraband. These rules are necessary to properly encourage offenders to make good choices.

PRP/PLS objected to the provisions of section 254.7(a)(iv) allowing for visit-related sanctions for specified offenses regardless of the location of the misconduct. Such penalties are the only meaningful sanctions for many offenders and they are necessary and appropriate.

NYSDA focused on attorney visits. NYSDA sought an addition to section 200.2(d)(iii) clarifying that legal papers may be subjected to a cursory examination for contraband, but nothing more. The Department added cautionary language providing that "Inspection of handbags, briefcases, and other containers in the possession of an attorney or duly approved legal representative prior to an approved legal visit shall be limited to a cursory examination for contraband. Written materials shall be inspected, as unobtrusively as possible, to verify that the materials do not contain contraband."

NYSDA suggested that the regulation clearly define the procedure for a confirmed positive Ion Scan test. The Department made a non-substantive revision to section 200.2(e) to indicate "If a visitor tests positive, a second test will be conducted to confirm or negate the first test result" and "A confirmed positive test means that a second sample from the same area on the person or the person's belongings tests positive for the same substance."

NYSDA asserted that the penalty for a refusal to submit to an Ion Scan test should not be a 2 day denial of visitation. Treating a refusal to submit to a test in the same manner as a positive test is appropriate, in part because Ion Scan searches are conducted at random rather than for every visit.

NYSDA noted that the language in proposed section 200.2(f)(5) suggested that past refusals to submit to a strip search may be a factor considered in denial of a future visit. The rule has been clarified by deleting the word "solely".

NYSDA suggested a list of contraband items should be given to each visitor and that the definition of contraband should not include an attorney's business card. Business cards were removed from the list of items an inmate is prohibited from possessing. A cross reference to section 270.2 (B)(14) of Title 7, setting forth the Standards of Inmate Behavior concerning contraband, has been added.

NYSDA referenced the language at 201.2(b)(7) permitting the Superintendents to modify department visiting rules to adjust to local conditions and suggested that all such modifications should be posted at the relevant facility and on the Department's website. Local visiting policies are provided to offenders as a part of their facility orientation. Local visiting policies are also made available to current or prospective visitors through the facility.

Department of Financial Services

EMERGENCY RULE MAKING

Unauthorized Providers of Health Services

I.D. No. DFS-13-12-00001-E

Filing No. 215

Filing Date: 2012-03-09

Effective Date: 2012-03-09

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

Action taken: Addition of Subpart 65-5 (Regulation 68-E) to Title 11 NYCRR.

Statutory authority: Financial Services Law, section 202, and arts. 3 and 4; and Insurance Law, sections 301 and 5221, and arts. 4 and 51

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

Specific reasons underlying the finding of necessity: This regulation concerns the deauthorization of certain providers of health services. Insurance Law § 5109(a) requires the Superintendent, in consultation with the Commissioner of Health and the Commissioner of Education, to promulgate standards and procedures for investigating and suspending or removing the authorization for providers of health services to demand or request payment for health services under Article 51 of the Insurance Law upon findings certain unlawful conduct reached after investigation, notice, and a hearing pursuant to § 5109.

For years, certain owners and operators of professional service corporations and other types of corporations have abused the no-fault insurance system. These persons are involved in activities that include intentionally staging accidents and billing no-fault insurers for health services that were unnecessary or never in fact rendered. Indeed, recent federal indictments have demonstrated that organized crime has infiltrated and permeated the no-fault provider network. Such wide-scale criminal activity is estimated to have defrauded insurers of at least hundreds of millions of dollars, if not more. Insurers ultimately pass on these costs to New York consumers in the form of higher automobile premiums, and schemes such as the fraudulent staging of auto accidents endangers the innocent public. Furthermore, it places in peril the quality of care received by innocent auto accident victims and the public's health, safety, and welfare.

It is of the utmost importance that the Superintendent, Commissioner of Health, and Commissioner of Education be able, as soon as possible, to prohibit health service providers who engage such activities from demanding or requesting payment from no-fault insurers.

For the reasons stated above, emergency action is necessary for the public health, public safety, and general welfare.

Subject: Unauthorized Providers of Health Services.

Purpose: Promulgates standards and procedures for investigating and suspending or removing the authorization for health service providers.

Text of emergency rule: A new Subpart 65-5 is added to read as follows:

Section 65-5.0 Preamble.

(a) For years, certain owners and operators of professional service corporations or other similar business entities have abused the no-fault insurance system. These persons are involved in activities that include intentionally staging accidents and billing no-fault insurers for health services that were unnecessary or never in fact rendered. This fraud costs no-fault insurers tens if not hundreds of millions of dollars, which insurers ultimately pass on to New York consumers in the form of higher automobile insurance premiums.

(b) Among other schemes, of great concern to the public are the ownership, control, and daily operation of professional service corporations or other similar business entities by individuals who are not licensed to practice medicine. Ownership of professional service corporations by unlicensed persons works as follows. Unlicensed persons pay licensed physicians to use the physicians' names, signatures, and licenses for the purpose of fraudulently billing no-fault insurers for services that were never rendered, are of no diagnostic value, or are medically unnecessary. These physicians essentially sell their licenses, for a fee, and become "paper owners" of the professional service corporation, which in turn permits unlicensed and unqualified persons to own, operate, and control a professional service corporation, although they are prohibited from having any financial interest in such a corporation pursuant to Article 15 of the Business Corporation Law. Schemes such as this, which could involve professional business entities other than professional service corporations and health care professionals other than physicians, severely compromise the safety and integrity of the health care system in New York. As a result, certain professional business entities have become unjustly enriched through the ill-gotten proceeds of illegal activity, increasing the cost of insurance premiums for the driving public. More important, these abuses threaten the affordability of health care and the public's health, safety, and welfare.

(c) Insurance Law section 5109 requires the Superintendent of Financial Services, in consultation with the Commissioner of Health and the Commissioner of Education, to establish standards and procedures for the investigation and suspension or removal of a provider of health services' authorization to demand or request payment for health services provided under Article 51 of the Insurance Law. This Part shall implement Insurance Law section 5109.

Section 65-5.1 Definitions.

As used in this Subpart, the following terms shall have the meaning ascribed to them:

(a) "Health services" or "medical services" means services, supplies, therapies, or other treatments as specified in Insurance Law section 5102(a)(1)(i), (ii), or (iv).

(b) "Insurer" shall have the meaning set forth in Insurance Law section 5102(g), and also shall include the motor vehicle accident indemnification corporation and any company or corporation providing coverage for basic economic loss, as defined in Insurance Law section 5102(a), pursuant to Insurance Law section 5103(g).

(c) "Noticing commissioner" means the Commissioner of Health or the Commissioner of Education, whomever sends a notice of hearing under this Subpart.

(d) "Provider of health services" or "provider" means a person or entity who or that renders health services.

(e) "Superintendent" means the Superintendent of Financial Services. Section 65-5.2 Investigations.

(a) The superintendent may investigate any reports made pursuant to Insurance Law section 405, allegations, or other information in the superintendent's possession, regarding providers of health services engaging in any of the unlawful activities set forth in Insurance Law section 5109(b). After conducting an investigation, the superintendent shall send to the Commissioner of Health and the Commissioner of Education a list of any providers who or that the superintendent believes may have engaged in any of the unlawful activities set forth in Insurance Law section 5109(b), together with a description of the grounds for inclusion on the list. Within 45 days of receipt of the list, the Commissioner of Health and Commissioner of Education shall notify the superintendent in writing whether they confirm that the superintendent has a reasonable basis to proceed with notice and a hearing for determining whether any of the listed providers should be deauthorized from demanding or requesting any payment for medical services in connection with any claim under Article 51 of the Insurance Law.

(b) The Commissioner of Health and the Commissioner of Education also may investigate any reports, allegations, or other information in their possession, regarding providers engaging in any of the unlawful activities set forth in Insurance Law section 5109(b). If either commissioner conducts an investigation, then the commissioner, or the superintendent, if so designated, shall be responsible for providing notice and an opportunity to be heard to the providers of health services that they are subject to deauthorization from demanding or requesting any payment for medical services in connection with any claim under Article 51 of the Insurance Law. Nothing in this Section, however, shall preclude the superintendent, Commissioner of Health, or Commissioner of Education from conducting joint investigations and hearings, or from conducting professional misconduct proceedings against the providers of health services pursuant to the Public Health Law or Title VIII of the Education Law.

Section 65-5.3 Notice; how given.

(a)(1) The superintendent, Commissioner of Health, or Commissioner of Education shall give notice of any hearing to a provider at least 30 days prior to the hearing, in writing, either by delivering it to the provider or by depositing the same in the United States mail, postage prepaid, registered or certified, and addressed to the last known place of business of the provider or if no such address is known, then to the residence address of the provider.

