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.

Department of Agriculture and Markets

EMERGENCY RULE MAKING

Captive Cervids

I.D. No. AAM-19-13-00002-E
Filing No. 413
Filing Date: 2013-04-18
Effective Date: 2013-04-18

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

Action taken: Amendment of section 68.1(g) of Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 18, 72 and 74

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

Specific reasons underlying the finding of necessity: The rule amends section 68.1(g) of 1 NYCRR to prohibit the importation of captive cervids (deer, elk and moose) into New York State from entities within states where CWD has been detected within the past 60 months or from any part of a state which is within 50 miles of a site in another state where CWD has been detected within the past 60 months.

CWD, Chronic Wasting Disease, is a progressive, fatal, degenerative neurological disease of captive and free-ranging deer, elk, and moose (cervids) that was first recognized in 1967 as a clinical wasting syndrome of unknown cause in captive mule deer in Colorado. CWD belongs to the family of diseases known as transmissible spongiform encephalopathies (TSEs). The name derives from the pin-point size holes in brain tissue of infected animals which gives the tissue a sponge-like appearance. TSEs include a number of different diseases affecting animals and humans including bovine spongiform encephalopathy (BSE) in cattle, scrapie in sheep and goats and Creutzfeldt-Jacob disease (CJD) in humans. Although CWD shares certain features with other TSEs, it is a distinct disease affecting only deer, elk and moose. There is no known treatment or vaccine for CWD.

The origin of CWD is unknown. The agent that causes CWD and other TSEs has not been completely characterized. However, the theory supported by most scientists is that TSE diseases are caused by proteins called prions. The exact mechanism of transmission is unclear. However, evidence suggests that as an infectious and communicable disease, CWD is transmitted directly from one animal to another through saliva, feces, and urine containing abnormal prions shed in those body fluids and excretions. The species known to be susceptible to CWD are Rocky Mountain elk (Cervus canadensis), red deer (Cervus elaphus), mule deer (Odocoileus hemionus), black-tailed deer (Odocoileus hemionus), white-tailed deer (Odocoileus virginianus), sika deer (Cervus nippon), and moose (Alces alces).

CWD is a slow and progressive disease. Because the disease has a long incubation period (1 1/2 to 5 years), deer, elk and moose infected with CWD may not manifest any symptoms for a number of years after they become infected. As the disease progresses, deer, elk and moose with CWD show changes in behavior and appearance. These clinical signs may include progressive weight loss, stumbling, tremors, lack of coordination, excessive salivation and drooling, loss of appetite, excessive thirst and urination, listlessness, teeth grinding, abnormal head posture and drooping ears.

The United States Secretary of Agriculture declared CWD to be an emergency that threatens the livestock industry of the United States and authorized the United States Department of Agriculture to establish a CWD eradication program. This prompted the Department in 2004 to adopt regulations which allow for importation of captive cervids from states with confirmed cases of CWD under a health standard and permit system.

Nonetheless, 22 states, including New York, as well as two provinces in Canada have either CWD detections in free ranging deer or have cases of CWD diagnosed in captive deer. Most recently, this past fall, CWD was diagnosed in captive deer in Pennsylvania. Department regulations currently prohibit the importation of CWD susceptible cervids from a CWD infected zone, which is defined as a geographic area, irrespective of state boundaries, in which CWD is present, whether in wild or captive cervids. This rule would amend the definition of CWD infected zone in section 68.1(g) of 1 NYCRR to include (1) any state which has had a diagnosed case of CWD in captive or wild cervids within the past 60 months; (2) any part of a state which is within 50 miles of a site in another state where CWD was diagnosed in a captive or wild cervids within the past 60 months; or (3) any area designated by the Commissioner as having a high risk of CWD contamination.

The regulations are necessary to protect the general welfare. By establishing a five-year look-back for CWD affliction in cervids, the rule would help protect animal health as well as New York's 14 to 21 million dollar captive deer industry and the 750-million dollar wild deer hunting industry.

Based on the facts and circumstances set forth above, the Department has determined that the immediate adoption of this rule is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest.

Subject: Captive cervids.

Purpose: To prevent the further spread of chronic wasting disease in New York State.

Text of emergency rule: Subdivision (g) of section 68.1 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to read as follows:

(g) CWD infected zone means [a defined geographic area, irrespective of state boundaries, in which CWD is present, whether in wild or captive cervids]*:*

(1) any state which has had a diagnosed case of CWD in captive or wild cervids within the past 60 months;

(2) any part of a state which is within 50 miles of a site in another state where CWD has been diagnosed in captive or wild cervids within the past 60 months; or

(3) any area designated by the Commissioner as having a high risk of CWD contamination.

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 July 16, 2013.

Text of rule and any required statements and analyses may be obtained from: David Smith, DVM, Director, Division of Animal Industry, NYS Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-3502, email: david.smith@agriculture.ny.gov

Regulatory Impact Statement

1. Statutory authority:

Section 18(6) of the Agriculture and Markets Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department.

Section 72 of the Law authorizes the Commissioner to adopt and enforce rules and regulations for the control, suppression or eradication of communicable diseases among domestic animals and to prevent the spread of infection and contagion.

Section 72 of the Law also provides that whenever any infectious or communicable disease affecting domestic animals shall exist or have recently existed outside this State, the Commissioner shall take measures to prevent such disease from being brought into the State.

Section 74 of the Law authorizes the Commissioner to adopt rules and regulations relating to the importation of domestic or feral animals into the State.

2. Legislative objectives:

The statutory provisions pursuant to which this rule is proposed are aimed at preventing infectious or communicable diseases affecting domestic animals from being brought into the State to control, suppress and eradicate such diseases and prevent the spread of infection and contagion. The rule would further this legislative goal by prohibiting importation of cervids from states or parts of states where CWD has been detected within the past 60 months, thereby protecting animal health and New York's deer industry.

3. Needs and benefits:

The rule prohibits the movement of cervids (deer, elk and moose) from states or parts of states where CWD has been detected within the past 60 months.

CWD, Chronic Wasting Disease, is a progressive, fatal, degenerative neurological disease of captive and free-ranging deer, elk, and moose (cervids) that was first recognized in 1967 as a clinical wasting syndrome of unknown cause in captive mule deer in Colorado. CWD belongs to the family of diseases known as transmissible spongiform encephalopathies (TSEs). The name derives from the pin-point size holes in brain tissue of infected animals which gives the tissue a sponge-like appearance. TSEs include a number of different diseases affecting animals and humans including bovine spongiform encephalopathy (BSE) in cattle, scrapie in sheep and goats and Creutzfeldt-Jacob disease (CJD) in humans. Although CWD shares certain features with other TSEs, it is a distinct disease affecting only deer, elk and moose. There is no known treatment or vaccine for CWD.

The origin of CWD is unknown. The agent that causes CWD and other TSEs has not been completely characterized. However, the theory supported by most scientists is that TSE diseases are caused by proteins called prions. The exact mechanism of transmission is unclear. However, evidence suggests that as an infectious and communicable disease, CWD is transmitted directly from one animal to another through saliva, feces, and urine containing abnormal prions shed in those body fluids and excretions. The species known to be susceptible to CWD are Rocky Mountain elk (Cervus canadensis), red deer (Cervus elaphus), mule deer (Odocoileus hemionus), black-tailed deer (Odocoileus hemionus), white-tailed deer (Odocoileus virginianus), sika deer (Cervus nippon), and moose (Alces alces).

CWD is a slow and progressive disease. Because the disease has a long incubation period (1 ½ to 5 years), deer, elk and moose infected with CWD may not manifest any symptoms of the disease for a number of years after they become infected. As the disease progresses, deer, elk and moose with CWD show changes in behavior and appearance. These clinical signs may include progressive weight loss, stumbling, tremors, lack of coordination, excessive salivation and drooling, loss of appetite, excessive thirst and urination, listlessness, teeth grinding, abnormal head posture and drooping ears.

The United States Secretary of Agriculture declared CWD to be an emergency that threatens the livestock industry of the United States and authorized the United States Department of Agriculture to establish a CWD eradication program. This prompted the Department in 2004 to adopt regulations which allow for importation of captive cervids from states with confirmed cases of CWD under a health standard and permit system. Nonetheless, 22 states, including New York, as well as two provinces in Canada have either CWD detections in free ranging deer or have cases of CWD diagnosed in captive deer. Most recently, this past fall, CWD was diagnosed in captive deer in Pennsylvania.

Department regulations currently prohibit the importation of CWD susceptible cervids from a CWD infected zone, which is defined as a geographic area, irrespective of state boundaries, in which CWD is present, whether in wild or captive cervids. This rule would amend the definition of CWD infected zone in section 68.1(g) of 1 NYCRR to include (1) any state which has had a diagnosed case of CWD in captive or wild cervids within the past 60 months; (2) any part of a state which is within 50 miles of a site in another state where CWD has been diagnosed in captive or wild cervids within the past 60 months; or (3) any area designated by the Commissioner as having a high risk of CWD contamination. By establishing a five-year look-back for CWD affliction in cervids, the rule would help protect animal health as well as New York's 14 to 21 million dollar captive deer industry and 750-million dollar wild deer hunting industry.

4. Costs:

(a) Costs to regulated parties:

There are approximately 433 entities raising a total of approximately 9,600 captive deer in New York State. Of these entities, approximately 25 purchase deer from out of state. Last year, 38 head of deer were purchased out of state by these entities at a cost of $19,000 to $190,000 ($500 to $5,000 per head). The rule will exclude approximately 50 deer per year from importation, requiring New York entities to purchase deer from entities within New York State, entities within states where CWD has not been detected within the past 60 months or from any part of a state which is within 50 miles of a site in another state where CWD has not been detected within the past 60 months. Sourcing approximately 50 deer from these other locations could increase costs an average of $500 to $2,000 per deer, or $25,000 to $100,000 total. It is anticipated that most of these deer (approximately 40 head) would be purchased in New York State rather than out of state. At $1,000 to $5,000 per deer, New York entities could realize $40,000 to $200,000 in additional income.

(b) Costs to the agency, state and local governments:

There will be no cost to the Department, State or local governments.

(c) Source:

Costs are based upon data from the records of the Department's Division of Animal Industry as well as observations of the deer industry in New York State.

5. Local government mandates:

The proposed amendments would not impose any program, service, duty or other responsibility upon any county, city, town, village, school district, fire district or other special district.

6. Paperwork:

It is anticipated that the rule will not result in any additional paperwork for regulated parties.

7. Duplication:

The rule does not duplicate any State or federal requirements.

8. Alternatives:

Three alternatives were considered.

The first alternative was to leave the current regulatory scheme in place which allows for importation of captive cervids from states with known cases of CWD if the states meet certain health standards and comply with a permitting system under the current regulations. However, this approach was determined to be inadequate given the apparent further spread of CWD in the country. Additionally, deer owners could circumvent New York's current regulation by accessing New York markets through movement of deer through states not subject to the current requirements.

The second alternative was to implement a total ban on importation. Due to the spread of CWD to other states and the threat that this disease poses to the State's captive and wild deer populations, it is clear a total ban on importation of CWD susceptible species would be the best method of preventing another introduction of this disease into New York State. Furthermore, by permitting the disease to be detected and controlled in a more efficient manner, a complete ban on importation would greatly simplify an epidemiologic investigation if a new case of CWD were to occur in New York State at some future date.

The third alternative and the one ultimately implemented in this rule is the prohibition of movement of CWD susceptible species into New York

from states which have had a diagnosed case of CWD in captive or wild cervids in the past 60 months or any part of a state which is within 50 miles of a site in another state where CWD has been diagnosed in the past 60 months. It was determined that absent notice and an opportunity for a regulatory hearing, this alternative was the best one to pursue on an emergency basis. However, since a total ban on imports is likely to be the best method to help prohibit the further introduction of CWD in New York, it is anticipated that the total ban set forth in the second alternative will be pursued as a permanent measure at a later date.

9. Federal standards:

The proposed regulations do not exceed any minimum standards of the federal government.

10. Compliance schedule:

The rule will be effective upon filing with the Department of State.

Regulatory Flexibility Analysis

1. Effect of rule:

There are approximately 433 small businesses raising a total of approximately 9,600 captive cervids (the family that includes deer and elk) in New York State.

The rule will have no impact on local governments.

2. Compliance requirements:

Under the rule, regulated parties are prohibited from importing cervids into New York State from entities within states where CWD has been detected within the past 60 months or from any part of a state which is within 50 miles of a site in another state where CWD has been detected within the past 60 months.

The rule will have no impact on local governments.

3. Professional services:

It is not anticipated that regulated parties will have to secure any professional services in order to comply with this rule.

The rule will have no impact on local governments.

4. Compliance costs:

There are approximately 433 entities raising a total of approximately 9,600 captive deer in New York State. Of these entities, approximately 25 purchase deer from out of state. Last year, 38 head of deer were purchased out of state by these entities at a cost of $19,000 to $190,000 ($500 to $5,000 per head). The rule will exclude approximately 50 deer per year from importation, requiring New York entities to purchase deer from entities within New York State, entities within states where CWD has not been detected within the past 60 months or from any part of a state which is within 50 miles of a site in another state where CWD has not been detected within the past 60 months. Sourcing approximately 50 deer from these other locations could increase costs an average of $500 to $2,000 per deer, or $25,000 to $100,000 total. It is anticipated that most of these deer (approximately 40 head) would be purchased in New York State rather than out of state. At $1,000 to $5,000 per deer, New York entities could realize $40,000 to $200,000 in additional income.

The rule will have no impact on local governments.

5. Economic and technological feasibility:

The economic and technological feasibility of complying with the rule has been assessed. The rule is economically feasible. Although the regulation may result in deer farmers paying higher prices for deer purchased within the State than they would if they were to purchase deer from out of state, the economic consequences of the infection or exposure to CWD of the approximately 9,600 captive cervids already in the State would be far greater. The rule is technologically feasible. The 10 to 15 deer farmers who have purchased deer from outside New York State would still be able to purchase animals within the State as well as from states and parts of states within 50 miles of other states where there have been no CWD detections in the past 60 months.

The rule will have no impact on local governments.

6. Minimizing adverse impact:

In conformance with State Administrative Procedure Act section 202-b(1), the rule was drafted to minimize economic impact and reporting requirements for all regulated parties, including small businesses. While the rule prohibits approximately 10 to 15 entities from purchasing deer from states with CWD detections within the past 60 months or states within 50 miles of other states with CWD detections within the past 60 months, those entities would still be able to purchase animals from deer farmers within New York as well as from states with no CWD detections within parameters set forth in the rule. Market forces may result in higher prices for these purchasers. However, the economic consequences of the infection or exposure to CWD of the approximately 9,600 captive cervids already in the State would be far greater absent the ban set forth in the rule.

The rule will have no impact on local governments.