(2) The notice shall refer to the applicable provisions of the law under which action is proposed to be taken and the grounds therefor, but failure to make such reference shall not render the notice ineffective if the provider to whom it is addressed is thereby or otherwise reasonably apprised of such grounds.

(3) It shall be sufficient for the superintendent or noticing commissioner to give to the provider:

(i) notice of the time and the place at which an opportunity for hearing will be afforded; and

(ii) if the person appears at the time and place specified in the notice or any adjourned date, a hearing.

(b) If the noticed provider seeks a hearing, then the provider shall notify the superintendent or noticing commissioner in writing, within 10 days of receipt of the notice, that a hearing is demanded; in such case the superintendent or noticing commissioner shall give the provider a further notice of the time and place of such hearing in the manner stated in this section, to the address specified by the provider if supplied.

(c) At least 10 days prior to the hearing date fixed in the notice, the provider may file an answer to any charges with the superintendent or noticing commissioner.

(d) Any hearing of which such notice is given may be adjourned from time to time without other notice than the announcement thereof at such hearing.

(e) The statement of any regular salaried employee of the Department of Financial Services, Department of Health, or Department of Education, subscribed and affirmed by such employee as true under the penalties of perjury, stating facts that show that any notice referred to in this section

has been delivered or mailed as hereinbefore provided, shall be presumptive evidence that such notice has been duly delivered or mailed, as the case may be.

Section 65-5.4 Hearings.

(a) Unless otherwise provided, any hearing may be held before the superintendent, Commissioner of Health or Commissioner of Education, any deputy, or any designated salaried employee of the Department of Financial Services, Department of Health, or Department of Education who is authorized by the superintendent or noticing commissioner for such purpose. The hearing shall be noticed, conducted, and administered in compliance with the State Administrative Procedure Act.

(b) The person conducting the hearing shall have the power to administer oaths, examine and cross-examine witnesses, and receive documentary evidence, and shall report his or her findings, in writing, to the superintendent or noticing commissioner with a recommendation. The report, if adopted by the superintendent or noticing commissioner, may be the basis of any determination made by the superintendent or noticing commissioner.

(c) Every such hearing shall be open to the public unless the superintendent or noticing commissioner, or the person authorized by the superintendent or noticing commissioner to conduct such hearing, shall determine that a private hearing would be in the public interest, in which case the hearing shall be private.

(d) Every provider affected shall be permitted to: be present during the giving of all the testimony; be represented by counsel; have a reasonable opportunity to inspect all adverse documentary proof; examine and cross-examine witnesses; and present proof in support of the provider's interest. A stenographic record of the hearing shall be made, and the witnesses shall testify under oath.

(e) Nothing herein contained shall require the observance of any such hearing of formal rules of pleading or evidence.

Section 65-5.5 Report of hearing and findings.

(a) Pending a final determination by the superintendent, Commissioner of Health, or Commissioner of Education, if the superintendent or noticing commissioner believes that the provider has engaged in any activity set forth in Insurance Law section 5109(b), then the superintendent or noticing commissioner may temporarily prohibit the provider from demanding or requesting any payment for medical services under Article 51 of the Insurance Law for up to 90 days from the date of the notice of such temporary prohibition pursuant to Insurance Law section 5109(e).

(b) The hearing officer shall issue to the superintendent or noticing commissioner the report described in Section 65-5.4(b) of this Subpart, with a recommendation. The superintendent or noticing commissioner shall adopt, modify, remand, or reject the hearing officer's report and recommendation.

(c) Upon consideration of the hearing officer's report and recommendation, the superintendent or noticing commissioner may issue a final order prohibiting the provider from demanding or requesting any payment for medical services in connection with any claim under Article 51 of the Insurance Law and requiring the provider to refrain from subsequently treating, for remuneration, as a private patient, any person seeking medical treatment under Article 51.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire June 6, 2012.

Text of rule and any required statements and analyses may be obtained from: David L. Neustadt, Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1690, email: David.Neustadt@dfs.ny.gov

Regulatory Impact Statement

1. Statutory authority: Section 202 and Articles 3 and 4 of the Financial Services Law, and Sections 301 and 5221 and Articles 4 and 51 of the Insurance Law. Insurance Law § 301 and Financial Services Law §§ 202 and 302 authorize the Superintendent of Financial Services (the "Superintendent") to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insurance Law. Article 3 of the Financial Services Law sets forth administrative and procedural provisions, while Article 4 of the Financial Services Law confers certain powers and duties on the Superintendent with regard to financial frauds prevention. Insurance Law § 5221 specifies the duties and obligations of the Motor Vehicle Accident Indemnification Corporation ("MVAIC") with regard to the payment of no-fault benefits to qualified persons. In addition, Article 4 of the Insurance Law sets forth requirements for reporting and preventing fraud, while Article 51 of the Insurance Law governs the no-fault insurance system.

2. Legislative objectives: Insurance Law § 5109 requires the Superintendent, in consultation with the Commissioner of Health and the Commissioner of Education, to promulgate standards and procedures for

investigating and suspending or removing the authorization for health service providers to demand or request payment for health services under Article 51 of the Insurance Law upon findings of certain unlawful conduct reached after investigation, notice, and a hearing pursuant to § 5109. Furthermore, Insurance Law § 301 and Financial Services Law §§ 202 and 302 authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insurance Law.

3. Needs and benefits: For years, certain owners and operators of professional service corporations and other business entities have abused the no-fault insurance system. These persons are involved in activities that include intentionally staging accidents and billing no-fault insurers for health services that were unnecessary or never in fact rendered. Indeed, recent federal indictments have demonstrated that organized crime has infiltrated and permeated the no-fault provider network. Such wide-scale criminal activity is estimated to have defrauded insurers of at least hundreds of millions of dollars, if not more. Insurers ultimately pass on these costs to New York consumers in the form of higher automobile insurance premiums, and schemes such as the fraudulent staging of auto accidents endanger the innocent public. Furthermore, these activities place in peril the quality of care received by innocent auto accident victims and the public's health, safety, and welfare.

It is of the utmost importance that the Superintendent, Commissioner of Health, and Commissioner of Education be able, as soon as possible, to prohibit health service providers who engage in such activities from demanding or requesting payment from no-fault insurers.

Therefore, after consultation with the Commissioner of Health and the Commissioner of Education, the Superintendent drafted this rule to promulgate standards and procedures for investigating and suspending or removing the authorization for health service providers to demand or request payment for health services under Article 51 of the Insurance Law upon findings of certain unlawful conduct reached after investigation, notice, and a hearing pursuant to § 5109.

4. Costs: This rule does not impose compliance costs on state or local governments. The rule should reduce costs for no-fault insurers, which may include local governments who self-fund their no-fault insurance benefits, because it will permit the Superintendent, Commissioner of Health, or Commissioner of Education to prohibit, after notice and a hearing, health service providers who engage in certain unlawful conduct from demanding or requesting payment from no-fault insurers. The rule also should reduce costs for New York consumers in the form of reduced automobile insurance premiums.

5. Local government mandates: This rule does not impose any requirement upon a city, town, village, school district, or fire district.

6. Paperwork: This rule does not impose any additional paperwork.

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

8. Alternatives: There were no significant alternatives to consider.

9. Federal standards: There are no minimum standards of the federal government for the same or similar subject areas. The rule is consistent with federal standards or requirements.

10. Compliance schedule: This rule takes effect 95 days after filing with the Secretary of State, because Insurance Law § 5109(a) requires notice to all health service providers of the provisions of § 5109 and this rule at least 90 days in advance of the effective date of the rule.

Regulatory Flexibility Analysis

1. Effect of the rule: The Department of Financial Services ("Department") finds that this rule will generally not impose reporting, recordkeeping or other requirements on small businesses or local governments. The basis for this finding is that this rule does not impose any substantive requirements on small businesses or local governments. In addition, this rule affects no-fault insurers authorized to do business in New York State and self-insurers, none of which fall within the definition of "small business" because none are both independently owned and have less than one hundred employees. Self-insurers are typically large enough to have the financial ability to self-insure losses and the Department does not have any information to indicate that any self-insurers are small businesses.

This rule also affects health service providers, some of whom may be considered small businesses. However, this rule does not impose any substantive requirements on health service providers.

Some local governments self-insure their no-fault benefits. The Department has not been able to determine the number of local governments that are self-insured. However, this rule does not impose any substantive requirements on local governments, and any impact on local governments would be positive and should reduce their costs.

2. Compliance requirements: This rule does not impose any additional paperwork.

3. Professional services: This rule does not require anyone to use professional services. However, if a health service provider is subject to a hearing, the provider may be represented by counsel.