7. Small business and local government participation:

The Department and the Department of Environmental Conservation (DEC) have reached a tentative agreement that any state which has had a case of CWD in the past five years would be defined as a CWD infected zone within the meaning of Part 68 of 1 NYCRR. However, there has not been any outreach yet regarding this rule with regulated parties, although outreach is planned in the near future.

The rule will have no impact on local governments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The approximately 433 entities raising captive deer in New York State are located throughout the rural areas of New York, as defined by section 481(7) of the Executive Law.

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

Under the rule, regulated parties are prohibited from importing cervids into New York State from entities within states where CWD has been detected within the past 60 months or from any part of a state which is within 50 miles of a site in another state where CWD has been detected within the past 60 months. There are no reporting and record-keeping requirements required under the rule; nor is it anticipated that regulated parties would have to secure any professional services in order to comply with the rule.

3. Costs:

There are approximately 433 entities raising a total of approximately 9,600 captive deer in New York State. Of these entities, approximately 25 purchase deer from out of state. Last year, 38 head of deer were purchased out of state by these entities at a cost of $19,000 to $190,000 ($500 to $5,000 per head). The rule will exclude approximately 50 deer per year from importation, requiring New York entities to purchase deer from entities within New York State, entities within states where CWD has not been detected within the past 60 months or from any part of a state which is within 50 miles of a site in another state where CWD has not been detected within the past 60 months. Sourcing approximately 50 deer from these other locations could increase costs an average of $500 to $2,000 per deer, or $25,000 to $100,000 total. It is anticipated that most of these deer (approximately 40 head) would be purchased in New York State rather than out of state. At $1,000 to $5,000 per deer, New York entities could realize $40,000 to $200,000 in additional income.

4. Minimizing adverse impact:

In conformance with State Administrative Procedure Act section 202-bb(2), the rule was drafted to minimize economic impact and reporting requirements for all regulated parties, including those in rural areas. While the rule prohibits approximately 10 to 15 entities from purchasing deer from states with CWD detections within the past 60 months or states within 50 miles of other states with CWD detections within the past 60 months, those entities would still be able to purchase animals from deer farmers within New York as well as from states with no CWD detections within parameters set forth in the rule. Market forces may result in higher prices for these purchasers. However, the economic consequences of the infection or exposure to CWD of the approximately 9,600 captive cervids already in the State would be far greater absent the ban set forth in the rule.

5. Rural area participation:

The Department and the Department of Environmental Conservation (DEC) have reached a tentative agreement that any state which has had a case of CWD in the past five years would be defined as a CWD infected zone within the meaning of Part 68 of 1 NYCRR. However, there has not been any outreach yet regarding this rule with regulated parties, although outreach is planned in the near future.

The rule will have no impact on local governments.

Job Impact Statement

1. Nature of Impact:

It is not anticipated that there will be an impact on jobs and employment opportunities.

2. Categories and Numbers Affected:

The number of persons employed by the 433 entities engaged in raising captive deer in New York State is unknown.

3. Regions of Adverse Impact:

The 433 entities in New York State engaged in raising captive deer are located throughout the State.

4. Minimizing Adverse Impact:

By helping to protect the approximately 9,600 captive deer currently raised by approximately 433 New York entities from the further introduction of CWD, this rule will help to preserve the jobs of those employed in this agricultural industry.

Assessment of Public Comment

The agency received no public comment since publication of the last assessment of public comment.

Department of Economic Development

EMERGENCY RULE MAKING

Empire Zones Reform

I.D. No. EDV-19-13-00001-E
Filing No. 412
Filing Date: 2013-04-17
Effective Date: 2013-04-17

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

Action taken: Amendment of Parts 10 and 11; renumbering and amendment of Parts 12 through 14 to Parts 13, 15 and 16; and addition of new Parts 12 and 14 to Title 5 NYCRR.

Statutory authority: General Municipal Law, art. 18-B, section 959; L. 2000, ch. 63; L. 2005, ch. 63; L. 2009, ch. 57

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

Specific reasons underlying the finding of necessity: Regulatory action is needed immediately to implement the statutory changes contained in Chapter 57 of the Laws of 2009. The emergency rule also clarifies the administrative procedures of the program, improves efficiency and helps make it more cost-effective and accountable to the State's taxpayers, particularly in light of New York's current fiscal climate. It bears noting that General Municipal Law section 959(a), as amended by Chapter 57 of the Laws of 2009, expressly authorizes the Commissioner of Economic Development to adopt emergency regulations to govern the program.

Subject: Empire Zones reform.

Purpose: Allow department to continue implementing Zones reforms and adopt changes that would enhance program's strategic focus.

Substance of emergency rule: The emergency rule is the result of changes to Article 18-B of the General Municipal Law pursuant to Chapter 63 of the Laws of 2000, Chapter 63 of the Laws of 2005, and Chapter 57 of the Laws of 2009. These laws, which authorize the empire zones program, were changed to make the program more effective and less costly through higher standards for entry into the program and for continued eligibility to remain in the program. Existing regulations fail to address these requirements and the existing regulations contain several outdated references. The emergency rule will correct these items.

The rule contained in 5 NYCRR Parts 10 through 14 (now Parts 10-16 as amended), which governs the empire zones program, is amended as follows:

1. The emergency rule, tracking the requirements of Chapter 63 of the Laws of 2005, requires placement of zone acreage into "distinct and separate contiguous areas."

2. The emergency rule updates several outdated references, including: the name change of the program from Economic Development Zones to Empire Zones, the replacement of Standard Industrial Codes with the North American Industrial Codes, the renaming of census-tract zones as investment zones, the renaming of county-created zones as development zones, and the replacement of the Job Training Partnership Act (and private industry councils) with the Workforce Investment Act (and local workforce investment boards).

3. The emergency rule adds the statutory definition of "cost-benefit analysis" and provides for its use and applicability.

4. The emergency rule also adds several other definitions (such as applicant municipality, chief executive, concurring municipality, empire zone capital tax credits or zone capital tax credits, clean energy research and development enterprise, change of ownership, benefit-cost ratio, capital investments, single business enterprise and regionally significant project) and conforms several existing regulatory definitions to statutory definitions, including zone equivalent areas, women-owned business enterprise, minority-owned business enterprise, qualified investment project, zone development plans, and significant capital investment projects. The emergency rule also clarifies regionally significant project eligibility. Additionally, the emergency rule makes reference to the following tax credits and exemptions: the Qualified Empire Zone Enterprise ("QEZE") Real Property Tax Credit, QEZE Tax Reduction Credit, and the QEZE Sales and Use Tax Exemption. The emergency rule also reflects the eligibility of agricultural cooperatives for Empire Zone tax credits and the QEZE Real Property Tax Credit.

5. The emergency rule requires additional statements to be included in an application for empire zone designation, including (i) a statement from the applicant and local economic development entities pertaining to the integration and cooperation of resources and services for the purpose of providing support for the zone administrator, and (ii) a statement from the applicant that there is no viable alternative area available that has existing public sewer or water infrastructure other than the proposed zone.

6. The emergency rule amends the existing rule in a manner that allows for the designation of nearby lands in investment zones to exceed 320 acres, upon the determination by the Department of Economic Development that certain conditions have been satisfied.

7. The emergency rule provides a description of the elements to be included in a zone development plan and requires that the plan be resubmitted by the local zone administrative board as economic conditions change within the zone. Changes to the zone development plan must be approved by the Commissioner of Economic Development ("the Commissioner"). Also, the rule adds additional situations under which a business enterprise may be granted a shift resolution.

8. The emergency rule grants discretion to the Commissioner to determine the contents of an empire zone application form.

9. The emergency rule tracks the amended statute's deletion of the category of contributions to a qualified Empire Zone Capital Corporation from those businesses eligible for the Zone Capital Credit.

10. The emergency rule reflects statutory changes to the process to revise a zone's boundaries. The primary effect of this is to limit the number of boundary revisions to one per year.

11. The emergency rule describes the amended certification and decertification processes. The authority to certify and decertify now rests solely with the Commissioner with reduced roles for the Department of Labor and the local zone. Local zone boards must recommend projects to the State for approval. The labor commissioner must determine whether an applicant firm has been engaged in substantial violations, or pattern of violations of laws regulating unemployment insurance, workers' compensation, public work, child labor, employment of minorities and women, safety and health, or other laws for the protection of workers as determined by final judgment of a judicial or administrative proceeding. If such applicant firm has been found in a criminal proceeding to have committed any such violations, the Commissioner may not certify that firm.

12. The emergency rule describes new eligibility standards for certification. The new factors which may be considered by the Commissioner when deciding whether to certify a firm is (i) whether a nonmanufacturing applicant firm projects a benefit-cost ratio of at least 20:1 for the first three years of certification, (ii) whether a manufacturing applicant firm projects a benefit-cost ratio of at least 10:1 for the first three years of certification, and (iii) whether the business enterprise conforms with the zone development plan.

13. The emergency rule adds the following new justifications for decertification of firms: (a) the business enterprise, that has submitted at least three years of business annual reports, has failed to provide economic returns to the State in the form of total remuneration to its employees (i.e. wages and benefits) and investments in its facility greater in value to the tax benefits the business enterprise used and had refunded to it; (b) the business enterprise, if first certified prior to August 1, 2002, caused individuals to transfer from existing employment with another business enterprise with similar ownership and located in New York state to similar employment with the certified business enterprise or if the enterprise acquired, purchased, leased, or had transferred to it real property previously owned by an entity with similar ownership, regardless of form of incorporation or organization; (c) change of ownership or moving out of the Zone, (d) failure to pay wages and benefits or make capital investments as represented on the firm's application, (e) the business enterprise makes a material misrepresentation of fact in any of its business annual reports, and (f) the business enterprise fails to invest in its facility substantially in accordance with the representations contained in its application. In addition, the regulations track the statute in permitting the decertification of a business enterprise if it failed to create new employment or prevent a loss of employment in the zone or zone equivalent area, and deletes the condition that such failure was not due to economic circumstances or conditions which such business could not anticipate or which were beyond its control. The emergency rule provides that the Commissioner shall revoke the certification of a firm if the firm fails the standard set forth in (a) above, or if the Commissioner makes the finding in (b) above, unless the Commissioner determines in his or her discretion, after consultation with the Director of the Budget, that other economic, social and environmental factors warrant continued certification of the firm. The emergency rule further provides for a process to appeal revocations of certifications based on (a) or (b) above to the Empire Zones Designation Board. The emergency rule also provides that the Commissioner may

revoke the certification of a firm upon a finding of any one of the other criteria for revocation of certification set forth in the rule.

14. The emergency rule adds a new Part 12 implementing record-keeping requirements. Any firm choosing to participate in the empire zones program must maintain and have available, for a period of six years, all information related to the application and business annual reports.

15. The emergency rule clarifies the statutory requirement from Chapter 63 of the Laws of 2005 that development zones (formerly county zones) create up to three areas within their reconfigured zones as investment (formerly census tract) zones. The rule would require that 75% of the acreage used to define these investment zones be included within an eligible or contiguous census tract. Furthermore, the rule would not require a development zone to place investment zone acreage within a municipality in that county if that particular municipality already contained an investment zone, and the only eligible census tracts were contained within that municipality.

16. The emergency rule tracks the statutory requirements that zones reconfigure their existing acreage in up to three (for investment zones) or six (for development zones) distinct and separate contiguous areas, and that zones can allocate up to their total allotted acreage at the time of designation. These reconfigured zones must be presented to the Empire Zones Designation Board for unanimous approval. The emergency rule makes clear that zones may not necessarily designate all of their acreage into three or six areas or use all of their allotted acreage; the rule removes the requirement that any subsequent additions after their official redesignation by the Designation Board will still require unanimous approval by that Board.

17. The emergency rule clarifies the statutory requirement that certain defined "regionally significant" projects can be located outside of the distinct and separate contiguous areas. There are four categories of projects: (i) a manufacturer projecting the creation of fifty or more net new jobs in the State of New York; (ii) an agri-business or high tech or biotech business making a capital investment of ten million dollars and creating twenty or more net new jobs in the State of New York, (iii) a financial or insurance services or distribution center creating three hundred or more net new jobs in the State of New York, and (iv) a clean energy research and development enterprise. Other projects may be considered by the empire zone designation board. Only one category of projects, manufacturers projecting the creation of 50 or more net new jobs, are allowed to progress before the identification of the distinct and separate contiguous areas and/or the approval of certain regulations by the Empire Zones Designation Board. Regionally significant projects that fall within the four categories listed above must be projects that are exporting 60% of their goods or services outside the region and export a substantial amount of goods or services beyond the State.

18. The emergency rule clarifies the status of community development projects as a result of the statutory reconfiguration of the zones.

19. The emergency rule clarifies the provisions under Chapter 63 of the Laws of 2005 that allow for zone-certified businesses which will be located outside of the distinct and separate contiguous areas to receive zone benefits until decertified. The area which will be "grandfathered" shall be limited to the expansion of the certified business within the parcel or portion thereof that was originally located in the zone before redesignation. Each zone must identify any such business by December 30, 2005.

20. The emergency rule elaborates on the "demonstration of need" requirement mentioned in Chapter 63 of the Laws of 2005 for the addition (for both investment and development zones) of an additional distinct and separate contiguous area. A zone can demonstrate the need for a fourth or, as the case may be, a seventh distinct and separate contiguous area if (1) there is insufficient existing or planned infrastructure within the three (or six) distinct and separate contiguous areas to (a) accommodate business development and there are other areas of the applicant municipality that can be characterized as economically distressed and/or (b) accommodate development of strategic businesses as defined in the local development plan, or (2) placing all acreage in the other three or six distinct and separate contiguous areas would be inconsistent with open space and wetland protection, or (3) there are insufficient lands available for further business development within the other distinct and separate contiguous areas.

The full text of the emergency rule is available at www.empire.state.ny.us

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires July 15, 2013.

Text of rule and any required statements and analyses may be obtained from: Thomas P Regan, NYS Department of Economic Development, 30 South Pearl Street, Albany NY 12245, (518) 292-5123, email: tregan@esd.ny.gov

Regulatory Impact Statement

STATUTORY AUTHORITY:

Section 959(a) of the General Municipal Law authorizes the Commissioner of Economic Development to adopt on an emergency basis rules and regulations governing the criteria of eligibility for empire zone designation, the application process, the certification of a business enterprises as to eligibility of benefits under the program and the decertification of a business enterprise so as to revoke the certification of business enterprises for benefits under the program.

LEGISLATIVE OBJECTIVES:

The rulemaking accords with the public policy objectives the Legislature sought to advance because the majority of such revisions are in direct response to statutory amendments and the remaining revisions either conform the regulations to existing statute or clarify administrative procedures of the program. These amendments further the Legislative goals and objectives of the Empire Zones program, particularly as they relate to regionally significant projects, the cost-benefit analysis, and the process for certification and decertification of business enterprises. The proposed amendments to the rule will facilitate the administration of this program in a more efficient, effective, and accountable manner.