4. Compliance costs: This rule does not impose compliance costs on small businesses or local governments, because it does not impose any substantive requirements. The rule should reduce costs for no-fault insurers, which may include local governments who self-fund their no-fault insurance benefits, because it will permit the Superintendent, Commissioner of Health, or Commissioner of Education to prohibit, after notice and a hearing, health service providers who engage in certain unlawful conduct from demanding or requesting payment from no-fault insurers.

5. Economic and technological feasibility: This rule does not impose any substantive requirements on small businesses or local governments, so there should not be any issues pertaining to economic and technological feasibility.

6. Minimizing adverse impact: This rule affects uniformly health service providers and no-fault insurers in all parts of New York State and the rule is mandated by statute. The Department does not believe that it will have an adverse impact.

7. Small business and local government participation: Interested parties will have the opportunity to comment once the proposal is published in the *State Register*.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Health service providers, insurers, and self-insurers affected by this regulation do business in every county in this state, including rural areas as defined under Section 102(10) of the State Administrative Procedure Act. Some of the home offices of these health service providers, insurers, and self-insurers lie within rural areas. Some government entities that are self-insurers for no-fault benefits may be located in rural areas.

2. Reporting, recordkeeping and other compliance requirements: This rule does not impose any additional paperwork.

3. Costs: This rule does not impose compliance costs on state or local governments. The rule should reduce costs for no-fault insurers, which may include local governments who self-fund their no-fault insurance benefits, because it will permit the Superintendent, Commissioner of Health, or Commissioner of Education to prohibit, after notice and a hearing, health service providers who engage in certain unlawful conduct from demanding or requesting payment from no-fault insurers. The rule also should reduce costs for New York consumers in the form of reduced automobile insurance premiums.

4. Minimizing adverse impact: This rule affects uniformly health service providers and no-fault insurers in both rural and nonrural areas of New York State and the rule is mandated by statute. The Department of Financial Services does not believe that it will have an adverse impact on rural areas.

5. Rural area participation: Interested parties will have the opportunity to comment once the proposal is published in the *State Register*.

Job Impact Statement

This rule will not have any adverse impact on jobs and employment opportunities of persons engaging in lawful conduct in New York State, because the rule only allows the Superintendent of Financial Services, Commissioner of Health, or Commissioner of Education to investigate and suspend or remove the authorization for health service providers to demand or request payment for health services under Article 51 of the Insurance Law upon findings of certain unlawful conduct reached after investigation, notice, and a hearing pursuant to Insurance Law § 5109.

are being promulgated on an emergency basis because of the need for the Fund to be operational as of October 1, 2011. Authority for emergency promulgation was specifically provided in section 111 of Article VII of the New York State 2011-2012 Budget.

Subject: NYS Medical Indemnity Fund.

Purpose: To provide the structure within which the NYS Medical Indemnity Fund will operate.

Substance of emergency rule: As required by new section 2999-j(15) of the Public Health Law (PHL), the New York State Commissioner of Health, in consultation with the Superintendent of Insurance, has promulgated these regulations to provide the structure within which the New York State Medical Indemnity Fund (“Fund”) will operate. Included are (a) critical definitions such as “birth-related neurological injury” and “qualifying health care costs” for purposes of coverage, (b) what the application process for enrollment in the Fund will be, (c) what qualifying health care costs will require prior approval, (d) what the claims submission process will be, (e) what the review process will be for claims denials, (f) what the process will be for reviews of prior approval, and (g) how and when the required actuarial calculations will be done.

The application process itself has been developed to be as streamlined as possible. Submission of a completed application form, a signed release form, and a certified copy of a judgment or court-ordered settlement that finds or deems the plaintiff to have sustained a birth-related neurological injury is all that is required for actual enrollment in the Fund. Prior to coverage being provided, the parent or other person authorized to act on behalf of a qualified plaintiff must provide the Fund with documentation regarding the nature and degree of the plaintiff’s birth related neurological injuries, including diagnoses and impact on the applicant’s activities of daily living and instrumental activities of daily living. In addition, the parent or other authorized person must submit the name, address, and phone number of all providers providing care to the applicant at the time of enrollment for purposes of both claims processing and case management. To the extent that documents prepared for litigation and/or other health related purposes contain the required background information, that such documentation may be submitted to meet these requirements as well, provided that this documentation still accurately describes the applicant’s condition and treatment being provided.

Those expenses that will or can be covered as qualifying health care costs are defined as broadly as defined by the statute. Prior approval is required only for very costly items, items that involve major construction, and/or out of the ordinary expenses. Such prior approval requirements are similar to the prior approval requirements of various Medicaid waiver programs and to commercial insurance prior approval requirements for certain items and/or services.

Reviews of denials of claims and denials of requests for prior approval will provide enrollees with full due process and prompt decisions. Enrollees are entitled to a conference with the Fund Administrator or his or her designee and a hearing before a Department of Health hearing officer. The hearing officer will make a recommendation regarding the issue and the Commissioner or his designee will make the final determination. An expedited review procedure has also been developed for urgent situations.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire June 10, 2012.

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

Regulatory Impact Statement

Statutory Authority:

Section 2999-j(15) of the Public Health Law (PHL) specifically states that the Commissioner of Health, in consultation with the Superintendent of Financial Services (the Superintendent of Insurance until October 3, 2011), “ shall promulgate. . . all rules and regulations necessary for the proper administration of the fund in accordance with the provisions of this section, including, but not limited to those concerning the payment of claims and concerning the actuarial calculations necessary to determine, annually, the total amount to be paid into the fund as otherwise needed to implement this title.”

Legislative Objectives:

The Legislature delegated the details of the Fund’s operation to the two State agencies that have the appropriate expertise to develop, implement and enforce all aspects of the Fund’s operations. Those two agencies are the Department of Health and the Insurance Department (the Insurance Department will merge with into a new agency, the New York State Department of Financial Services, on October 3, 2011). These proposed regulations reflect the collaboration of both agencies in providing the administrative details for the manner in which the Fund will operate.

Department of Health

EMERGENCY RULE MAKING

NYS Medical Indemnity Fund

I.D. No. HLT-13-12-00010-E

Filing No. 221

Filing Date: 2012-03-13

Effective Date: 2012-03-13

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

Action taken: Amendment of Part 69 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2999-j

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

Specific reasons underlying the finding of necessity: These regulations

Needs and Benefits:

The regulations have the goal of establishing a process to provide that persons who have obtained a settlement or a judgment based on having sustained a birth-related neurological injury as the result of medical malpractice will have lifetime medical coverage.

Costs:**Regulated Parties:**

There are no costs imposed on regulated parties by these regulations. Qualified plaintiffs will not incur any costs in connection with applying for enrollment in the Fund or coverage by the Fund.

Costs to the Administering Agencies, the State, and Local Governments:

Costs associated with the Fund will be covered by applicable appropriations. The Department of Health will also seek Federal Financial Participation for the health care costs of qualified plaintiffs that otherwise would be covered by Medicaid. No costs are expected to local governments.

Local Government Mandates:

None.

Paperwork:

The proposed regulations impose no reporting requirements on any regulated parties.

Duplication:

There are no other State or Federal requirements that duplicate, overlap, or conflict with the statute and the proposed regulations. Although some of the services to be provided by the Fund are the same as those available under certain Medicaid waivers, the waivers have limited slots. Coordination of benefits will be one of the responsibilities of the Fund Administrator. Health care services, equipment, medications or other items that are available to qualified plaintiffs through commercial insurance coverage they may have or through other State or Federal programs such as the Early Intervention Program or as part of an Individualized Education Plan will not be covered by the Fund.

Alternatives:

Given the statute's directive, there are no alternatives to promulgating the proposed regulations.

Federal Standards:

There are no minimum Federal standards regarding this subject.

Compliance Schedule:

The Fund must be operational by October 1, 2011.

Regulatory Flexibility Analysis**Effect of Rule:**

For 2009, of the 135 general hospitals in New York State that provided maternity services, only ten had less than two hundred deliveries that year.

Compliance Requirements:

The regulations impose no new reporting or recordkeeping obligations.

Professional Services:

None.

Compliance Costs:

There are no costs imposed by these regulations on regulated businesses or local governments.

Economic and Technological Feasibility:

The proposed regulations should not create any economic or technological issues for any hospitals or other health care providers. Manual billing will be permitted for those providers that do not have electronic billing capacity.

Minimizing Adverse Impact:

There will be no adverse impact on small businesses and local governments.

Small Business and Local Government Participation:

For purposes of the regulation drafting process, input was sought from hospital associations, provider associations and advocacy organizations throughout the State as well as the Consumer Advisory Committee required by the statute.

Rural Area Flexibility Analysis**Types and Estimated Number of Rural Areas:**

The New York State Medical Indemnity Fund being implemented by these regulations will cover future medical expenses for all qualified plaintiffs throughout New York State who have obtained a judgment or a settlement based on a birth-related neurological impairment on or after April 1, 2011.

Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services:

No reporting, recordkeeping, other compliance requirement or professional services other than the submission of claims are required by the regulations.

Costs:

There are no costs to rural areas associated with these regulations.

Minimizing Adverse Impact:

There will be no adverse impact on rural areas as a result of the proposed regulations.

Rural Area Participations:

For purposes of the regulation drafting process, input was sought from hospital associations, provider associations and advocacy organizations throughout the State as well as the Consumer Advisory Committee required by the statute.

Job Impact Statement**Nature of Impact:**

The regulations should have no substantial impact on jobs and employment opportunities.

Categories and Numbers Affected:

None.

Regions of Adverse Impact:

None.

Minimizing Adverse Impact:

None.

Self-Employment Opportunities:

None.

NOTICE OF ADOPTION**Medicaid Benefit Limits for Enteral Formula, Prescription Footwear, and Compression Stockings**

I.D. No. HLT-39-11-00007-A

Filing No. 222

Filing Date: 2012-03-13

Effective Date: 2012-03-28

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

Action taken: Amendment of Parts 505 and 513 of Title 18 NYCRR.

Statutory authority: Public Health Law, sections 201 and 206; and Social Services Law, sections 363-a and 365-a(2)

Subject: Medicaid Benefit Limits for Enteral Formula, Prescription Footwear, and Compression Stockings.

Purpose: To impose benefit limitations on Medicaid coverage of enteral formula, prescription footwear, and compression stockings.

Text or summary was published in the September 28, 2011 issue of the Register, I.D. No. HLT-39-11-00007-P.

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

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

Assessment of Public Comment

Public comment was received from 16 commentators: the Cystic Fibrosis Center at SUNY-Upstate, SAPS Drug Wholesale, Inc., Abbott Nutrition, a manufacturer of enteral nutritional formulas, Alzheimer's Association, Dialysis Patient Citizens, Northeast Kidney Foundation, Dr. Brett Abrams, a dietician, a registered nurse, a social worker, God's Love We Deliver, New York State Dietetic Association, Self Help, and three citizens.

Several commenters objected to coverage of enteral nutritional formulas for adults being limited to tube feeding and to treatment of inborn metabolic disorders. Various commenters urged that Medicaid also cover nutritional supplements for children with chronic kidney disease and for individuals with HIV/AIDS, cancer, diabetes, Alzheimer's disease, autism, or renal disease. One commenter requested coverage of prescription footwear for persons with leg length disparities. No changes were made to the proposed regulation as a result of these comments, since the Department lacks the authority to provide for such coverage by regulation, given the specific limitations imposed by SSL section 365-a(2)(g). However, the Department notes that SSL section 365-a(2)(g) in no way limits the ability of individuals under age 21 to receive early and periodic screening, diagnosis and treatment (EPSDT) services otherwise available pursuant to section 365-a(3).

Other comments expressed the opinion that the enteral formula limitations would harm other patient populations with a legitimate medical need for these nutritional supplements, and place a financial burden on persons who no longer have enteral formula covered by Medicaid. These comments were essentially criticisms of the legislative change to SSL section 365-a(2)(g); they were not comments on specific language in the proposed regulation, nor did they suggest that the proposed regulation failed to conform to the statutory requirements. Therefore, no changes were made to the proposed regulation as a result of these comments.

One commenter posited a diminishment in health status of persons who no longer have enteral formula covered by Medicaid, and estimated an ad-

ditional cost of \$8 million annually from a resulting rise in hospital admissions. The commenter submitted a cost analysis based primarily on assumptions drawn from a 2006 study published in The American Journal of Medicine entitled "A Randomized Double-blind, Placebo-controlled Trial of Nutritional Supplementation During Acute Illness". The study compared the hospital readmission rates of elderly persons who received oral medical nutrition during hospitalization and for the following six months, and those who did not. From the information submitted by the commenter, the Department could not conclude that the cited study established that the proposed regulation would result in increased Medicaid costs, let alone allow statistically reliable cost estimates to be developed. The Department concluded that the commenter's assertion, that unintended consequences of the proposed regulation would result in higher costs to the Medicaid program, is speculative.

One commenter, a community services organization, argued that the limitations on coverage of enteral formula, compression stockings, and prescription footwear violate federal requirements relating to the amount, duration, and scope of services provided under the Medicaid program, and that, at a minimum, the proposed regulation must provide a prior approval mechanism by which these services and supplies would be covered for persons with other medical conditions who established a medical need for them. The Department disagrees with the commenter's interpretation of the federal Medicaid requirements in question, and considers it inconsistent with the flexibility granted states to decide the extent to which they will cover optional Medicaid services. In any event, as indicated above, the Department cannot, by regulation, provide coverage of these services in contravention of the limitations imposed by the State Legislature in SSL section 365-a(2)(g). Therefore, no changes were made to the proposed regulation as a result of this comment.

Office of Mental Health

NOTICE OF ADOPTION

Behavioral Health Organization Implementation

I.D. No. OMH-03-12-00006-A

Filing No. 219

Filing Date: 2012-03-12

Effective Date: 2012-03-28

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

Action taken: Amendment of Parts 580, 582 and 587 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 31.04 and 43.02; Social Services Law, section 365-m

Subject: Behavioral Health Organization Implementation.

Purpose: To inform providers of their responsibilities and requirements associated with Behavioral Health Organization implementation.

Text or summary was published in the January 18, 2012 issue of the Register, I.D. No. OMH-03-12-00006-EP.

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: Joyce.Donohue@omh.ny.gov

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Prior Approval Review (PAR) for Quality and Appropriateness

I.D. No. OMH-13-12-00003-P

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

Proposed Action: This is a consensus rule making to amend Part 551 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, section 31.04

Subject: Prior Approval Review (PAR) for Quality and Appropriateness.

Purpose: To add provisions for electronic submission of PAR applications.

Text of proposed rule: Subdivision (b) of Section 551.8 of Title 14 NYCRR is amended to read as follows:

(b) Applicants proposing projects shall submit [an original and five copies of the complete application, and applicants proposing projects subject to prior approval by the Department of Health under the Public Health Law shall submit an original and six copies of the complete application to the Office of Mental Health, Bureau of Inspection and Certification, 44 Holland Avenue, Albany, NY 12229] *applications in a form and format prescribed by the Office of Mental Health. Such form and format shall include instructions for submission of the application, and shall facilitate submission in either paper or electronic format.*

Text of proposed 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: Joyce.Donohue@omh.ny.gov

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

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

Consensus Rule Making Determination

This rule making is filed as a Consensus rule on the grounds that its purpose is to make technical, non-controversial changes to existing regulations and provide mandate relief; therefore, no person is likely to object.

14 NYCRR Part 551, Prior Approval Review for Quality and Appropriateness, establishes an efficient and timely process for the initial licensure of a program seeking to provide mental health services. When Part 551 was drafted in 2009, the Office of Mental Health (Office) did not specifically include provisions related to the electronic submission of Prior Approval Review (PAR) applications, although it was understood that that capability existed and was an acceptable method of submission. In 2011, 90 percent of all E-Z PAR applications were submitted electronically. For those entities applying for licensure that have computer access, this method of submission may provide for an easier and less-costly transmittal. In recognition of this fact, the Office is seeking to amend Section 551.8(b) of Title 14 NYCRR by including provisions regarding electronic submissions of PAR applications. It is important to note that the Office will continue to accept paper copies of applications from those entities that do not choose to, or do not have the capability to, submit applications electronically.

Statutory Authority: Section 31.04 of the Mental Hygiene Law grants the Commissioner of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction and to establish procedures for the issuance and amendment of operating certificates.

Job Impact Statement

A job impact statement is not being submitted with this notice because it is evident from the subject matter of the rule making that there will be no impact on jobs and employment opportunities. The consensus rule provides mandate relief by including provisions for the submittal of electronic copies of Prior Approval Review application in lieu of paper copies, unless otherwise specified by the Office of Mental Health.

Department of Motor Vehicles

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Light Vehicle Diesel Inspections

I.D. No. MTV-13-12-00004-P

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

Proposed Action: Amendment of Part 79 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 301(a), (f), 302(a), (e), 304(b) and 304-a

Subject: Light vehicle diesel inspections.

Purpose: Require OBD II inspections on 1997 model year or newer light duty diesel passenger cars and trucks or light duty diesel vehicles.