NEEDS AND BENEFITS:

The emergency rule is required in order to implement the statutory changes contained in Chapter 57 of the Laws of 2009. The emergency rule also clarifies the administrative procedures of the program, improves efficiency and helps make it more cost-effective and accountable to the State's taxpayers, particularly in light of New York's current fiscal climate.

COSTS:

A. Costs to private regulated parties: None. There are no regulated parties in the Empire Zones program, only voluntary participants.

B. Costs to the agency, the state, and local governments: There will be additional costs to the Department of Economic Development associated with the emergency rule making. These costs pertain to the addition of personnel that may need to be hired to implement the Empire Zones program reforms. There may be savings for the Department of Labor associated with the streamlining of the State's administration and concentration of authority within the Department of Economic Development. There is no additional cost to local governments.

C. Costs to the State government: None. There will be no additional costs to New York State as a result of the emergency rule making.

LOCAL GOVERNMENT MANDATES:

None. Local governments are not mandated to participate in the Empire Zones program. If a local government chooses to participate, there is a cost associated with local administration that local government officials agreed to bear at the time of application for designation as an Empire Zone. One of the requirements for designation was a commitment to local administration and an identification of local resources that would be dedicated to local administration.

This emergency rule does not impose any additional costs to the local governments for administration of the Empire Zones program.

PAPERWORK:

The emergency rule imposes new record-keeping requirements on businesses choosing to participate in the Empire Zones program. The emergency rule requires all businesses that participate in the program to establish and maintain complete and accurate books relating to their participation in the Empire Zones program for a period of six years.

DUPLICATION:

The emergency rule conforms to provisions of Article 18-B of the General Municipal Law and does not otherwise duplicate any state or federal statutes or regulations.

ALTERNATIVES:

No alternatives were considered with regard to amending the regulations in response to statutory revisions.

FEDERAL STANDARDS:

There are no federal standards in regard to the Empire Zones program. Therefore, the emergency rule does not exceed any Federal standard.

COMPLIANCE SCHEDULE:

The period of time the state needs to assure compliance is negligible, and the Department of Economic Development expects to be compliant immediately.

Regulatory Flexibility Analysis

1. Effect of rule

The emergency rule imposes new record-keeping requirements on small businesses and large businesses choosing to participate in the Empire Zones program. The emergency rule requires all businesses that participate in the program to establish and maintain complete and accurate books relating to their participation in the Empire Zones program for a period of six years. Local governments are unaffected by this rule.

2. Compliance requirements

Each small business and large business choosing to participate in the Empire Zones program must establish and maintain complete and accurate books, records, documents, accounts, and other evidence relating to such business's application for entry into the Empire Zone program and relating to existing annual reporting requirements. Local governments are unaffected by this rule.

3. Professional services

No professional services are likely to be needed by small and large businesses in order to establish and maintain the required records. Local governments are unaffected by this rule.

4. Compliance costs

No initial capital costs are likely to be incurred by small and large businesses choosing to participate in the Empire Zones program. Annual compliance costs are estimated to be negligible for both small and larges businesses. Local governments are unaffected by this rule.

5. Economic and technological feasibility

The Department of Economic Development ("DED") estimates that complying with this record-keeping is both economically and technologically feasible. Local governments are unaffected by this rule.

6. Minimizing adverse impact

DED finds no adverse economic impact on small or large businesses with respect to this rule. Local governments are unaffected by this rule.

7. Small business and local government participation

DED is in full compliance with SAPA Section 202-b(6), which ensures that small businesses and local governments have an opportunity to participate in the rule-making process. DED has conducted outreach within the small and large business communities and maintains continuous contact with small businesses and large businesses with regard to their participation in this program. Local governments are unaffected by this rule.

Rural Area Flexibility Analysis

The Empire Zones program is a statewide program. Although there are municipalities and businesses in rural areas of New York State that are eligible to participate in the program, participation by the municipalities and businesses is entirely at their discretion. The emergency rule imposes no additional reporting, record keeping or other compliance requirements on public or private entities in rural areas. Therefore, the emergency rule will not have a substantial adverse economic impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The emergency rule relates to the Empire Zones program. The Empire Zones program itself is a job creation incentive, and will not have a substantial adverse impact on jobs and employment opportunities. In fact, the emergency rule, which is being promulgated as a result of statutory reforms, will enable the program to continue to fulfill its mission of job creation and investment for economically distressed areas. Because it is evident from its nature that this emergency rule will have either no impact or a positive impact on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Education Department

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

State Student Assessments in the Elementary and Secondary Grades

I.D. No. EDU-19-13-00005-EP

Filing No. 421

Filing Date: 2013-04-23

Effective Date: 2013-04-23

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

Proposed Action: Amendment of Part 8 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided) and 209(not subdivided)

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

Specific reasons underlying the finding of necessity: Pursuant to the New York State Constitution and the Education Law, the Board of Regents is responsible for the general supervision of all educational activities within the State. Included among these activities is the authority to, for example, establish "examinations as to attainments in learning" (Education Law § 207) and "examinations in studies furnishing a suitable standard of graduation" (Education Law § 209).

The proposed amendment is necessary to clarify the Board of Regents' authority to approve the State-designated performance levels or cut scores for determining proficiency on State assessments administered to students in the elementary and secondary grades, which are established by the Commissioner.

The Board of Regents adopted the Common Core State Standards (CCSS) for English Language Arts & Literacy and Mathematics at its July 2010 meeting and incorporated New York-specific additions, creating the Common Core Learning Standards (CCLS), at its January 2011 meeting. The first State assessments to measure student progress on the CCLS are being administered in April 2013 for Grades 3-8 ELA and math. Following the administration of the new tests, the Department will use a research-based methodology to set cut scores and performance standards for the tests, which must be approved by the Board of Regents. Beginning with ELA and Algebra I in June 2014, Regents Examinations that measure student progress on the CCLS will be phased in during a transition period. Similar performance-standard setting processes will occur after the initial administration of each new Regents Examination.

Because the Board of Regents meets at scheduled intervals, the July 22-23, 2013 meeting is the earliest the proposed rule could be presented for adoption, after publication of a Notice of Proposed Rule Making in the State Register and expiration of the 45-day public comment period required under the State Administrative Procedure Act (SAPA). Furthermore, pursuant to SAPA, the earliest a rule adopted at the July meeting could become effective is August 7, 2013, the date a notice of adoption is published in the State Register. However, adoption of this regulation on an emergency basis is necessary now for the preservation of the general welfare in order to clarify the Board of Regents' authority to approve cut scores and performance standards for State assessments prior to the Commissioner's establishment of cut scores and performance standards for the new Grades 3-8 ELA and math assessments measuring student progress on the CCLS, which are being administered Statewide for the first time in April 2013.

It is anticipated that the emergency rule will be presented to the Board of Regents for adoption as a permanent rule at the July 2013 Regents meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative Procedure Act for proposed rulemakings.

Subject: State student assessments in the elementary and secondary grades.

Purpose: To clarify procedures for establishment of cut scores and performance standards for determining proficiency on State Assessments.

Text of emergency/proposed rule: 1. The Title of Part 8 of the Rules of the Board of Regents is amended, effective April 23, 2013, to read as follows:

REGENTS EXAMINATIONS *AND OTHER STATE ASSESSMENTS*

2. Section 8.3 of the Rules of the Board of Regents is amended, effective April 23, 2013, to read as follows:

8.3 Passing mark *or State designated performance level*

1. Except as [provided] *prescribed* in section [100.5(a)(5)(i)] *100.5* of this Title, the minimum passing [mark] *score* in Regents examinations shall be 65 [percent] *or such other minimum passing score as approved by the Board of Regents*.

2. The State designated performance level or cut score for determining proficiency on all State student assessments in the elementary and secondary grades, other than Regents examinations, shall be established by the Commissioner subject to approval by the Board of Regents.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire July 21, 2013.

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Ken Slentz, Deputy Commissioner P-12 Education, State Education Department, State Education Building 2M, 89 Washington Ave., Albany, NY 12234, (518) 474-5520, email: NYSEDP12@mail.nysed.gov

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

This rule was not under consideration at the time this agency submitted its Regulatory Agenda for publication in the Register.

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law § 101 continues existence of Education Department, with Board of Regents as its head, and authorizes Regents to appoint Com-

missioner of Education as Department's Chief Administrative Officer, which is charged with general management and supervision of all public schools and educational work of State.

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

Education Law § 208 authorizes the Regents to establish examinations as to attainments in learning, and award and confer suitable certificates, diplomas and degrees on persons who satisfactorily meet the requirements prescribed.

Education Law § 209 authorizes the regents to establish examinations in studies furnishing a suitable standard of graduation therefrom and of admission to colleges, and to confer certificates or diplomas on students who satisfactorily pass such examinations.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the Regents authority under the above statutes, in particular, their authority to establish ''examinations as to attainments in learning'' (Education Law § 208) and ''examinations in studies furnishing a suitable standard of graduation'' (Education Law § 209).

3. NEEDS AND BENEFITS:

Currently, the Rules of the Board of Regents and the Regulations of the Commissioner of Education do not address the process for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education other than the Regents examinations. The Department's past practice has been to submit the State-designated performance levels or cut scores to the Board of Regents for their review, but questions have been raised about the process that will be used for designation of the State-designated performance levels for the 2012-2013 grades 3-8 State assessments that are being administered in April 2013. The proposed amendment to the Rules of the Board of Regents would codify the Department's past practice by clarifying that the State-designated performance level or cut score for determining proficiency on all State assessments administered to students in the elementary and secondary grades, other than Regents examinations, shall be established by the Commissioner subject to approval by the Board of Regents.

The Board of Regents adopted the Common Core State Standards (CCSS) for English Language Arts & Literacy and Mathematics at its July 2010 meeting and incorporated New York-specific additions, creating the Common Core Learning Standards (CCLS), at its January 2011 meeting. The first State assessments to measure student progress on the CCLS are being administered in April 2013 for Grades 3-8 ELA and math. Following the administration of the new tests, the Department will use a research-based methodology to set cut scores and performance standards for the tests, which must be approved by the Board of Regents. Beginning with ELA and Algebra I in June 2014, common-core aligned Regents Examinations will be phased in during a transition period. Similar performance-standard setting processes will occur after the initial administration of each new Regents Examination.

With respect to Regents examinations, the passing scores are specified in section 100.5 of the Regulations of the Commissioner. The proposed amendment makes needed technical changes to the existing language of Regents Rule 8.3, which currently references section 100.5(a)(5)(i) only, to broaden the cross-reference to capture provisions recently added to section 100.5 related to the special education safety net which specify passing scores for certain students. The amendments also clarify that while 65 remains the minimum passing score on Regents examinations, with the exceptions set forth in section 100.5, it is no longer a percentage. Finally, in order to reflect the upcoming transition to Regents Exams that measure student progress on the CCLS, which may not be scored on a 0-100 scale, the amendment clarifies that the Board of Regents may prescribe a different minimum passing score.

4. COSTS:

The proposed amendment will not impose any costs on the State, local governments, private regulated parties, or the State Education Department.

The proposed amendment merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty or responsibility upon school districts, charter schools or other local governments. The proposed amendment merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

6. PAPERWORK:

The proposed amendment does not impose any additional reporting, record keeping or other paperwork requirements upon school districts or charter schools. The proposed amendment merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

7. DUPLICATION:

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

8. ALTERNATIVES:

There are no significant alternatives and none were considered. The proposed amendment merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

9. FEDERAL STANDARDS:

There are no applicable Federal standards.

10. COMPLIANCE SCHEDULE:

It is anticipated that compliance may be achieved by the effective date of the proposed amendment, which does not impose any additional costs or compliance requirements on local governments and private regulated parties, and merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments of student proficiency in elementary and secondary education other than Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents.

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

Local Governments:

1. EFFECT OF RULE:

The proposed amendment applies to each school district, board of cooperative educational services (BOCES) and charter schools in the State. At present, there are 695 school districts (including New York City) and 37 BOCES. There are currently approximately 190 charter schools.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any additional compliance requirements on regulated parties but merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes needed technical changes to the existing language of Regents Rule 8.3, which currently references section 100.5(a)(5)(i) only, to broaden the cross-reference to capture provisions recently added to section 100.5 related to the special education safety net which specify passing scores for certain students. The amendments also clarify that while 65 remains the minimum passing score on Regents examinations, with the exceptions set forth in section 100.5, it is no longer a percentage. Finally, in order to reflect the upcoming transition to Regents Exams that measure student progress on the CCLS, which may not be scored on a 0-100 scale, the amendment clarifies that the Board of Regents may prescribe a different minimum passing score.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

The proposed amendment does not impose any additional costs on regulated parties but merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional costs or technological requirements.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any additional compliance requirements or costs on regulated parties but merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

7. LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed amendment have been provided to District Superintendents with the request that they distribute them to school districts within their supervisory districts for review and comment. Copies were also provided for review and comment to the chief school officers of the five big city school districts and to charter schools.

8. INITIAL REVIEW OF RULE (SAPA § 207):

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment does not impose any additional compliance requirements or costs on regulated parties. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts, boards of cooperative educational services (BOCES) and charter schools in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. There is currently one charter school located in a rural area.

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

The proposed amendment does not impose any additional compliance requirements on regulated parties but merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes needed technical changes to the existing language of Regents Rule 8.3, which currently references section 100.5(a)(5)(i) only, to broaden the cross-reference to capture provisions recently added to section 100.5 related to the special education safety net which specify passing scores for certain students. The amendments also clarify that while 65 remains the minimum passing score on Regents examinations, with the exceptions set forth in section 100.5, it is no longer a percentage. Finally, in order to reflect the upcoming transition to Regents Exams that measure student progress on the CCLS, which may not be scored on a 0-100 scale, the amendment clarifies that the Board of Regents may prescribe a different minimum passing score.

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

3. COSTS:

The proposed amendment does not impose any additional costs on regulated parties but merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any additional compliance requirements or costs on regulated parties but merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

The proposed amendment relates to State-designated performance levels or cut scores for purposes of determining student proficiency on State Assessments that are administered to students throughout the State, including those in rural areas. Such standards, of necessity, must be uniform throughout the State. Therefore, it was not possible to establish different requirements or exemptions for rural areas.

5. RURAL AREA PARTICIPATION:

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

6. INITIAL REVIEW OF RULE (SAPA § 207):

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment does not impose any additional compliance requirements or costs on regulated parties. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Job Impact Statement

The proposed amendment merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments of student proficiency in elementary and secondary education other than Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents.

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

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Moral Character Hearings Under 8NYCRR Part 83 for Certified Teachers and Other Certified School Personnel

I.D. No. EDU-19-13-00006-EP

Filing No. 422

Filing Date: 2013-04-23

Effective Date: 2013-04-23

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

Proposed Action: Amendment of section 83.4 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 305(7), (30), 3001(2), 3001-d(2), 3004(1), 3004-c(not subdivided), 3006(1), 3009(1), 3010(not subdivided) and 3035(1) and (3)

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

Specific reasons underlying the finding of necessity: The Department's Office of School Personnel Review & Accountability (OSPRA) is

responsible for facilitating fingerprint generated criminal background checks in accordance with the Education Law (Chapter 180 of the Laws of 2000). All prospective covered school employees and/or applicants for a teaching certificate must be fingerprinted.

Generally, fingerprints are collected across the state at school districts, Boards of Cooperative Educational Services (BOCES), colleges and universities, and law enforcement agencies. Fingerprints are received by the Department in two formats: hard cards containing fingerprints that are collected through the "ink and roll" method and mailed, and scanned fingerprint images captured on a scanner and transmitted electronically via a server. All fingerprint images are delivered by the Department to the state Division of Criminal Justice Services (DCJS) to conduct a state criminal history records check and to forward them to the Federal Bureau of Investigation (FBI) for processing against their criminal record repository.

The Department has taken steps to better ensure the security of fingerprints in recent years by growing the number of fingerprints collected electronically. Approximately 75 percent of fingerprints are collected electronically, which reduces the opportunity for the integrity of fingerprints to be compromised.

However, the Department has begun to review the fingerprinting process to close potential gaps that may exist, such as the ability of a person to submit false fingerprints. As part of this review, the Department has determined that the proposed amendment is needed to expedite the removal of school district personnel that commit certain crimes. Currently, there are no provisions to expeditiously address actions related to fingerprint fraud, which can result in convicted felons whose presence in the classroom or school poses a danger to the safety of students and/or staff evading the criminal history record check process and gaining access to schools. The proposed amendment establishes a rebuttable presumption that a teacher or school administrator who is convicted of any crime relating to the submission of false information, or who has committed fraud, relating to his/her criminal history record check lacks good moral character.

Emergency action is needed for the preservation of the general welfare in order to ensure that action can be taken expeditiously to revoke or suspend the certificates of teachers and school administrators who commit a crime involving fraud or the submission of false information related to their criminal history record checks in order to ensure the safety of the children and faculty of the schools in this State.

Subject: Moral character hearings under 8 NYCRR Part 83 for certified teachers and other certified school personnel.

Purpose: To establish a rebuttable presumption that a certified individual who is convicted of any crime relating to the submission of false information, or who has committed fraud, relating to his/her criminal history record check lacks good moral character.

Text of emergency/proposed rule: 1. Paragraph (4) of subdivision (d) of section 83.4 of the Regulations of the Commissioner of Education shall be amended, effective April 23, 2013, to read as follows:

(4) any crime committed involving the submission of false information, or the commission of fraud, related to a criminal history record check.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire July 21, 2013.

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Peg Rivers, NYS Education Department, Office of Higher Education, Room 979, Washington Avenue, Albany, NY 12234, (518) 486-3633, email: privers@mail.nysed.gov

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

This rule was not under consideration at the time this agency submitted its Regulatory Agenda for publication in the Register.

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Subdivision (7) of section 305 of the Education Law authorizes the Commissioner of Education to annul teaching certificates and establishes other penalties in proceedings brought against individuals holding such certificates.

Paragraph (a) of subdivision (30) of section 305 of the Education Law authorizes the Commissioner of Education to promulgate regulations to authorize the fingerprinting of prospective employees of nonpublic and private elementary and secondary schools, and for the use of information derived from searches of the records of the Division of Criminal Justice Services ("DCJS") and the Federal Bureau of Investigation ("FBI") based on the use of such fingerprints. This paragraph also requires the Commissioner, in cooperation with DCJS to promulgate a form to be provided to nonpublic or private elementary or secondary schools in connection with the submission of fingerprints and a form for the recordation of allegations of child abuse in an educational setting.

Paragraph (b) of subdivision (30) of Section 305 of the Education Law requires the Commissioner of Education, in cooperation with DCJS, to promulgate a form to be provided to all prospective employees of nonpublic and private elementary and secondary schools that elect to fingerprint and seek clearance for prospective employees to inform the prospective employee that the Commissioner is authorized to request his or her criminal history information and that the employee has the right to obtain, review and seek correction of such information.

Paragraph (c) of subdivision (30) of Section 305 of the Education Law requires the prospective employer to obtain the signed, informed consent of the prospective employee on a form supplied by the Commissioner of Education.

Paragraph (d) of subdivision (30) of Section 305 of the Education Law requires the Commissioner to develop forms to be provided to all nonpublic or private elementary and secondary schools that elect to fingerprint their prospective employees, to be completed and signed by prospective employees when conditional appointment or emergency conditional appointment is offered.

Subdivision (2) of section 3001 of the Education Law establishes certification by the State Education Department as a qualification to teach in the public schools of New York State.

Subdivision (2) of section 3001-d of the Education Law authorizes nonpublic or private elementary or secondary schools to apply to the Commissioner for criminal history record checks on prospective employees.

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

Section 3004-c provides that when the Commissioner determines that a certification be denied, the applicant shall be afforded notice and the right to be heard and offer proof in opposition to such determination in accordance with regulations of the Commissioner.

Paragraph (b) of subdivision (1) of section 3006 of the Education Law provides that the Commissioner of Education may issue such teacher certificates as the Regents Rules prescribe.

Subdivision (1) of section 3009 of the Education Law provides that no part of the school moneys apportioned to a district shall be applied to the payment of the salary of an unqualified teacher, nor shall his salary or part thereof, be collected by a district tax except as provided in the Education Law.

Section 3010 of the Education Law provides that any trustee or member of a board of education who applies, or directs, or consents to the application of, any district money to the payment of an unqualified teacher's salary, commits a misdemeanor.

Subdivision (1) of section 3035 of the Education Law authorizes the Commissioner of Education to submit to DCJS two sets of fingerprints for prospective school employees along with processing fees, for the purpose of obtaining criminal history records from DCJS and the FBI.

Paragraph (a) of subdivision (3) of section 3035 of the Education Law requires the Commissioner of Education to promptly notify the nonpublic or private elementary or secondary school when the prospective school employee is cleared for employment based on his or criminal history and provides a prospective school employee who is denied clearance the right to be heard and offer proof in opposition to such determination in accordance with the Regulations of the Commissioner of Education.

Paragraph (b) of subdivision (3) of section 3035 of the Education Law requires the Commissioner of Education to promptly notify the prospective employee and the appropriate nonpublic or private elementary or secondary school when a prospective employee is conditionally cleared for employment based upon his or her criminal history or that more time is needed to make the determination.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the objectives of the above-referenced statutes to ensure the security of fingerprints and other information provided as part of a criminal history check of prospective school employees pursuant to Education Law section 305(30), by providing for the expedited removal of school district personnel that commit crimes involving the submission of false information, or the commission of fraud, related to a criminal history record check.

3. NEEDS AND BENEFITS:

The State Education Department's Office of School Personnel Review & Accountability (OSPRA) is responsible for facilitating fingerprint generated criminal background checks in accordance with the Education Law (Chapter 180 of the Laws of 2000). All prospective covered school

employees and/or applicants for a teaching certificate must be fingerprinted.

Generally, fingerprints are collected across the state at school districts, Boards of Cooperative Educational Services (BOCES), colleges and universities, and law enforcement agencies. Fingerprints are received by the Department in two formats: hard cards containing fingerprints that are collected through the "ink and roll" method and mailed, and scanned fingerprint images captured on a scanner and transmitted electronically via a server. All fingerprint images are delivered by the Department to the state Division of Criminal Justice Services (DCJS) to conduct a state criminal history records check and to forward them to the Federal Bureau of Investigation (FBI) for processing against their criminal record repository.

The Department has taken steps to better ensure the security of fingerprints in recent years by growing the number of fingerprints collected electronically. Approximately 75 percent of fingerprints are collected electronically, which reduces the opportunity for the integrity of fingerprints to be compromised.

However, the Department has begun to review the fingerprinting process to close potential gaps that may exist, such as the ability of a person to submit false fingerprints. As part of this review, the Department has determined that the proposed amendment is needed to expedite the removal of school district personnel that commit certain crimes. Currently, there are no provisions to expeditiously address actions related to fingerprint fraud, which can result in convicted felons whose presence in the classroom or school poses a danger to the safety of students and/or staff evading the criminal history record check process and gaining access to schools. The proposed amendment establishes a rebuttable presumption that a teacher or school administrator who is convicted of any crime relating to the submission of false information, or who has committed fraud, relating to his/her criminal history record check lacks good moral character.

4. COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

(d) Costs to the regulatory agency: None.

The proposed amendment will not impose any costs on the State, local governments, private regulated parties, or the State Education Department. By establishing a rebuttable presumption that a teacher or school administrator who is convicted of any crime relating to the submission of false information, or who has committed fraud, relating to his/her criminal history record check lacks good moral character, the proposed amendment will reduce costs to the State Education Department associated with conducting moral character hearings under Part 83 of the Commissioner's Regulations, by expediting the removal of teachers and administrators that commit crimes involving the submission of false information, or the commission of fraud, related to a criminal history record check.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty or responsibility upon local governments. The proposed amendment relates to evidentiary standards in the conduct of moral character hearings for certified teachers and other certified school personnel under Part 83 of the Commissioner's Regulations, and merely establishes a rebuttable presumption that a certified individual who is convicted of any crime relating to the submission of false information, or who has committed fraud, relating to his/her criminal history record check lacks good moral character. The proposed amendment will thereby expedite the removal of teachers and administrators that commit crimes involving the submission of false information, or the commission of fraud, related to a criminal history record check.

6. PAPERWORK:

The proposed amendment does not impose any additional paperwork or recordkeeping requirements.

7. DUPLICATION:

The proposed amendment does not duplicate other requirements of State and Federal government.

8. ALTERNATIVES:

There are no significant alternatives to the proposed amendment, and none were considered.

9. FEDERAL STANDARDS:

There are no Federal requirements relating to the subject matter of the proposed amendment.

10. COMPLIANCE SCHEDULE:

The proposed amendment does not impose any costs or compliance requirements. The proposed amendment relates to evidentiary standards in hearings relating to the conduct of moral character hearings for certified teachers and other certified school personnel under Part 83 of the Commissioner's Regulations, and merely establishes a rebuttable presumption that a certified individual who is convicted of any crime relating to the submission of false information, or who has committed fraud, relating to his/her criminal history record check lacks good moral character. The proposed amendment will thereby expedite the removal of teachers and administrators that commit crimes involving the submission of false information, or the commission of fraud, related to a criminal history record check.

Regulatory Flexibility Analysis

The proposed amendment relates to evidentiary standards in the conduct of moral character hearings for certified teachers and other certified school personnel under Part 83 of the Commissioner's Regulations, and will not impose any adverse economic, reporting, recordkeeping, or any other compliance requirements on small businesses or local governments. Because it is evident from the nature of the rule that it does not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment would apply to holders of teaching certificates or other certificates issued pursuant to Part 80 of the Commissioner's Regulations in New York State, including those who live or work in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 square miles.

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

The proposed amendment does not impose any additional reporting, recordkeeping, or other compliance requirements, or professional services requirements on any regulated party. The proposed amendment relates to evidentiary standards in the conduct of moral character hearings for certified teachers and other certified school personnel under Part 83 of the Commissioner's Regulations, and merely establishes a rebuttable presumption that a teacher or school administrator who is convicted of any crime relating to the submission of false information, or who has committed fraud, relating to his/her criminal history record check lacks good moral character. The proposed amendment will thereby expedite the removal of teachers and administrators that commit crimes involving the submission of false information, or the commission of fraud, related to a criminal history record check.

3. COSTS:

The proposed amendment will not impose any costs on public or private entities located in rural areas.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any compliance requirements or costs on public or private entities located in rural areas. The proposed amendment relates to evidentiary standards in the conduct of moral character hearings for certified teachers and other certified school personnel under Part 83 of the Commissioner's Regulations, and merely establishes a rebuttable presumption that a teacher or school administrator who is convicted of any crime relating to the submission of false information, or who has committed fraud, relating to his/her criminal history record check lacks good moral character. The proposed amendment will thereby expedite the removal of teachers and administrators that commit crimes involving the submission of false information, or the commission of fraud, related to a criminal history record check. Because evidentiary standards in Part 83 moral character hearings must be uniformly applicable throughout the State in order to meet Constitutional requirements, it is not possible to establish differing requirements for or to exempt affected individuals in rural the proposed amendment's provisions.

5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Rural Education Advisory Committee, which includes representatives of school districts located in rural areas. In addition, the Department has distributed copies of the proposed amendment for review and comment by the Department's Professional Standards and Practices Board for Teaching, which includes representatives of teachers, school administrators, institutions offering teacher preparatory programs, the general public, and students in teacher education programs. The Board includes members who live or work in rural areas.

6. INITIAL REVIEW OF RULE (SAPA § 207):

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment is part of long-range Regents policy enactments to ensure the integrity and security of fingerprinting and other aspects of the criminal background checks of prospective school employees. The Department has taken steps to better ensure the security of fingerprints in recent years by growing the number of fingerprints collected electronically. Approximately 75 percent of

fingerprints are collected electronically, which reduces the opportunity for the integrity of fingerprints to be compromised. However, the Department has begun to review the fingerprinting process to close potential gaps that may exist, such as the ability of a person to submit false fingerprints. As part of this review, the Department has determined that the proposed amendment is needed to expedite the removal of school district personnel that commit certain crimes. Currently, there are no provisions to expeditiously address actions related to fingerprint fraud, which can result in convicted felons whose presence in the classroom or school poses a danger to the safety of students and/or staff evading the criminal history record check process and gaining access to schools. The proposed amendment establishes a rebuttable presumption that a teacher or school administrator who is convicted of any crime relating to the submission of false information, or who has committed fraud, Accordingly, there is no need for a shorter review period.

The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Job Impact Statement

The proposed amendment relates to evidentiary standards in the conduct of moral character hearings for certified teachers and other certified school personnel under Part 83 of the Commissioner's Regulations, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

NOTICE OF EMERGENCY ADOPTION AND REVISED RULE MAKING NO HEARING(S) SCHEDULED

New York State Career Development and Occupational Studies Commencement Credential

I.D. No. EDU-52-12-00012-ERP

Filing No. 426

Filing Date: 2013-04-23

Effective Date: 2013-04-23

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

Action Taken: Amendment of sections 100.5, 100.6 and 200.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided), 305(1), (2), 4402(1-7) and 4403(3)

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

Specific reasons underlying the finding of necessity: The proposed amendment authorizes school districts and nonpublic schools, beginning July 1, 2013 and thereafter, to award a student with a disability, upon graduation from high school, with a New York State Career Development and Occupational Studies Commencement Credential that recognizes the student's achievement of career development and occupational studies learning standards at the commencement level. The regulations repealing a school's authority to award an individualized education program (IEP) diploma goes into effect on June 30, 2013. Emergency action is therefore necessary for the preservation of the general welfare to ensure that students with disabilities exiting high school in the 2013-14 school year have an alternate graduation credential available to them.