Substance of proposed rule (Full text is posted at the following State website: www.dmv.ny.gov): The proposed amendments to Part 79 will require the OBD II inspections of model year 1997 or newer light-duty diesel passenger cars and trucks, or light-duty diesel vehicles (LDDVs).

Conforming amendments are made in relation to procedures related to the OBD II inspection for light duty diesel vehicles.

Technical clean-up amendments are made in reference to forms required by DMV. Obsolete references to the expired NYTEST program are deleted.

Text of proposed rule and any required statements and analyses may be obtained from: Heidi Bazicki, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 526, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.ny.gov

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

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

Regulatory Impact Statement

1. Statutory authority: Section 301(a) of the Vehicle and Traffic Law (VTL) provides that the Commissioner of the Department of Motor Vehicles (hereinafter "the Commissioner") shall require every motor vehicle registered in this state to have an emissions inspection. Section 301(d)(1) of the VTL authorizes the Commissioner, in consultation with the Commissioner of the Department of Environmental Conservation, to implement a motor vehicle emissions inspection program. Section 301(f) of the VTL authorizes the Commissioner to promulgate regulations to implement a heavy duty vehicle inspection. Section 302(a) of the VTL provides that it shall be the duty of the Commissioner to administer the provisions of Article 5 of the Vehicle and Traffic Law which provides for the periodic inspection of all motor vehicles. Section 302(e) of the VTL empowers the Commissioner to make reasonable rules and regulations for the administration and enforcement of Article 5 and the periods during which motor vehicles are required to be inspected. Section 304(b) of the VTL authorizes the Commissioner to establish procedures for the reporting of inspections. Section 304-a of the VTL authorizes the Commissioner to regulate certified inspectors.

2. Legislative objectives: Under Article 19 of the Environmental Conservation Law, the Department of Environmental Conservation (DEC) is expressly authorized to promulgate regulations limiting exhaust emissions from motor vehicles. Consistent with this legislative objective of controlling and reducing air pollution, Article 5 of the Vehicle and Traffic Law authorizes the Commissioner of Motor Vehicles to require inspection stations to conduct emissions inspections of certain motor vehicles. This proposal, which requires the OBD II inspections of model year 1997 or newer light-duty diesel passenger cars and trucks, or light-duty diesel vehicles (LDDVs), will contribute to the State's commitment to abate air pollution from vehicle's exhaust systems. This aligns with the legislative objective of reducing air pollution from mobile sources.

3. Needs and benefits: The proposed amendments to Part 79 will require the OBD II inspections of model year 1997 or newer light-duty diesel passenger cars and trucks, or light-duty diesel vehicles (LDDVs). This proposal will contribute to the State's commitment to abate air pollution from vehicle's exhaust systems.

Currently, LDDVs are exempt from the mandatory OBD II emissions inspection. However, in December of 2010, DEC adopted a rule that would require such inspections of 1997 or newer LDDVs on January 1, 2012. This proposed regulation is necessary to align DMV's and DEC's regulations.

The proposed LDDV OBD II inspections would provide a statewide emissions reduction benefit, as these vehicles are currently exempt by 15 NYCRR Part 79 and 6 NYCRR Part 217 from emissions testing. Inclusion of these vehicles will result in increased emphasis on maintenance and repair of vehicles with illuminated malfunction indicator lights (MILs). The Department estimates an initial statewide emission reduction of as much as 63.25 tons per year (combined VOC and NOx) by adopting LDDV OBD II testing. This estimate was based on 9,469 initial LDDV OBD II inspections in 2012, an estimated 12 percent failure rate, and a proration of the modeled Mobile 6 reductions for OBD II inspected gasoline-powered light-duty vehicles.

The Department believes that LDDVs should be subject to the same inspection requirements as gasoline-powered light-duty vehicles, as LDDVs are not exempted by federal statute or regulation from emissions testing. Presently, the states of California, Connecticut, Missouri, New Hampshire, Oregon, Vermont, and the Commonwealth of Massachusetts have mandatory LDDV OBD II inspections.

LDDVs are projected to become a larger percentage of the nation's light-duty fleet in the future. The Energy Information Administration estimates that LDDVs could represent 10 percent of all light-duty sales by 2030.

The rule also makes minor clarifying amendments to Part 79 that are not substantive in nature.

4. Costs: a. To regulated parties: There are no anticipated increased costs to official emissions inspection stations, including official fleet inspection stations with OBD II emissions inspection testing equipment, operated by local governments. The OBD II emissions inspection testing

of subject light-duty diesel-powered vehicles will be conducted with the existing NYVIP computerized vehicle inspection systems currently in use at official emissions inspection stations.

b. Source: DMV's Office of Vehicle Safety, which obtained its information from DMV's Office of Clean Air.

c. Cost to vehicle registrants: The Department of Environmental Conservation has estimated that approximately 9,500 light-duty diesel-powered vehicles will be subject to OBD II emissions inspection testing during calendar year 2012. An inspection station located within the New York Metropolitan Area (NYMA) may charge a fee up to \$37.00 for a combined safety and OBD II emissions inspection (the maximum fee for the safety inspection is \$10.00 and the maximum fee for the OBD II emissions inspection is \$27.00). An inspection station located outside of the NYMA may charge a fee up to \$21.00 for a combined safety and OBD II emissions inspection (the maximum fee for the safety inspection is \$10.00 and the maximum fee for the OBD II emissions inspection is \$11.00).

The Department of Environmental Conservation estimates that the failure rate for light-duty diesel-powered vehicles will range between 11 and 14 percent. Assuming 9,500 light-duty diesel-powered vehicles are inspected during calendar year 2012, and a 12 percent failure rate, it is estimated that 1,140 vehicles would fail the OBD II emissions inspection the first year. Motorists who present light-duty diesel-powered vehicles for inspection and subsequently fail the emissions inspection will be required to repair these vehicles and may be required to pay the maximum fee for the emissions re-inspection (\$27.00 if performed in a NYMA inspection station, and \$11.00 if performed in an upstate inspection station).

The average repair cost for a vehicle that has failed an OBD II emissions inspection test was cited at \$370.00 in the "High Mileage Study" conducted by the United States Environmental Protection Agency (USEPA). This USEPA estimate is consistent with average OBD II related repair costs referenced within state inspection and maintenance program evaluation reports.

5. Local government mandates: Local governments that own and operate vehicles are subject to the same motor vehicle inspection requirements as privately owned vehicles. Local governments are required to pay inspection fees (if they go to a public station) and repair their vehicles, if necessary. Local governments that operate their own fleet inspection stations equipped with OBD II emissions inspection testing equipment will incur no additional costs as the fees are waived. There are 15 vehicles owned by local governments that will now be required to get the OBDII emissions test. These vehicles are divided among 11 local governments. 5 of these governments have their own inspection station and will incur no additional costs. The remaining 6 do not have inspection equipment. However, all 6 are in counties where there is another government-operated inspection facility and therefore, as allowed by NYCRR 79.15(c), have access to a no-fee inspection.

6. Paperwork: This proposal does not impose any new paperwork requirements.

7. Duplication: This proposed regulation does not duplicate or conflict with any State or Federal rule.

8. Alternatives: The Department canvassed the industry about the proposed regulation. A draft regulation was sent to the Eastern New York Coalition of Automotive Retailers, the Gasoline & Automotive Service Dealers Association Ltd., the Greater New York Automobile Association, the Long Island Gasoline Retailers Association & Allied Trades, Inc., the Niagara Frontier Automobile Dealers Association, Inc., the New York State Automobile Dealers, the Rochester Automobile Dealers Association, the Service Station & Repair Shop Operators of Upstate New York, the Service Station Dealers of Greater New York, the Service Station Operators of Southern New York, the Syracuse Automobile Dealers Association, and the New York State Association of Service Stations and Repair Shops.

The Department only received one response, that from the New York State Association of Service Stations and Repair Shops, which expressed support for the rule.

The Department did not consider a "no action alternative".

9. Federal standards: This proposal does not duplicate a federal rule.

10. Compliance schedule: Compliance will be effective upon adoption in the State Register.

Regulatory Flexibility Analysis

1. Effect of rule: There are currently 10,194 inspection stations that are licensed to perform OBD II emissions inspections and that are equipped with the NYVIP computerized vehicle inspection system equipment. Local governments operate about 313 of these stations.

2. Compliance requirements: Inspection stations would be required to perform the OBD II inspections of model year 1997 or newer light-duty diesel passenger cars and trucks, or light-duty diesel vehicles (LDDVs).

3. Professional services: This regulation would not require inspection stations to obtain new professional services beyond any that they may already use.

4. Compliance costs: Inspection stations would incur no compliance costs: Local governments that own and operate vehicles are subject to the same motor vehicle inspection requirements as privately owned vehicles. Local governments are required to pay inspection fees (if they go to a public station) and repair their vehicles, if necessary. Local governments that operate their own fleet inspection stations equipped with OBD II emissions inspection testing equipment will incur no additional costs as the fees are waived. There are 15 vehicles owned by local governments that will now be required to get the OBDII emissions test. These vehicles are divided among 11 local governments. Five of these governments have their own inspection station and will incur no additional costs. The remaining 6 do not have inspection equipment. However, all 6 are in counties where there is another government-operated inspection facility and therefore, as allowed by NYCRR 79.15(c), have access to a no-fee inspection.

5. Economic and technological feasibility: This proposal will not impose any new technological requirements for inspection stations.

6. Minimizing adverse impact: The Department, as explained below, consulted with a broad spectrum of associations about this proposal.

7. Small business and local government participation: The Department canvassed the industry about the proposed regulation. A draft regulation was sent to the Eastern New York Coalition of Automotive Retailers, the Gasoline & Automotive Service Dealers Association Ltd., the Greater New York Automobile Association, the Long Island Gasoline Retailers Association & Allied Trades, Inc., the Niagara Frontier Automobile Dealers Association, Inc., the New York State Automobile Dealers, the Rochester Automobile Dealers Association, the Service Station & Repair Shop Operators of Upstate New York, the Service Station Dealers of Greater New York, the Service Station Operators of Southern New York, the Syracuse Automobile Dealers Association, and the New York State Association of Service Stations and Repair Shops.

The Department only received one response, that from the New York State Association of Service Stations and Repair Shops, which expressed support for the rule.

Rural Area Flexibility Analysis

A RAFA is not attached because this rule will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

A Job Impact Statement is not submitted with this rule because it will not have an adverse impact on job creation or development.

Niagara Falls Water Board

NOTICE OF ADOPTION

Adoption of a Schedule of Rates, Fees a Charges

I.D. No. NFW-01-12-00005-A

Filing No. 214

Filing Date: 2012-03-08

Effective Date: 2012-03-08

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

Action taken: Amendment of sections 1950.15 and 1950.20 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, section 1230-j

Subject: Adoption of a schedule of Rates, Fees and Charges.

Purpose: To pay for the increase costs necessary to operate, maintain and manage the system, and to achieve covenants with bondholders.

Text or summary was published in the January 4, 2012 issue of the Register, I.D. No. NFW-01-12-00005-EP.

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

Revised rule making(s) were previously published in the State Register on January 4, 2012.

Text of rule and any required statements and analyses may be obtained from: John J. Ottaviano, Legal Counsel, Niagara Falls Water Board, 172 East Avenue, Lockport, New York 14094, (716) 438-0488, email: ottaviano@ruppbaase.com

Revised Regulatory Impact Statement

A revised regulatory impact statement is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Revised Regulatory Flexibility Analysis

A revised regulatory flexibility analysis is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Revised Rural Area Flexibility Analysis

A revised rural area flexibility analysis is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Revised Job Impact Statement

A revised job impact statement is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Public Service Commission

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Major Electric Rate Filing

I.D. No. PSC-13-12-00006-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 the Inc. Village of Rockville Centre to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service—P.S.C. No. 3—Electricity.

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

Subject: Major electric rate filing.

Purpose: To consider a proposal to increase annual electric revenues.

Public hearing(s) will be held at: 11:00 a.m., May 8 and 9, 2012* at Department of Public Service, Three Empire State Plaza, 3rd Fl. Hearing Rm., Albany, NY.

*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 11-E-0590.

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 the Inc. Village of Rockville Centre (Rockville) to increase its annual electric operating revenues by approximately \$3.5 million or 16.9%. The statutory suspension period for the proposed filing runs through September 29, 2012. The Commission may adopt in whole or in part or reject terms set forth in Rockville's proposal.

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.ny.gov

Data, views or arguments may be submitted to: Jaelyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.ny.gov

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-0590SP1)

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

Authorization to Transfer Certain Real Property

I.D. No. PSC-13-12-00005-P

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

Proposed Action: The Public Service Commission is considering whether to authorize the transfer of certain real property in Saugerties, New York owned by Central Hudson Gas & Electric Corporation to M&B Land Trust.

Statutory authority: Public Service Law, section 70

Subject: Authorization to transfer certain real property.

Purpose: To decide whether to approve the transfer of certain real property.

Substance of proposed rule: By petition dated February 8, 2012, Central Hudson Gas and Electric Corporation (Central Hudson) seeks approval to transfer property located in the Town of Saugerties, Ulster County to M&B Land Trust. The Commission is considering whether to approve, reject, or modify, in whole or in part, the petition, as well as related matters.

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

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.ny.gov

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.

(12-M-0085SP1)

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

Temporary State Assessment

I.D. No. PSC-13-12-00007-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 proposed tariff filing by Pennsylvania Electric Company to make revisions to electric tariff schedule, P.S.C. No. 6—Electricity.

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

Subject: Temporary State Assessment.

Purpose: To implement a surcharge to recover the Temporary State Energy and Utility Service Conservation Assessment.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Pennsylvania Electric Company to implement Rider D - Temporary State Assessment Surcharge Rider to recover the Temporary State Energy and Utility Service Conservation Assessment pursuant to Commission Order issued June 19, 2009 in Case 09-M-0311. The Commission may apply aspects of its decision here to the requirements for tariffs of other utilities.

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.ny.gov

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.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(09-M-0311SP3)

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

Use of Monies Realized from the Dissolution of the Rural Telephone Bank

I.D. No. PSC-13-12-00008-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 request by The Middleburgh Telephone Company to reimburse its treasury from monies it realized as a result of the dissolution of the Rural Telephone Bank for construction costs of upgrading and expanding Broadband services.

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

Subject: Use of monies realized from the dissolution of the Rural Telephone Bank.

Purpose: To allow The Middleburgh Telephone Company to reimburse its treasury.

Substance of proposed rule: The Middleburgh Telephone Company (the company) is requesting permission to reimburse its treasury \$200,000 from the intrastate portion (\$200,000 total company) of monies it realized as a result of the dissolution of the Rural Telephone Bank (RTB) to continue to upgrade and expand their Central Office Equipment for the purposes of Broadband deployment. The RTB dissolution proceeds were deferred in New York State Public Service Commission Case 06-C-0314. The company's intrastate RTB deferral balance as of December 31, 2011 was \$200,000. In order to keep up with its customers' increasing demand for Internet bandwidth the company would like to continue to upgrade and expand their Central Office equipment on their Bandwidth Expansion construction project including additional broadband loop carrier and the expansion of their fiber to the home (FTTH) build-out. The Commission is considering whether to grant, deny or modify, in whole or in part, approval of the company's request. The commission may apply its decision here to other utilities.

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.ny.gov

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.ny.gov

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.

(12-C-0102SP1)

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

Approval of NYSEG's Leasing of Space at its Kirkwood Building to Two Non-Utility Firms

I.D. No. PSC-13-12-00009-P

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

Proposed Action: The Commission is considering a petition from New York State Electric & Gas Corporation (NYSEG) requesting the approval of the leasing of space at its Kirkwood building to two non-utility firms.

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

Subject: Approval of NYSEG's leasing of space at its Kirkwood building to two non-utility firms.

Purpose: Consideration of approval of NYSEG's leasing of space at its Kirkwood building to two non-utility firms.

Substance of proposed rule: The Public Service Commission is considering a petition filed on March 8, 2012 by New York State Electric & Gas

Corporation (NYSEG) requesting the approval of the leasing of space at its Kirkwood building, located at 18 Link Drive, Binghamton, New York, to two non-utility firms, Coughlin & Gerhart, LLP/COIF Realty (a law and realty firm) and O'Brien & Gere (an architectural and engineering firm). 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.ny.gov

Data, views or arguments may be submitted to: Jaelyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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.