A Notice of Proposed Rule Making was published in the State Register on December 26, 2012 for a 45-day public comment period. The proposed amendment was revised in response to public comment and A Notice of Revised Rule Making will be published in the State Register for a 30-day public comment period.

Because the Board of Regents meets at fixed intervals, the earliest the proposed amendment could be presented for regular adoption is the June 17-18, 2013 Regents meeting. Furthermore, pursuant to the State Administrative Procedure Act (SAPA), the earliest effective date of the proposed amendment, if adopted at the June meeting, would be July 3, 2013, the date a Notice of Adoption would be published in the State Register. However, school districts must start preparations now, in order to timely implement programs leading to a New York State Career Development and Occupational Studies Commencement Credential for the 2013-2014 school year. Emergency action is therefore necessary for the preservation of the general welfare to immediately establish criteria for the issuance of a New York State Career Development and Occupational Studies Commencement Credential to ensure that programs leading to such Credential are timely implemented for the 2013-2014 school year pursuant to the regulation's requirements, and thereby ensure that students with disabilities have an existing credential available to them when the IEP diploma sunsets as of June 30, 2013.

It is anticipated that the revised proposed amendment will be presented to the Board of Regents for adoption as a permanent rule at their June 2013 Regents meeting, which is the first scheduled meeting after expiration of the 30-day public comment period mandated by the State Administrative Procedure Act for revised rule makings.

Subject: New York State Career Development and Occupational Studies Commencement Credential.

Purpose: Establish criteria for a career development and occupational studies commencement credential to students with disabilities.

Text of emergency/revised rule: 1. Subparagraph (i) of paragraph (7) of subdivision (b) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective April 23, 2013, as follows:

(i) Except as provided in subparagraphs (vi), (vii), (viii) and (xi) of this paragraph, and paragraph (d)(7) of this section, for students first entering grade nine in the 2001-2002 school year and thereafter, there shall be no diplomas [or], certificates*, or credentials* other than the following:

(a) Regents diploma;

(b) Regents diploma with an advanced designation;

(c) State high school equivalency diploma as provided in section 100.7 of this Part;

(d) High School Individualized Education Program Diploma as provided in section 100.9 of this Part; [or]

(e) Regents diploma, or Regents diploma with an advanced designation, with an affixed technical endorsement awarded upon completion of an approved career and technical education program pursuant to paragraph (d)(6) of this section*;*

(f) Skills and achievement commencement credential as provided in section 100.6(a) of this Part; or

(g) New York State career development and occupational studies commencement credential as provided in section 100.6(b) of this Part.

2. Section 100.6 of the Regulations of the Commissioner of Education is amended, effective April 23, 2013, as follows:

§ 100.6 *High school exiting credentials.*

(a) Skills and achievement commencement credential. Beginning with the 2013-14 school year and thereafter, the board of education or trustees of a school district shall, and the principal of a nonpublic school may, issue a skills and achievement commencement credential to a student who has taken the State assessment for students with severe disabilities, as defined in section 100.1(t)(2)(iv) of this Part, in accordance with the following provisions:

[(a)] *(1)* Prior to awarding the skills and achievement commencement credential, the governing body of the school district or nonpublic school shall ensure that:

[(1)] *(i)*. . .

[(2)] *(ii)*. . .

[(3)] *(iii)*. . .

[(b)] *(2)*. . .

[(c)] *(3)*. . .

[(d)] *(4)* The credential shall be issued together with a summary of the student's academic achievement and functional performance, as required pursuant to section 200.4(c)(4) of this Title, that includes documentation of:

[(1)] *(i)*. . .

[(2)] *(ii)*. . .

[(3)] *(iii)*. . .

School districts may use the State model form developed by the commissioner for the summary of academic and functional performance or a locally-developed form that meets the requirements of this subdivision.

(b) New York State career development and occupational studies commencement credential. Beginning July 1, 2013 and thereafter, the board of education or trustees of a school district shall, and the principal of a nonpublic school may, issue a New York State career development and occupational studies commencement credential to a student with a disability who meets the requirements of paragraph (1) of this subdivision to document preparation for entry-level employment after high school, except for those students deemed eligible for a skills and achievement commencement credential pursuant to subdivision (a) of this section. Consistent with sections 100.2(q)(1) and 100.5 of this Part, the school district or nonpublic

school shall ensure that the student has been provided with appropriate opportunities to earn a Regents or local high school diploma, including providing a student with meaningful access to participate and progress in the general curriculum to assist the student to meet the State's learning standards.

(1) Except as provided in paragraphs (2), (5) and (6) of this subdivision, prior to awarding the career development and occupational studies commencement credential, the board of education or trustees of the school district, or the governing body of the nonpublic school, shall ensure that each of the following requirements have been met:

(i) the school district has evidence that the student has developed, annually reviewed and, as appropriate, revised a career plan to ensure the student is actively engaged in career exploration. Such plan shall include, but is not limited to, a statement of the student's self-identified career interests; career-related strengths and needs; career goals; and career and technical coursework and work-based learning experiences that the student plans to engage in to achieve those goals. School districts shall provide students with either a model form developed by the commissioner to document a student's career plan, or a locally-developed form that meets the requirements of this subdivision and, as appropriate, shall assist the student to develop his/her career plan. The student's career plan may not be limited to career-related activities provided by the school and may include activities to be provided by an entity other than the school; provided that nothing in this subdivision shall be deemed to require the school to provide the student with the specific activities identified in the career plan. A student's preferences and interests as identified in his/her career plan shall be reviewed annually and considered in the development of the student's individualized education program pursuant to section 200.4(d)(2)(ix) of this Title. A copy of the student's career plan in effect during the school year in which the student exits high school shall be maintained in the student's permanent record;

(ii) the school district has evidence that the student has demonstrated commencement level knowledge and skills relating to the career development and occupational studies learning standards set forth in section 100.1(t)(1)(vii)(a), (b) and (c) of this Part, including but not limited to career development, integrated learning and the universal foundation skills; and the student has successfully completed in grades 9-12 not less than the equivalent of two units of study in career and technical education course(s) and/or work-based learning experiences. The equivalent units of study shall be earned through coursework in career and technical education and/or work-based learning experiences, provided that the equivalent units of study shall include a minimum of 54 hours of documented school supervised work-based learning experiences related to career awareness, exploration and/or preparation which may, but are not required to, be completed in conjunction with the student's career and technical education course(s). For purposes of this subdivision: (1) career and technical education course(s) means a grade 9 -12 course or courses in career and technical education, as defined in section 100.1(l) of this Part, that consists of specialized and integrated courses that are approved by the local board of education or by the Department pursuant to section 100.5(d)(6)(iv); and (2) work-based learning experiences include, but are not limited to, job shadowing, community service, volunteering, service learning, senior project(s) and/or school based enterprise(s), which shall be provided, consistent with Department guidelines, under the supervision of the district and documented in the student's transcript; and

(iii) Within one year prior to a student's exit from high school, at least one work skills employability profile for the student has been completed by designated school staff or other individuals knowledgeable about the student's employability skills and experiences that identifies the student's attainment of each of the commencement level career development and occupational studies learning standards set forth in section 100.1(t)(1)(vii)(a), (b) and (c) of this Part including, but not limited to career development; integrated learning; and universal foundation skills and, as appropriate, documents the student's attainment of technical knowledge and work-related skills, work experiences, performance on industry-based assessments and other work-related and academic achievements. School districts may use a model form developed by the commissioner to document a student's work skills employability profile, or a locally-developed form that meets the requirements of this subdivision. A copy of the student's work skills employability profile(s) shall be maintained in the student's permanent record.

(2) Notwithstanding the provisions of paragraph (1) of this subdivision, a board of education or trustees of the school district, or the governing body of the nonpublic school, may award the career development and occupational studies commencement credential to a student who has met the requirements for a nationally-recognized work-readiness credential, including but not limited to SkillsUSA, the National Work Readiness Credential, the National Career Readiness Certificate – (ACT) WorkKeys and the Comprehensive Adult Student Assessment Systems Workforce Skills Certification System.

(3) The credential shall be issued at the same time the student receives his/her Regents or local high school diploma or, for a student whose disability prevents the student from earning a Regents or local diploma, any time after such student has attended school for at least 12 years, excluding kindergarten, or has received a substantially equivalent education elsewhere, or at the end of the school year in which a student attains the age of 21.

(4) The certificate awarded shall be similar in form to the diploma issued by the school district or nonpublic school, except that it shall not use the term ''diploma'' but shall indicate that the student has earned a New York State career development and occupational studies commencement credential that has been endorsed by the New York State Board of Regents as a certificate of readiness for entry-level employment. Award of the credential shall be documented in the student's transcript.

(5) For students with disabilities who exit from high school prior to July 1, 2015, the district or nonpublic school may award the career development and occupational studies commencement credential to a student who has not met all of the requirements in subparagraph (ii) of paragraph (1) of this subdivision, provided that the school principal, in consultation with relevant faculty, has determined that the student has otherwise demonstrated knowledge and skills relating to the commencement level career development occupational studies learning standards.

(6) For students with disabilities who transfer from another school district within the State or another state, the principal shall, after consultation with relevant faculty, evaluate the work-based learning experiences and coursework on the student's transcript or other records to determine if the student meets the requirements in subparagraph (ii) of paragraph (1) of this subdivision.

(7) A school district that awards this credential to more than twenty percent of the students with disabilities in the cohort, where such credential is not a supplement to a regular high school diploma, shall be required to use a portion of its Part B Individuals with Disabilities Education Act grant funds for targeted activities as deemed necessary by the Department to ensure that students with disabilities have appropriate access to participate and progress in the general education curriculum necessary to earn a regular high school diploma.

[(e)] *(c)* If the student receiving a credential *pursuant to subdivision (a) or (b) of this section* is less than 21 years of age, such credential shall be accompanied by a written statement of assurance that the student named as its recipient shall continue to be eligible to attend the public schools of the school district in which the student resides without the payment of tuition until the student has earned a [regular] *Regents or local* high school diploma or until the end of the school year in which such student turns age 21, whichever shall occur first.

3. Subparagraph (iii) of paragraph (5) of subdivision (a) of section 200.5 of the Regulations of the Commissioner of Education is amended, effective April 23, 2013, as follows:

(iii) Prior to the student's graduation with an individualized education program (IEP) diploma or, beginning with the 2013-14 school year, prior to a student's exit with a skills and achievement commencement credential *or a career development and occupational studies commencement credential* as set forth in section 100.6 of this Title, such prior written notice must indicate that the student continues to be eligible for a free appropriate public education until the end of the school year in which the student turns age 21 or until the receipt of a [regular] *Regents or local* high school diploma.

This notice is intended to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on December 26, 2012, I.D. No. EDU-52-12-00012-P. The emergency rule will expire 90 days after filing.

Emergency rule compared with proposed rule: Substantial revisions were made in 100.6(b)(1), 100.6(b)(2), 100.6(b)(4), 100.6(b)(5), 100.6(b)(6) and 100.6(b)(7).

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: James P. DeLorenzo, Assistant Commissioner P-12, State Education Department, Office of Special Education, State Education Building, Room 309, 89 Washington Ave., Albany, NY 12234, (518) 402-3353, email: spedpubliccomment@mail.nysed.gov

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

Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on December 26, 2012, the following substantial revisions were made to the proposed rule:

Sections 100.5(b)(7)(i)(g), 100.6(b), 100.6(b)(1), 100.6(b)(5) and

200.5(a)(5)(iii) were revised to replaced the proposed name of the credential, "Regents certificate of work readiness" with "New York State career development and occupational studies commencement credential" or ''career development and occupational studies commencement credential.''

Section 100.6(b)(1)(i) was revised to add that, as appropriate, a school must assist a student to develop his/her career plan and that the students' preferences and interests as identified in his/her career plan shall be reviewed annually and considered in the development of the student's individualized education program.

Section 100.6(b)(1)(ii) was revised to add that the student must demonstrate his/her knowledge and skills relating to the career development and occupational studies learning standards at the commencement level; to replace the term "secondary level" with "in grades 9-12" and to define, for purposes of this subdivision: career and technical education courses to mean a grade 9 -12 course or courses in career and technical education that consists of specialized and integrated courses that are approved by the local board of education or by the Department; and to add to the definition of work-based learning experiences, that they must be provided consistent with Department guidelines and under the supervision of the district.

Section 100.6(b)(1)(iii) was revised to add that at least one work skills employability profile for the student must be completed and that the employability profile must, as appropriate, also document the student's attainment of technical knowledge and work-related skills, work experiences, performance on industry-based assessments and other work-related and academic achievements.

Section 100.6(b)(2) was revised to add that a board of education or trustees of the school district, or the governing body of the nonpublic school, may, in lieu of the career plan, instruction and employability profile requirements, award the career development and occupational studies commencement credential to a student who has met the requirements for a nationally-recognized work-readiness credential.

Section 100.6(b)(4) was revised to add that the credential must indicate that it has been endorsed by the New York State Board of Regents as a certificate of readiness for entry-level employment.

Section 100.6(b)(5) was revised to provide that for students with disabilities who exit from high school prior to July 1, 2015, the district or nonpublic school may award the career development and occupational studies commencement credential to a student who has not met all of the requirements in section 100.6(b)(1)(ii), provided that the school principal, in consultation with relevant faculty, has determined that the student has otherwise demonstrated knowledge and skills relating to the commencement level career development occupational studies learning standards.

Section 100.6(b)(6) was revised to provide that for students with disabilities who transfer from another school district within the State or another state, the principal shall, after consultation with relevant faculty, evaluate the work-based learning experiences and coursework on the student's transcript or other records to determine if the student meets the requirements in 100.6(b)(1)(ii).

Section 100.6(b)(7) was added to indicate that a school district that awards this credential to more than 20 percent of the students with disabilities in the cohort, where such credential is not a supplement to a regular high school diploma, shall be required to use a portion of its Part B Individuals with Disabilities Education Act grant funds for targeted activities, as deemed necessary by the Department, to ensure that students with disabilities have appropriate access to participate and progress in the general education curriculum necessary to earn a regular high school diploma.