(12-M-0086SP1)

Workers' Compensation Board

EMERGENCY RULE MAKING

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

I.D. No. WCB-13-12-00002-E

Filing No. 216

Filing Date: 2012-03-12

Effective Date: 2012-03-12

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

Action taken: Addition of Parts 440 and 442 to Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117, 13 and 13-o

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

Specific reasons underlying the finding of necessity: This rule provides pharmacy and durable medical equipment fee schedules, the process for payment of pharmacy bills, and rules for the use of a designated pharmacy or pharmacies. Many times claimants must pay for prescription drugs and medicines themselves. It is unduly burdensome for claimants to pay out-of-pocket for prescription medications as it reduces the amount of benefits available to them to pay for necessities such as food and shelter. Claimants also have to pay out-of-pocket many times for durable medical equipment. Adoption of this rule on an emergency basis, thereby setting pharmacy and durable medical equipment fee schedules will help to alleviate this burden to claimants, effectively maximizing the benefits available to them. Benefits will be maximized as the claimant will only have to pay the fee schedule amount and there reimbursement from the carrier will not be delayed. Further, by setting these fee schedules, pharmacies and other suppliers of durable medical equipment will be more inclined to dispense the prescription drugs or equipment without requiring claimants to pay up front, rather they will bill the carrier. Adoption of this rule further advances pharmacies directly billing by setting forth the requirements for the carrier to designate a pharmacy or network of pharmacies. Once a carrier makes such a designation, when a claimant uses a designated pharmacy he cannot be asked to pay out-of-pocket for causally related prescription medicines. This rule sets forth the payment process for pharmacy bills which along with the set price should eliminate disputes over payment and provide for faster payment to pharmacies. Finally, this rule allows claimants to fill prescriptions by the internet or mail order thus aiding claimants with mobility problems and reducing transportation costs necessary to drive to a pharmacy to fill prescriptions. Accordingly, emergency adoption of this rule is necessary.

Subject: Pharmacy and durable medical equipment fee schedules and requirements for designated pharmacies.

Purpose: To adopt pharmacy and durable medical equipment fee schedules, payment process and requirements for use of designated pharmacies.

Substance of emergency rule: Chapter 6 of the Laws of 2007 added Section 13-o to the Workers' Compensation Law ("WCL") mandating the Chair to adopt a pharmaceutical fee schedule. WCL Section 13(a) mandates that the Chair shall establish a schedule for charges and fees for medical care and treatment. Part of the treatment listed under Section 13(a) includes medical supplies and devices that are classified as durable medical equipment. The proposed rule adopts a pharmaceutical fee schedule and durable medical equipment fee schedule to comply with the mandates. This rule adds a new Part 440 which sets forth the pharmacy fee schedule and procedures and rules for utilization of the pharmacy fee schedule and a new Part 442 which sets forth the durable medical equipment fee schedule.

Section 440.1 sets forth that the pharmacy fee schedule is applicable to prescription drugs or medicines dispensed on or after the most recent effective date of § 440.5 and the reimbursement for drugs dispensed before that is the fee schedule in place on the date dispensed.

Section 440.2 provides the definitions for average wholesale price, brand name drugs, controlled substances, generic drugs, independent pharmacy, pharmacy chain, remote pharmacy, rural area and third party payor.

Section 440.3 provides that a carrier or self-insured employer may designate a pharmacy or pharmacy network which an injured worker must use to fill prescriptions for work related injuries. This section sets forth the requirements applicable to pharmacies that are designated as part of a pharmacy network at which an injured worker must fill prescriptions. This section also sets forth the procedures applicable in circumstances under which an injured worker is not required to use a designated pharmacy or pharmacy network.

Section 440.4 sets forth the requirements for notification to the injured worker that the carrier or self-insured employer has designated a pharmacy or pharmacy network that the injured worker must use to fill prescriptions. This section provides the information that must be provided in the notice to the injured worker including time frames for notice and method of delivery as well as notifications of changes in a pharmacy network.

Section 440.5 sets forth the fee schedule for prescription drugs. The fee schedule in uncontroverted cases is average wholesale price minus twelve percent for brand name drugs and average wholesale price minus twenty percent for generic drugs plus a dispensing fee of five dollars for generic drugs and four dollars for brand name drugs, and in controverted cases is twenty-five percent above the fee schedule for uncontroverted claims plus a dispensing fee of seven dollars and fifty cents for generic drugs and six dollars for brand-name drugs. This section also addresses the fee when a drug is repackaged.

Section 440.6 provides that generic drugs shall be prescribed except as otherwise permitted by law.

Section 440.7 sets forth a transition period for injured workers to transfer prescriptions to a designated pharmacy or pharmacy network. Prescriptions for controlled substances must be transferred when all refills for the prescription are exhausted or after ninety days following notification of a designated pharmacy. Non-controlled substances must be transferred to a designated pharmacy when all refills are exhausted or after 60 days following notification.

Section 440.8 sets forth the procedure for payment of prescription bills or reimbursement. A carrier or self-insured employer is required to pay any undisputed bill or portion of a bill and notify the injured worker by certified mail within 45 days of receipt of the bill of the reasons why the bill or portion of the bill is not being paid, or request documentation to determine the self-insured employer's or carrier's liability for the bill. If objection to a bill or portion of a bill is not received within 45 days, then the self-insured employer or carrier is deemed to have waived any objection to payment of the bill and must pay the bill. This section also provides that a pharmacy shall not charge an injured worker or third party more than the pharmacy fee schedule when the injured worker pays for prescriptions out-of-pocket, and the worker or third party shall be reimbursed at that rate.

Section 440.9 provides that if an injured worker's primary language is other than English, that notices required under this part must be in the injured worker's primary language.

Section 440.10 provides penalties for failing to comply with this Part and that the Chair will enforce the rule by exercising his authority pursuant to Workers' Compensation Law § 111 to request documents.

Part 442 sets forth the fee schedule for durable medical equipment.

Section 442.1 sets for that the fee schedule is applicable to durable medical goods and medical and surgical supplies dispensed on or after July 11, 2007.

Section 442.2 sets forth the fee schedule for durable medical equipment as indexed to the New York State Medicaid fee schedule, except the payment for bone growth stimulators shall be made in one payment. This sec-

tion also provides for the rate of reimbursement when Medicaid has not established a fee payable for a specific item and for orthopedic footwear. This section also provides for adjustments to the fee schedule by the Chair as deemed appropriate in circumstances where the reimbursement amount is grossly inadequate to meet a pharmacies or providers costs and clarifies that hearing aids are not durable medical equipment for purposes of this rule.

Appendix A provides the form for notifying injured workers that the claim has been contested and that the carrier is not required to reimburse for medications while the claim is being contested.

Appendix B provides the form for notification of injured workers that the self-insured employer or carrier has designated a pharmacy that must be used to fill prescriptions.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires June 9, 2012.

Text of rule and any required statements and analyses may be obtained from: Heather MacMaster, Esq., New York State Workers' Compensation Board, 20 Park Street, Office of General Counsel, Albany, New York 12207, (518) 486-9564, email: regulations@wcb.ny.gov

Summary of Regulatory Impact Statement

Section 1 provides the statutory authority for the Chair to adopt a pharmacy fee schedule pursuant to Workers' Compensation Law Section (WCL) 13-o as added to the WCL by Chapter 6 of the Laws of 2007 which requires the Chair to adopt a pharmaceutical fee schedule. Chapter 6 also amended WCL Section 13(a) to mandate that the Chair establish a schedule for charges and fees for medical care and treatment. Such medical care and treatment includes supplies and devices that are classified as durable medical equipment (hereinafter referred to as DME).

Section 2 sets forth the legislative objectives of the proposed regulations which provide the fee schedules to govern the cost of prescription medicines and DME. This section provides a summary of the overall purpose of the proposed regulation to reduce costs of workers' compensation and the scope of the regulation with regard to process and guidance to implement the rule.

Section 3 explains the needs and benefits of the proposed regulation. This section provides the explanation of the requirement of the Chair to adopt a pharmacy fee schedule as mandated by Chapter 6 of the Laws of 2007. The legislation authorizes carriers and self-insured employers to voluntarily decide to designate a pharmacy or pharmacy network and require claimants to obtain their prescription medicines from the designated pharmacy or network. This section explains how prescriptions were filled prior to the enactment of the legislation and the mechanisms by which prescriptions were reimbursed by carriers and self-insured employers. This section also provides the basis for savings under the proposed regulation. The cost savings realized by using the pharmacy fee schedule will be approximately 12 percent for brand name drugs and 20 percent for generic drugs from the average wholesale price. This section explains the issues with using the Medicaid fee schedule. The substantive requirements are set forth that carriers must follow to notify a claimant of a designated pharmacy or network. This includes the information that must be included in the notification as well as the time frames within which notice must be provided. This section also describes how carriers and self-insured employers will benefit from a set reimbursement fee as provided by the proposed regulation. This section provides a description of the benefits to the Board by explaining how the proposed regulation will reduce the number of hearings previously necessary to determine proper reimbursement of prescription medications by using a set fee schedule.