The above changes require that the Needs and Benefits, Costs, Local Government Mandates, Paperwork, Alternatives and Compliance Schedule sections of the previously published Regulatory Impact Statement be revised to read as follows:

NEEDS AND BENEFITS:

In January 2012, the Regulations of the Commissioner were amended to repeal the individualized education program (IEP) diploma, effective July 1, 2013, and replace it with a Skills and Achievement Commencement Credential for students with severe disabilities who are eligible to take the New York State Alternate Assessment. The proposed amendment would, beginning July 1, 2013 and thereafter, authorize school districts and nonpublic schools to award a career development and occupational studies commencement credential to other students with a disability to document high school preparation for entry-level employment. The credential could be awarded as a supplement to a Regents or local high school diploma or, for a student with a disability who is unable to earn a Regents or local diploma, as the student's exiting credential. Because the IEP diploma sunsets as of June 30, 2013, the proposed amendment includes exceptions to certain requirements to allow appropriate discretion for school principals to determine whether students exiting high school in the 2013-14 and 2014-15 school years have sufficient knowledge of the CDOS learning standards to qualify for the award of the career development and occupational studies commencement credential.

COSTS:

a. Costs to State government: None.

b. Costs to local governments: There may be costs associated with issuing students a career development and occupational studies commencement credential if districts opt to develop their own forms, in lieu of using the Department's career plan and employability profile model forms. These costs are anticipated to be minimal and capable of being absorbed by districts using existing staff and resources.

c. Costs to regulated parties: There may be costs associated with issuing students a career development and occupational studies commencement credential if districts opt to develop their own forms, in lieu of using the Department's career plan and employability profile model forms. These costs are anticipated to be minimal and capable of being absorbed by districts using existing staff and resources.

d. Costs to the State Education Department of implementation and continuing compliance: None.

LOCAL GOVERNMENT MANDATES:

The proposed amendment would require school districts to provide students with disabilities with the opportunity to exit high school with a career development and occupational studies commencement credential and to ensure that the student's transcript and permanent records include notation of career and technical education coursework and work-based learning experiences completed by the student. It would also require the district to provide a student with a copy of a form to complete his/her career plan; assist the student, if necessary, to develop the career plan; and consider the student's preferences and interests, as documented in the career plan, in the development of the student's IEP. Further, for students with disabilities who meet the minimum requirements for the certificate, the proposed amendment would require school personnel to complete and maintain at least one work skills employability profile for the student during his/her last year of school. Currently, an employability profile is only required for students participating in an approved career and technical education program pursuant to section 100.5(d)(6).

Section 100.5, as amended, adds the skills and achievement commencement credential and the career development and occupational studies commencement credential to the list of other diploma, credentials and certificates available to students.

Section 100.6, as amended, renumbers the provisions for the skills and achievement commencement credential; and establishes minimum requirements for students with disabilities to earn a career development and occupational studies commencement credential. This section further provides that upon a determination that a district provided the career development and occupational studies commencement credential to more than 20 percent of the cohort of students with disabilities, when the credential is not a supplement to a regular high school diploma, the district would, when deemed necessary by the Department, be required to use a portion of its IDEA funds to ensure students with disabilities are having appropriate access to the general curriculum as necessary to graduate with a local diploma.

Section 200.5, as amended, requires that prior notice relating to the provision of a free appropriate public education (FAPE) upon graduation must notify parents that a student awarded a career development and occupational studies commencement credential continues to be eligible for FAPE until the end of the school year in which the student turns age 21 or until the receipt of a Regents or local high school diploma.

PAPERWORK:

The proposed amendment requires transcript documentation of work-based learning experiences completed by a student with a disability and requires that the school complete an employability profile for a student with a disability who has met the minimum learning experiences to earn a career development and occupational studies commencement credential.

ALTERNATIVES:

Other options considered include requiring additional coursework and work-based learning experiences; establishing minimum credit requirements; and/or requiring students to pass the assessments necessary to earn one of the national work readiness credentials. The Department also considered extending the sunset date for the IEP diploma but chose to propose an exception to certain requirements to allow appropriate discretion for school principals to determine whether students exiting high school in the 2013-14 and 2014-15 school years have sufficient knowledge of the CDOS learning standards to qualify for the award of the career development and occupational studies commencement credential. The proposed rule adds that, in lieu of meeting the minimum requirements for a career plan, the equivalent of two units of student in career and technical education courses and/or work-related experiences, and development of an employability profile, the credential could be awarded to a student who otherwise met the requirements for one of the nationally-recognized work readiness credentials.

COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compli-

ance with the proposed amendment by its effective date. The proposed amendment establishes that the new credential must be available to students with disabilities beginning July 1, 2013 and thereafter. To ensure sufficient time for local educational agency (LEA) implementation, the proposed amendment includes exceptions to certain requirements to allow appropriate discretion for school principals to determine whether students exiting high school in the 2013-14 and 2014-15 school years have sufficient knowledge of the CDOS learning standards to qualify for the award of the career development and occupational studies commencement credential.

Revised Regulatory Flexibility Analysis

LOCAL GOVERNMENT

Since publication of a Notice of Proposed Rule Making in the State Register on December 26, 2013, substantial revisions were made to the proposed rule as described in the Revised Regulatory Impact Statement submitted herewith.

The above changes require that the Compliance Requirements, Compliance Costs, and Minimizing Adverse Impact sections of the previously published Regulatory Flexibility Analysis be revised to read as follows:

2. COMPLIANCE REQUIREMENTS:

The proposed amendment would require school districts to provide students with disabilities with the opportunity to exit high school with a career development and occupational studies commencement credential and to ensure that the student's transcript and permanent records include notation of career and technical education coursework and work-based learning experiences completed by the student. It would also require the district to provide a student with a copy of a form to complete his/her career plan. Further, for students with disabilities who meet the minimum requirements for the certificate of career development and occupational studies, the proposed amendment would require school personnel to complete and maintain a work skills employability profile for the student during his/her last year of school. Currently, an employability profile is only required for students participating in an approved career and technical education program pursuant to section 100.5(d)(6).

Section 100.5, as amended, adds the skills and achievement commencement credential and the career development and occupational studies commencement credential to the list of other diploma, credentials and certificates available to students.

Section 100.6, as amended, renumbers the provisions for the skills and achievement commencement credential; and establishes minimum requirements for students with disabilities to earn a career development and occupational studies commencement credential.

Section 200.5, as amended, requires that prior notice relating to the provision of a free appropriate public education (FAPE) upon graduation must notify parents that a student awarded a career development and occupational studies commencement credential continues to be eligible for FAPE until the end of the school year in which the student turns age 21 or until the receipt of a Regents or local high school diploma.

4. COMPLIANCE COSTS:

There may be costs to school districts, charter schools and nonpublic schools associated with issuing students a career development and occupational studies commencement credential if districts opt to develop their own forms, in lieu of using the Department's career plan and employability profile model forms. These costs are anticipated to be minimal and capable of being absorbed by districts using existing staff and resources.

6. MINIMIZING ADVERSE IMPACT:

The Department considered current diploma requirements and existing Department policy relating to work-based learning experiences when establishing the minimum coursework and work-based learning experience instructional requirements. Because the individualized education program (IEP) diploma sunsets as of June 30, 2013, to ensure sufficient time for local educational agency (LEA) implementation, the proposed amendment includes exceptions to certain requirements to allow appropriate discretion for school principals to determine whether students exiting high school in the 2013-14 and 2014-15 school years have sufficient knowledge of the CDOS learning standards to qualify for the award of the career development and occupational studies commencement credential.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on December 26, 2013, substantial revisions were made to the proposed rule as described in the Revised Regulatory Impact Statement submitted herewith.

The above changes require that the Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services, Costs, and Minimizing Adverse Impact sections of the previously published Rural Area Flexibility Analysis be revised to read as follows:

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

The proposed amendment does not impose any additional compliance requirements or professional services requirements on entities in rural areas.

The proposed amendment authorizes school districts and nonpublic schools, beginning July 1, 2013 and thereafter, to award a career development and occupational studies commencement credential to a student with a disability, except those deemed eligible for a skills and achievement commencement credential, to document the student's preparation for entry-level employment after high school.

Section 100.5, as amended, adds the skills and achievement commencement credential and the career development and occupational studies commencement credential to the list of other diploma, certificates and credentials available to students.

Section 100.6, as amended, renumbers the provisions for the skills and achievement commencement credential; and establishes minimum requirements for students with disabilities to earn a career development and occupational studies commencement credential.

Section 200.5, as amended, requires that prior notice relating to the provision of a free appropriate public education (FAPE) upon graduation must notify parents that a student awarded a career development and occupational studies commencement credential continues to be eligible for FAPE until the end of the school year in which the student turns age 21 or until the receipt of a Regents or local high school diploma.

3. COSTS:

There may be costs to school districts, charter schools and nonpublic schools in rural areas that are associated with issuing students a career development and occupational studies commencement credential if districts opt to develop their own forms, in lieu of using the Department's career plan and employability profile model forms. These costs are anticipated to be minimal and capable of being absorbed by districts using existing staff and resources.

4. MINIMIZING ADVERSE IMPACT:

The Department considered current diploma requirements and existing Department policy relating to work-based learning experiences when establishing the minimum coursework and work-based learning experience instructional requirements. Because the individualized education program (IEP) diploma sunsets as of June 30, 2013, to ensure sufficient time for local educational agency (LEA) implementation, the proposed amendment includes exceptions to certain requirements to allow appropriate discretion for school principals to determine whether students exiting high school in the 2013-14 and 2014-15 school years have sufficient knowledge of the CDOS learning standards to qualify for the award of the career development and occupational studies commencement credential.

The proposed amendment would authorize school districts to award a State-recognized credential to any student with a disability in the State who meets the minimum requirements, and therefore it is not appropriate to establish different compliance and reporting requirements for regulated parties in rural areas, or to exempt them from the rule's provisions.

Revised Job Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on December 26, 2013, substantial revisions were made to the proposed rule as described in the Revised Regulatory Impact Statement submitted herewith.

The proposed amendment, as so revised, authorizes school districts and nonpublic schools, beginning July 1, 2013 and thereafter, to award a career development and occupational studies commencement credential to a student with a disability, except those deemed eligible for a skills and achievement commencement credential, to document preparation for entry-level employment after high school.

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

Assessment of Public Comment

The following is a summary assessing the public comment received by the State Education Department since publication of a Notice of Proposed Rule Making in the State Register on December 26, 2012.

COMMENT:

Certificate benefits students with disabilities; specifies skills in more meaningful way than individualized education program (IEP) diploma; prepares students for competitive employment; validates importance of career planning, soft skills training, work-readiness activities and transition. Powerful document; worthy credential for students who worked to best of their abilities. Recognizes some students are unable to pass exams; provides achievable option; fosters positive self esteem; builds on transition in meaningful way; keeps students in school; helps students learn about themselves and requirements of work; and enhances ability to attain/retain employment. Manageable for districts; provides minimum

requirements while permitting expansion of coursework and work experiences; allows flexibility in delivery of required activities; and provides framework to identify appropriate work experiences. Support certificate being extension to a regular diploma.

DEPARTMENT RESPONSE:

Comments are supportive; no response is necessary.

COMMENT:

SED's approach to credential/diploma policies is fragmented. Develop diploma options and pathways to diploma for all students. Call it a diploma. "Diploma" recognizes completion of students' educational program and is recognized by other states. All diplomas and certificates should be available to all students.

DEPARTMENT RESPONSE:

We do not agree SED's approach to graduation policies is fragmented. Over the past two years, the Regents discussed graduation policy in consideration of students with disabilities. Standards for high school diplomas must be rigorous and represent readiness for employment or postsecondary education. All students with disabilities must be provided opportunities and appropriate supports and services to earn a diploma. With appropriate instruction, supports and services, most students with disabilities can graduate with a regular high school diploma. We do not promote policies that would lower expectations for students with disabilities. Some students, because of their disabilities, cannot reach those standards to earn a regular diploma, regardless of other diploma pathways that may be endorsed by the Regents. Proposed rule not intended to create a diploma pathway; terms such as "certificate" or "credential" distinguish it from a diploma.

COMMENT:

Limiting certificate to students with disabilities devalues certificate and identifies a student as having a disability. Work readiness skills are essential for everyone.

DEPARTMENT RESPONSE:

Many states offer certificates and/or diplomas specific to students with disabilities. Each student can decide whether to disclose to potential employers or others that he/she has earned this certificate. Students with disabilities deserve to be recognized with a credential that has potential to lead to post-school learning or work opportunities. Limiting this certificate to only students with disabilities may be revisited after Regents finalize policy on multiple pathways to a diploma.

COMMENT:

Do not eliminate IEP diploma before both phrases are operational. Confusing to have one option for students with severe disabilities and another for other students with disabilities.

DEPARTMENT RESPONSE:

The Skills and Achievement Commencement Credential for students with severe disabilities and this proposed credential for other students with disabilities will be available July 1, 2013, concurrent with elimination of the IEP diploma. Public comment strongly supported development of two distinct credentials to address a range of student abilities.

COMMENT:

Establish rigorous monitoring procedures to ensure compliance. Students will be tracked into certificate versus diploma path. Proposal gives educators "out" for not preparing students to graduate with a diploma.

DEPARTMENT RESPONSE:

Each board of education (BOE) must have policies and procedures ensuring compliance with State requirements. Proposal specifically indicates students must be provided with appropriate opportunities to earn a diploma. To address concerns, proposed rule was revised to add, at the discretion of SED, districts providing this credential to more than 20 percent of its cohort of students with disabilities, when credential is not a supplement to a diploma, may be required to use a portion of its federal Individuals with Disabilities Education Act funds to ensure student access to participate and progress in coursework leading to diploma.

COMMENT:

Certificate establishes significantly more requirements (coursework, work experiences, and transportation to work sites) and is additional burden for districts during period of diminished fiscal and human resources. Clarify if instruction can be integrated into general curriculum and if home and careers coursework counts; if 216 required hours is in addition to regular instruction and if certificate counts towards 22 required credits.

DEPARTMENT RESPONSE:

We do not agree proposal imposes substantially more requirements. The 216 hour minimum instructional requirement which includes 54 hours work-based learning, was selected in consideration of a student's need to complete other academic coursework and allows for significant flexibility in how hours are earned. Coursework and experiences for credential are consistent with federal and State transition requirements and existing requirements for implementation of Career Development and Occupational Studies (CDOS) learning standards. Instruction in the CDOS standards can occur in the student's academic classes and in career and technical education (CTE) courses, either approved by SED or local BOE. Home and careers course would not meet requirements as it is typically completed in middle school. Students can earn credit, as determined by the principal, for coursework and experiences associated with credential.

COMMENT:

Clarify who completes documentation. Students may require assistance completing career plan. Recommend transition planning and services, career plan, employability profile and exit summary be one plan documented in a data clearing house and accessed by service providers, parents and students.

DEPARTMENT RESPONSE:

Assignment of tasks is the responsibility of the principal and may vary from student to student. This may be appropriate for guidance counselors, special education teachers, related service providers or others. Proposed rule was revised to add schools must assist students develop career plans if necessary. While each of these documents/requirements interrelate and inform the other, combining them is not feasible as each has specific purposes and requirements. Transition services, pursuant to section 200.4(d)(2)(ix) of the Commissioner's Regulations must be documented in student's IEP. Nothing would preclude documents from being stored in a data clearing house. Student confidentiality must be protected and consent to release information obtained.

COMMENT:

No evidence that credential provides value for employability. Obtain endorsement from Department of Labor (DOL) or business sector. Market the credential.

DEPARTMENT RESPONSE:

We believe the credential has value for students. Earning this credential demonstrates attainment of commencement level CDOS learning standards, determined by employers to be necessary for employment. Development of career plan and completion of courses and/or work-based learning adds relevance to student learning and prepares students to apply learning in the workplace. To extent districts ensure standards are met when granting this credential, it will have a positive post-school result for students. SED staff met with a range of constituents, including employers, DOL, parents, students, rehabilitation providers, unions, and school personnel in developing the policy framework and documentation requirements. Upon adoption of rule, staff will work with stakeholders to promote further public awareness.

COMMENT:

Proposal fails to address relationship between certificate requirements and transition requirements and IEP development process.

DEPARTMENT RESPONSE:

Existing regulations require consideration of student strengths, preferences and interests when developing transition components of the IEP. To directly connect IEP development process and this credential, proposed rule was revised to add student preferences and interests, as identified in the career plan, must be considered when developing transition components of IEP.

COMMENT:

Using "Regents" in title is misleading; most associate "Regents" with diplomas/exams, not the State's policy-making Board. May mislead students and parents to believe certificate is equivalent to Regents diploma. Title does not identify competencies achieved. National certificates of "work readiness" have specific meaning.

DEPARTMENT RESPONSE:

Proposed rule was revised to change name to "New York State Career Development and Occupational Studies Commencement Credential" and to require certificate indicate endorsement by New York State's Board of Regents as certificate of readiness for entry-level employment. Proposed rule was revised to add, in lieu of the minimum requirements for a career plan, equivalent units of study, and employability profile, credential may be awarded to students earning one of the nationally-recognized work readiness certificates.

COMMENT:

Burden of arranging work-based learning experiences falls on families. Clarify if work-based learning includes part-time employment.

DEPARTMENT RESPONSE:

Schools, not families, are responsible for arranging work-based learning and do not included part-time employment as such experiences must be under school supervision.

COMMENT:

Clarify level of CDOS standards students need to attain to earn credential.

DEPARTMENT RESPONSE:

Revised rule clarifies students are expected to attain commencement level CDOS standards.

COMMENT:

Clarify if § 100.6(b)(5) allows individuals other than principals to evaluate work-based learning.

DEPARTMENT RESPONSE:

Proposed rule revised to clarify principal shall, after consultation with relevant faculty, evaluate these experiences to determine if they meet requirements.

COMMENT:

Clarify if principals authority in § 100.6(b)(5) to award transfer credits is different from § 100.5(d)(5).

DEPARTMENT RESPONSE:

Requirements for both are consistent.

COMMENT:

Include appeal process for students who believe they met minimum requirements but were not awarded the certificate.

DEPARTMENT RESPONSE:

Appeal process is not necessary. A parent or student would resolve this issue with the local BOE and/or submit a State complaint to SED's Office of Special Education.

COMMENT:

Clarify purpose of providing certificate at same time as regular diploma.

DEPARTMENT RESPONSE:

Instruction in CDOS standards and participation in career related coursework and work-based learning experiences prepare all students with disabilities for employment, including those receiving a diploma. Allowing all students with disabilities to engage in work readiness activities ensures separate track is not created for credential. Students working towards a regular diploma, who in the end cannot pass the required assessments, have the opportunity to exit with this credential.

COMMENT:

Allow students graduating with another credential to come back and work on certificate.

DEPARTMENT RESPONSE:

Students with disabilities that exited school and continue to be eligible for a free appropriate public education, must be provided opportunity to return to school until attaining a regular high school diploma or reaching end of school year in which they turn 21, whichever comes first. Proposed rule requires parents receive prior written notice of this information.

COMMENT:

Concerned how Department will ensure student access to credential as districts are not required to offer it. Quality of certificate could differ from district to district. Standardize procedures for completing employability profiles and qualifications for awarding certificate to ensure conformity across State.

DEPARTMENT RESPONSE:

Districts are required to offer this credential to all students with disabilities, excluding those eligible for the Skills and Achievement Commencement Credential. To ensure credential is awarded based on same standards throughout the State, proposed rule was revised to add districts must have documentation the student has minimally achieved commencement level CDOS learning standards in career development, integrated learning and the universal foundation skills. SED will provide a model employability profile form, career plan form and guidance to further standardize documentation.

COMMENT:

Allowing principals to issue certificates for students not completing coursework and experiences and exiting prior to July 1, 2015, jeopardizes credibility of credential.

DEPARTMENT RESPONSE:

School principals, after consultation with relevant faculty, determine if students demonstrate knowledge and skills relating to the commencement level CDOS standards and must have other documentation assuring student demonstrates essential knowledge and skills for entry level employment. Part 100 of the Commissioner's Regulations provides similar authority to school principals (e.g., discretion on transfer credits and credit by examination).

COMMENT:

Ensure families understand differences between certificate and diploma. Provide training for staff on CDOS standards and coursework, work-based learning and documentation requirements.

DEPARTMENT RESPONSE:

SED will advise districts of actions necessary to ensure information is provided regarding differences between diplomas and credentials. SED's website http://www.p12.nysed.gov/cte provides information about implementation of CDOS standards; integrating career and academic learning; requirements for work-based learning; and career planning. Additional information and training will be provided upon adoption of proposed rule.

NOTICE OF ADOPTION

The Dignity for All Students Act (L. 2010, Ch. 482; L. 2012, Ch. 102)

I.D. No. EDU-07-13-00012-A
Filing No. 423
Filing Date: 2013-04-23
Effective Date: 2013-07-01

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

Action taken: Amendment of section 100.2(c) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1), (2), 801-a (not subdivided) and 2854(1)(b); and L. 2012, ch. 102

Subject: The Dignity for All Students Act (L. 2010, ch. 482; L. 2012, ch. 102).

Purpose: To prescribe instructional requirements to implement the Dignity Act, as amended by ch. 102 of the Laws of 2012.

Text or summary was published in the February 13, 2013 issue of the Register, I.D. No. EDU-07-13-00012-P.

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

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is the 4th or 5th year after the year in which this rule is being adopted. This review period, justification for proposing same, and invitation for public comment thereon, were contained in a RFA, RAFA or JIS:

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on February 13, 2013, the State Education Department received the following comments.

COMMENT:

There is nothing in the Dignity Act, Education Law § 801-a or any related statutory provision that permits or requires the State Education Department to dictate to charter schools instructional programming.

DEPARTMENT RESPONSE:

The Department acknowledges that charter schools are not required to provide the instructional component on civility, citizenship and character education required to be provided under Education Law § 801-a.

However, the Department has previously determined that exclusion of charter schools from any instructional requirement relating to prevention of harassment and discrimination would be inconsistent with the intent of the Dignity for All Students Act (L. 2010, Ch. 482 - ''Dignity Act''), which is to afford all students in public schools an environment free of discrimination and harassment. Accordingly, in 2012, the Board of Regents amended Commissioner's Regulation section 100.2(c) to require charter schools to provide instruction that supports development of a school environment free of discrimination and harassment, as required by the Dignity Act, including, but not limited, to instruction that raises awareness and sensitivity to discrimination or harassment based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.

Subsequently, Chapter 102 of the Laws of 2012 was enacted to significantly expand the scope and intent of the Dignity Act to include provisions on bullying and cyberbullying. The proposed amendment is necessary to implement the instructional requirements of Chapter 102 of the Laws of 2012 and, consistent with that statute, merely extends the required instruction for all public school students, including charter school students, to explicitly include bullying and cyberbullying, and instruction in the safe, responsible use of the Internet and electronic communications.

COMMENT:

Concern was expressed that the proposed amendment exempts charter schools from the requirement to provide instruction in civility, citizenship and character education that includes awareness and sensitivity to discrimination or harassment and civility in the relations of people with the characteristics protected by the Dignity Act - i.e. race, weight, national origin, ethnic groups, religions, religious practices, mental or physical ability, sexual orientation, gender identity and expression), or sex.

DEPARTMENT RESPONSE:

The comment misinterprets the proposed amendment. As discussed in

the Department's response to the comment appearing above, the Department has previously determined that exclusion of charter schools from any instructional requirement relating to prevention of harassment and discrimination would be inconsistent with the intent of the Dignity Act, and in 2012 the Board of Regents amended Commissioner's Regulation section 100.2(c) to require charter schools to provide instruction that supports development of a school environment free of discrimination and harassment, as required by the Dignity Act, including but not limited to, instruction that raises awareness and sensitivity to discrimination or harassment based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex. The proposed amendment, consistent with L. 2010, Ch. 102, merely extends the required instruction for all public school students, including charter school students, to explicitly include bullying and cyberbullying, and instruction in the safe, responsible use of the Internet and electronic communications.

NOTICE OF ADOPTION

Code of Conduct

I.D. No. EDU-07-13-00013-A
Filing No. 424
Filing Date: 2013-04-23
Effective Date: 2013-07-01

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

Action taken: Amendment of sections 100.2(l) and 119.6 of Title 8 NYCRR.

Statutory authority: Education Law, sections 11(1)-(7), 12(1) and (2), 13(1)-(3), 14(1) and (3), 101(not subdivided), 207(not subdivided), 305(1) and (2), and 2801(1)-(5); L. 2012, ch. 102

Subject: Code of conduct.

Purpose: Conform regulations to code of conduct provisions in the Dignity for All Students Act, as amended by ch. 102, L. 2012.

Text of final rule: 1. Paragraph (2) of subdivision (l) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective July 1, 2013, as follows:

(2) Code of Conduct

(i) . . .

(ii) The code of conduct shall include, but is not limited to:

(a) provisions regarding conduct, dress and language deemed appropriate and acceptable on school property and at school functions, and conduct, dress, and language deemed unacceptable and inappropriate on school property *and at school functions* and provisions regarding acceptable civil and respectful treatment of teachers, school administrators, other school personnel, students, and visitors on school property and at school functions, including the appropriate range of disciplinary measures which may be imposed for violation of such code, and the roles of teachers, administrators, other school personnel, the board of education, and parents *or persons in parental relation*;

(b) provisions prohibiting [discrimination and] harassment*, bullying, and/or discrimination* against any student, by employees or students [on school property or at a school function,] that creates a hostile *school* environment by conduct [, with or without physical contact and/or by verbal] *or by* threats, intimidation or abuse, *including cyberbullying as defined in Education Law section 11(8),* [of such a severe nature] that *either*:

(1) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being*, including conduct, threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause emotional harm*; or

(2) reasonably causes or would reasonably be expected to cause *physical injury to* a student *or to cause a student* to fear for his or her physical safety,

(3) Such conduct shall include acts of harassment and/or bullying that occur:

(i) on school property, as defined in section 100.2(kk)(1)(i) of this Part; and/or

(ii) at a school function, as defined in section 100.2(kk)(1) of this Part; or

(iii) off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.

(4) For purposes of this paragraph, the term "threats, intimidation or abuse" shall include verbal and non-verbal actions.

(5) For purposes of this paragraph, ''emotional harm'' that takes place in the context of ''harassment or bullying'' means harm to a student's emotional well-being through creation of a hostile school environment that is so severe or pervasive as to unreasonably and substantially interfere with a student's education.

(6) Such conduct shall include, but is not limited to [, threats, intimidation, or abuse] *acts* based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender as defined in Education Law § 11(6), or sex; provided that nothing in this subdivision shall be construed to prohibit a denial of admission into, or exclusion from, a course of instruction based on a person's gender that would be permissible under Education Law sections 3201-a or 2854(2)(a) and Title IX of the Education Amendments of 1972 (20 U.S.C. section 1681, et seq.), or to prohibit, as discrimination based on disability, actions that would be permissible under section 504 of the Rehabilitation Act of 1973;

(c) standards and procedures to assure *the* security and safety of all students and school personnel;

(d) . . .

(e) . . .

(f) disciplinary measures to be taken in incidents on school property or at school functions involving the possession or use of illegal substances or weapons, the use of physical force, vandalism, violation of another student's civil rights[, harassment,] and threats of violence;

(g) disciplinary measures to be taken for incidents on school property or at school functions involving harassment, bullying and/or discrimination;

[(g)] *(h)* provisions for responding to acts of [discrimination, and] harassment*, bullying, and/or discrimination* against students by employees or students pursuant to clause (b) of this subparagraph *which, with respect to such acts against students by students, incorporate a progressive model of student discipline that includes measured, balanced and age-appropriate remedies and procedures that make appropriate use of prevention, education, intervention and discipline, and considers among other things, the nature and severity of the offending student's behavior(s), the developmental age of the student, the previous disciplinary record of the student and other extenuating circumstances, and the impact the student's behaviors had on the individual(s) who was physically injured and/or emotionally harmed. Responses shall be reasonably calculated to end the harassment, bullying, and/or discrimination, prevent recurrence, and eliminate the hostile environment. This progressive model of student discipline shall be consistent with the other provisions of the code of conduct;*

[(h)] *(i)*. . .

[(i)] *(j)*. . .

[(j)] *(k)* provisions ensuring *that* such code and the enforcement thereof are in compliance with State and Federal laws relating to students with disabilities;

[(k)] *(l)* provisions setting forth the procedures by which local law enforcement agencies shall be notified *promptly* of code violations*, including but not limited to incidents of harassment, bullying, and/or discrimination,* which *may* constitute a crime.

[(l)] *(m)*. . .

[(m)] *(n)*. . .

[(n)] *(o)* circumstances under and procedures by which referral to appropriate human service agencies shall be made*, as needed*;

[(o)] *(p)*. . .

[(p)] *(q)*. . .

[(q)] *(r)* a bill of rights and responsibilities of students which focuses upon positive student behavior and a safe and supportive school climate, which shall be written in plain-language, publicized and explained in an age-appropriate manner to all students on an annual basis; [and]

[(r)] *(s)* guidelines and programs for in-service education programs for all district staff members to ensure effective implementation of school policy on school conduct and discipline, including but not limited to, guidelines on promoting a safe and supportive school climate while discouraging, among other things, [discrimination or] harassment*, bullying and discrimination* against students by students and/or school employees; and including safe and supportive school climate concepts in the curriculum and classroom management*; and*

(t) a provision prohibiting retaliation against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.

(iii) Additional responsibilities.

(a) . . .

(b) Each board of education and board of cooperative educational services shall ensure community awareness of its code of conduct by:

(1) . . .

(2) . . .