Section 4 provides an explanation of the costs associated with the proposed regulation. It describes how carriers are liable for the cost of medication if they do not respond to a bill within 45 days as required by statute. This section describes how carriers and self-insured employers which decide to require the use of a designated network will incur costs for sending the required notices, but also describes how the costs can be offset to a certain degree by sending the notices listed in the Appendices to the regulation with other forms. Pharmacies will have costs associated with the proposed regulation due to a lower reimbursement amount, but the costs are offset by the reduction of administrative costs associated with seeking reimbursement from carriers and self-insured employers. Pharmacies will be required to post notice that they are included in a designated network and a listing of carriers that utilize the pharmacy in the network. This section describes how the rule benefits carriers and self-insured employers by allowing them to contract with a pharmacy or network to provide drugs thus allowing them to negotiate for the lowest cost of drugs.

Section 5 describes how the rule will affect local governments. Since a municipality of governmental agency is required to comply with the rules for prescription drug reimbursement the savings afforded to carriers and self-insured employers will be substantially the same for local governments. If a local government decides to mandate the use of a

designated network it will incur some costs from providing the required notice.

Section 6 describes the paperwork requirements that must be met by carriers, employers and pharmacies. Carriers will be required to provide notice to employers of a designated pharmacy or network, and employers in turn will provide such notice to employees so that employees will know to use a designated pharmacy or network for prescription drugs. Pharmacies will be required to post notice that they are part of a designated network and a listing of carriers that utilize the pharmacy within the network. This section also specifies the requirement of a carrier or self-insured employer to respond to a bill within 45 days of receipt. If a response is not given within the time frame, the carrier or self-insured employer is deemed to have waived any objection and must pay the bill. This section sets forth the requirement of carriers to certify to the Board that designated pharmacies within a network meet compliance requirements for inclusion in the network. This section sets forth that employers must post notification of a designated pharmacy or network in the workplace and the procedures for utilizing the designated pharmacy or network. This section also sets forth how the Chair will enforce compliance with the rule by seeking documents pursuant to his authority under WCL § 111 and impose penalties for non-compliance.

Section 7 states that there is no duplication of rules or regulations.

Section 8 describes the alternatives explored by the Board in creating the proposed regulation. This section lists the entities contacted in regard to soliciting comments on the regulation and the entities that were included in the development process. The Board studied fee schedules from other states and the applicability of reimbursement rates to New York State. Alternatives included the Medicaid fee schedule, average wholesale price minus 15% for brand and generic drugs, the Medicare fee schedule and straight average wholesale price.

Section 9 states that there are no applicable Federal Standards to the proposed regulation.

Section 10 provides the compliance schedule for the proposed regulation. It states that compliance is mandatory and that the proposed regulation takes effect upon adoption.

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. As part of the overall rule, these self-insured local governments will be required to file objections to prescription drug bills if they object to any such bills. This process is required by WCL § 13(j)(1) - (2). This rule affects members of self-insured trusts, some of which are small businesses. Typically a self-insured trust utilizes a third party administrator or group administrator to process workers' compensation claims. A third party administrator or group administrator is an entity which must comply with the new rule. These entities will be subject to the new rule in the same manner as any other carrier or employer subject to the rule. Under the rule, objections to a prescription bill must be filed within 45 days of the date of receipt of the bill or the objection is deemed waived and the carrier, third party administrator, or self-insured employer is responsible for payment of the bill. Additionally, affected entities must provide notification to the claimant if they choose to designate a pharmacy network, as well as the procedures necessary to fill prescriptions at the network pharmacy. If a network pharmacy is designated, a certification must be filed with the Board on an annual basis to certify that the all pharmacies in a network comply with the new rule. The new rule will provide savings to small businesses and local governments by reducing the cost of prescription drugs by utilization of a pharmacy fee schedule instead of retail pricing. Litigation costs associated with reimbursement rates for prescription drugs will be substantially reduced or eliminated because the rule sets the price for reimbursement. Additional savings will be realized by utilization of a network pharmacy and a negotiated fee schedule for network prices for prescription drugs.

2. Compliance requirements:

Self-insured municipal employers and self-insured non-municipal employers are required by statute to file objections to prescription drug bills within a forty five day time period if they object to bills; otherwise they will be liable to pay the bills if the objection is not timely filed. If the carrier or self-insured employer decides to require the use of a pharmacy network, notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Certification by carriers and self-insured employers must be filed on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule. Failure to comply with the provisions of the rule will result in requests for information pursuant to the Chair's existing statutory authority and the imposition of penalties.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will impose minimal compliance costs on small business or local governments which will be more than offset by the savings afforded by the fee schedule. There are filing and notification requirements that must be met by small business and local governments as well as any other entity that chooses to utilize a pharmacy network. Notices are required to be posted in the workplace informing workers of a designated network pharmacy. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule.

5. Economic and technological feasibility:

There are no additional implementation or technology costs to comply with this rule. The small businesses and local governments are already familiar with average wholesale price and regularly used that information prior to the adoption of the Medicaid fee schedule. Further, some of the reimbursement levels on the Medicaid fee schedule were determined by using the Medicaid discounts off of the average wholesale price. The Red Book is the source for average whole sale prices and it can be obtained for less than \$100.00. Since the Board stores its claim files electronically, it has provided access to case files through its eCase program to parties of interest in workers' compensation claims. Most insurance carriers, self-insured employers and third party administrators have computers and internet access in order to take advantage of the ability to review claim files from their offices.

6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts to all insurance carriers, employers, self-insured employers and claimants. The rule provides a process for reimbursement of prescription drugs as mandated by WCL section 13(i). Further, the notice requirements are to ensure a claimant uses a network pharmacy to maximize savings for the employer as any savings for the carrier can be passed on to the employer. The costs for compliance are minimal and are offset by the savings from the fee schedule. The rule sets the fee schedule as average wholesale price (AWP) minus twelve percent for brand name drugs and AWP minus twenty percent for generic drugs. As of July 1, 2008, the reimbursement for brand name drugs on the Medicaid Fee Schedule was reduced from AWP minus fourteen percent to AWP minus sixteen and a quarter percent. Even before the reduction in reimbursement some pharmacies, especially small ones, were refusing to fill brand name prescriptions because the reimbursement did not cover the cost to the pharmacy to purchase the medication. In addition the Medicaid fee schedule did not cover all drugs, include a number that are commonly prescribed for workers' compensation claims. This presented a problem because WCL § 13-o provides that only drugs on the fee schedule can be reimbursed unless approved by the Chair. The fee schedule adopted by this regulation eliminates this problem. Finally, some pharmacy benefit managers were no longer doing business in New York because the reimbursement level was so low they could not cover costs. Pharmacy benefit managers help to create networks, assist claimants in obtaining first fills without out of pocket costs and provide utilization review. Amending the fee schedule will ensure pharmacy benefit managers can stay in New York and help to ensure access for claimants without out of pocket cost.

7. Small business and local government participation:

The Assembly and Senate as well as the Business Council of New York State and the AFL-CIO provided input on the proposed rule.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all carriers, employers, self-insured employers, third party administrators and pharmacies in rural areas. This includes all municipalities in rural areas.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file objections to prescription drug bills within a forty five day time period or will be liable for payment of a bill. If regulated parties fail to comply with the provisions of Part 440 penalties will be imposed and the Chair will request documentation from them to enforce the provision regarding the pharmacy fee schedule. The new requirement is solely to expedite processing of prescription drug bills or durable medical bills under the existing obligation under Section 13 of the WCL. Notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Carriers and self-insured employers must file a certification on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule.

3. Costs:

This proposal will impose minimal compliance costs on carriers and employers across the State, including rural areas, which will be more than offset by the savings afforded by the fee schedule. There are filing and notification requirements that must be met by all entities subject to this rule. Notices are required to be posted and distributed in the workplace

informing workers of a designated network pharmacy and objections to prescription drug bills must be filed within 45 days or the objection to the bill is deemed waived and must be paid without regard to liability for the bill. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule. The rule provides a reimbursement standard for an existing administrative process.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government from imposition of new fee schedules and payment procedures. This rule provides a benefit to small businesses and local governments by providing a uniform pricing standard, thereby providing cost savings reducing disputes involving the proper amount of reimbursement or payment for prescription drugs or durable medical equipment. The rule mitigates the negative impact from the reduction in the Medicaid fee schedule effective July 1, 2008, by setting the fee schedule at Average Wholesale Price (AWP) minus twelve percent for brand name prescription drugs and AWP minus twenty percent for generic prescription drugs. In addition, the Medicaid fee schedule did not cover many drugs that are commonly prescribed for workers' compensation claimants. This fee schedule covers all drugs and addresses the potential issue of repackagers who might try to increase reimbursements.

5. Rural area participation:

Comments were received from the Assembly and the Senate, as well as the Business Council of New York State and the AFL-CIO regarding the impact on rural areas.

Job Impact Statement

The proposed amendment will not have an adverse impact on jobs. This amendment is intended to provide a standard for reimbursement of pharmacy and durable medical equipment bills.