(3) [providing] *mailing* a plain language summary of the code of

conduct to all persons in parental relation to students before the beginning of each school year and making such summary available thereafter upon request;

(4) providing each [existing] teacher with a copy of the complete code of conduct and a copy of any amendments to the code as soon as practicable following initial adoption or amendment of the code, and providing new teachers with a complete copy of the current code upon their employment; and

(5) . . .

2. Section 119.6 of the Regulations of the Commissioner of Education is amended, effective July 1, 2013, as follows:

§ 119.6 Policies against [discrimination and] harassment*, bullying, and discrimination*. Each charter school shall include in its disciplinary rules and procedures pursuant to Education Law section 2851(2)(h) or, if applicable, in its code of conduct:

(a) provisions, in an age-appropriate version and written in plain-language, prohibiting [discrimination and] harassment*, bullying, and/or discrimination* against any student, by employees or students [on school property or at a school function,] that creates a hostile environment by conduct [, with or without physical contact and/or by verbal] *or by* threats, intimidation or abuse, *including cyberbullying as defined in Education Law section 11(8),* [of such a severe nature] that *either*:

(1) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being*, including conduct, threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause emotional harm*; or

(2) reasonably causes or would reasonably be expected to cause *physical injury to* a student *or to cause a student* to fear for his or her physical safety.

(3) Such conduct shall include acts of harassment and/or bullying that occur:

(i) on school property, as defined in section 100.2(kk)(1)(i) of this Part; and/or

(ii) at a school function, as defined in section 100.2(kk)(1) of this Part; or

(iii) off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.

(4) For purposes of this section, the term "threats, intimidation or abuse" shall include verbal and non-verbal actions.

(5) For purposes of this section, ''emotional harm'' that takes place in the context of ''harassment or bullying'' means harm to a student's emotional well-being through creation of a hostile school environment that is so severe or pervasive as to unreasonably and substantially interfere with a student's education.

(6) Such conduct shall include, but is not limited to [, threats, intimidation, or abuse] *acts* based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender as defined in Education Law § 11(6), or sex; provided that nothing in this subdivision shall be construed to prohibit a denial of admission into, or exclusion from, a course of instruction based on a person's gender that would be permissible under Education Law sections 3201-a or 2854(2)(a) and Title IX of the Education Amendments of 1972 (20 U.S.C. section 1681, et seq.), or to prohibit, as discrimination based on disability, actions that would be permissible under section 504 of the Rehabilitation Act of 1973;

(b) provisions for responding to acts of [discrimination and] harassment*, bullying, and/or discrimination* against students by employees or students on school property or at a school function as defined in Education Law sections 11(1) and (2), pursuant to subdivision (a) of this section, including but not limited to disciplinary measures to be taken;

(c) guidelines on promoting a safe and supportive school climate while discouraging, among other things, [discrimination or] harassment*, bullying, and/or discrimination* against students by students and/or school employees; and including safe and supportive school climate concepts in the curriculum and classroom management.

(d) provisions which enable students, parents and persons in parental relation to make an oral or written report of harassment, bullying, and/or discrimination to teachers, administrators, and other school personnel that the school district deems appropriate; and

(e) a provision prohibiting retaliation against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 100.2(l)(2).

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on February 13, 2013, a nonsubstantial revision was made to the proposed rule as follows.

Section 100.2(l)(2)(ii)(b) has been revised to refer to ". . . a hostile school environment'' in order to clarify that, consistent with the Dignity Act, the provision is meant to address harassment, bullying and discrimination of students within the school environment.

The above change does not require any further revisions to the previously published Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis and Revised Rural Area Flexibility Analysis

SMALL BUSINESS AND LOCAL GOVERNMENTS

Since publication of a Notice of Proposed Rule Making in the State Register on February 13, 2013, a nonsubstantial revision was made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The change does not require any further changes to the previously published Regulatory Flexibility Analysis and Rural Area Flexibility Analysis.

Revised Job Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on February 13, 2013, a nonsubstantial revision was made to the proposed rule as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The proposed amendment, as revised, applies to school districts, boards of cooperative educational services (BOCES) and charter schools and is necessary to implement the code of conduct requirements of the Dignity for All Students Act, as amended by Chapter 102 of the Laws of 2012. The proposed revised amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed revised amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is the 4th or 5th year after the year in which this rule is being adopted. This review period, justification for proposing same, and invitation for public comment thereon, were contained in a RFA, RAFA or JIS:

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on February 13, 2013, the State Education Department received the following comments.

1. COMMENT:

The proposed amendment includes all the various policy and guideline components from the Dignity for All Students Act (L.2010, Ch 482 - ''Dignity Act''), as amended by Chapter 102 of the Laws of 2012) into the Code of Conduct. However, we believe the language of the law indicates that these requirements are separate from the Code of Conduct. Education Law § 12(1) provides that no student shall be subjected to harassment, bullying or discrimination, and Education Law § 12(2) specifically directs that the Code of Conduct include the provision in § 12(1). However, Education Law § 13 requires that school districts establish policies and procedures intended to create a school environment that is free from harassment, bullying and discrimination, and directs that districts ''include appropriate references to the provisions of the school district's code of conduct '' in such policies and procedures. This suggests that the Dignity Act requires more than adding provisions to the Code of Conduct. We believe the law requires, and we recommend, a "bullying" policy be developed which is separate from the Code of Conduct. Codes of Conduct already include many provisions and the Dignity Act element could easily get lost and overlooked. In addition, placing the Dignity Act provisions in a separate policy document would facilitate parents and students in locating the district's Dignity Act requirements.

DEPARTMENT RESPONSE:

The commenter is reading Education Law § 12 too narrowly by appearing to say that Education Law § 12(2) merely requires the code of conduct to contain an age-appropriate version of the policy contained in Education Law § 12(1), and nothing else. However, Education Law § 12(2) also states that a summary of the policy must be included in any summaries required by Education Law § 2801. The State Education Department believes that this means Education Law § 12(2) requires that the code of conduct must include more than the provision contained in Education Law § 12(1) because it would not be possible to ''summarize'' any further the brief prohibition language against harassment, bullying and discrimination contained in § 12(1). In addition, Education Law § 12(2)'s reference to an age-appropriate version of the policy contained in Education Law

12(1) requires more than simply restating the provisions of Education Law 12(1) in an age appropriate manner.

More importantly, the code of conduct governs the conduct of students, teachers, other school personnel and visitors. Thus, when Education Law § § 12 and 13 are read together and the intent of the code of conduct is considered, it is a reasonable interpretation of the Department's statutory authority to require the field to include its Dignity Act related policy in the code of conduct. In addition, the Department believes that it is both practical and functional for all policies addressing the conduct of students, faculty, school staff, and visitors be compiled into a code of conduct. Nevertheless, this does not preclude a school district from further elaborating on its policy in a separate document, which could be referenced in its code of conduct.

2. COMMENT:

Section 100.2(l)(2)(ii)(b), which requires a code of conduct to include ''provisions prohibiting harassment, bullying, and/or discrimination against any student, by employees or students that creates a hostile environment '', should be revised to refer to ''. . . a hostile school environment.'' Otherwise, the language suggests that school districts are responsible for the environment everywhere.

DEPARTMENT RESPONSE:

The Department agrees with this comment. A nonsubstantial revision has been made to section 100.2(l)(2)(ii)(b) to refer to ". . . a hostile school environment'' in order to clarify that Dignity Act addresses harassment, bullying and discrimination of students within the school environment.

3. COMMENT:

Why was the phrase ''of such a severe nature'' removed from section 100.2(l)(2)(ii)(b)?

DEPARTMENT RESPONSE:

The phrase was removed in order to conform the regulation to the Dignity Act, as amended by Chapter 102 of the Laws of 2012. The phrase ''of such a severe nature'' does not appear in the statute, and the proposed amended provision more accurately reflects the statutory requirements.

4. COMMENT:

Section 100.2(l)(2)(ii)(b) would benefit by cross-referencing the definition of ''harassment or bullying'' in section 100.2(kk)(1)(viii) to avoid repetitious language.

DEPARTMENT RESPONSE:

The Department believes that a revision is not appropriate here, because the definition in section 100.2(kk)(1)(viii) applies to the reporting requirements under the Dignity Act and refers to only ''harassment or bullying''; and the provision in section 100.2(l)(2)(ii)(b) refers to ''harassment, bullying, and/or discrimination'' and is thus broader in application.

5. COMMENT:

Is section 100.2(l)(2)(ii)(b)(4) appropriate in saying ''for purposes of this paragraph''?

DEPARTMENT RESPONSE:

Yes, because the provision is applicable to the entire Code of Conduct regulation, which is found in paragraph (2) of subdivision (l) of section 100.2.

6. COMMENT:

Clauses (g) and (h) of section 100.2(l)(2)(ii) should be combined. Clause (g) addresses discipline for harassment/bullying, while clause (h) addresses discipline, prevention and remediation. Why mention discipline in one context using the progressive model language in (h), but not include the language in (g)?

DEPARTMENT RESPONSE:

The Department does not believe it would be appropriate to merge these provisions. The provisions in (h) concerning a progressive model apply to student discipline. However, codes of conduct apply to students, teachers and other school personnel and visitors. Therefore, the provisions in clause (g) regarding disciplinary measures to be taken for incidents involving harassment, bullying and/or discrimination can include such conduct by students, teachers, school personnel and others and therefore are of broader application than clause (h), which applies only to students. Accordingly, it is appropriate to place such provisions in separate clauses.

7. COMMENT:

The State Education Department is commended for its thoughtful approach to implementing the Dignity for All Students Act. Successful implementation is critical to the safety and well-being of New York students. We fully support the proposed rule as a component of such implement.

DEPARTMENT RESPONSE:

The Department appreciates the support as we work to ensure that all students are educated in a safe and supportive environment.

8. COMMENT:

There is nothing in the Dignity Act or any related statutory provision that permits or requires the State Education Department to dictate to charter schools how to draft their codes of conduct.

DEPARTMENT RESPONSE:

The Department disagrees. Education Law § 2854(1)(b) provides that charter schools shall meet the same health and safety, civil rights, and student assessment requirements applicable to other public schools, except as otherwise specifically provided in Article 56 of the Education Law. The Dignity Act imposes certain health, safety and civil rights requirements on public schools. Consistent with the Dignity Act, section 119.6 was added to in 2012 to require charter schools to include in their disciplinary rules and procedures pursuant to Education Law section 2851(2)(h) or, if applicable, in their codes of conduct, provisions prohibiting discrimination and harassment against any student, by employees or students on school property or at a school function; provisions for responding to acts of discrimination and harassment against students by employees or students on school property or at a school function; and (c) guidelines on promoting a safe and supportive school climate while discouraging, among other things, discrimination or harassment against students by students and/or school employees; and including safe and supportive school climate concepts in the curriculum and classroom management.

Subsequently, Chapter 102 of the Laws of 2012 was enacted to significantly expand the scope and intent of the Dignity Act to include provisions on bullying and cyberbullying and to make the Act applicable in certain instances to conduct occurring off school property. The Department lacks authority to revise statutory requirements and/or exempt charter schools from these requirements.

The proposed amendment is necessary to implement the code of conduct requirements of Chapter 102 of the Laws of 2012 and, consistent with that statute, amends section 119.6 to refer to harassment, bullying and discrimination, including cyberbullying; provide a definition of ''emotional harm''; include acts of harassment and/or bullying that occur off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property; include provisions which enable students, parents and persons in parental relation to make an oral or written report of harassment, bullying, and/or discrimination to teachers, administrators, and other school personnel that the school district deems appropriate; and includes a provision prohibiting retaliation against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.

NOTICE OF ADOPTION

Reporting Requirements Under the Dignity for All Students Act

I.D. No. EDU-07-13-00014-A

Filing No. 425

Filing Date: 2013-04-23

Effective Date: 2013-07-01

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

Action taken: Amendment of section 100.2(kk) of Title 8 NYCRR.

Statutory authority: Education Law, sections 11(7), (8), 13(1), 15(not subdivided), 16(not subdivided), 101(not subdivided), 207(not subdivided), 305(1), (2) and 2854(1)(b); and L. 2012, ch. 102

Subject: Reporting requirements under the Dignity for All Students Act.

Purpose: To implement ch. 102, L. 2012 changes to the Dignity Act, for reporting incidents of harassment, bullying and discrimination.

Text of final rule: Subdivision (kk) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective July 1, 2013, as follows:

(kk) Dignity Act reporting requirements.

(1) Definitions. For purposes of this subdivision:

(i) ''School property'' means in or within any building, structure, athletic playing field, playground, parking lot, or land contained within the real property boundary line of a public elementary or secondary school, including a charter school; or in or on a school bus, as defined in Vehicle and Traffic Law section 142.

(ii) ''School function'' means a school-sponsored extracurricular event or activity.

(iii) ''Disability'' means disability as defined in Executive Law section 292(21).

(iv) ''Employee'' means employee as defined in Education Law section 1125(3), including an employee of a charter school.

(v) ''Sexual orientation'' means actual or perceived heterosexuality, homosexuality or bisexuality.

(vi) ''Gender'' means actual or perceived sex and shall include a person's gender identity or expression.

(vii) ''Discrimination'' means discrimination against any student

by a student or students and/or an employee or employees on school property or at a school function including, but not limited to, discrimination based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.

(viii) ''Harassment *or bullying*'' means the creation of a hostile environment by conduct or by [verbal] threats, intimidation or abuse*, including cyberbullying as defined in Education Law section 11(8),* that *either*:

(a) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional [or] *and/or* physical well-being [; or]*, including* conduct, [verbal] threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause *emotional harm; or*

(b) reasonably causes or would reasonably be expected to cause physical injury to a student *or to cause a student* to fear for his or her physical safety. [; such conduct, verbal threats, intimidation or abuse includes but is not limited to conduct, verbal threats, intimidation or abuse]

(c) Such definition shall include acts of harassment or bullying that occur:

(i) on school property, as defined in section 100.2(kk)(1)(i) of this Part; and/or

(ii) at a school function, as defined in section 100.2(kk)(1) of this Part; or

(iii) off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.

(d) For purposes of this subdivision, the term "threats, intimidation or abuse" shall include verbal and non-verbal actions. Acts of harassment and bullying shall include, but not be limited to, acts based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender*,* or sex.

(e) ''Emotional harm'' that takes place in the context of "harassment or bullying" means harm to a student's emotional well-being through creation of a hostile school environment that is so severe or pervasive as to unreasonably and substantially interfere with a student's education.

(ix) ''Material Incident of [Discrimination and/or] Harassment*, Bullying, and/or Discrimination*'' means a single *verified* incident or a series of related *verified* incidents where a student is subjected to [discrimination and/or] harassment*, bullying and/or discrimination* by a student and/or employee on school property or at a school function [that creates a hostile environment by conduct, with or without physical contact and/or by verbal threats, intimidation or abuse, of such severe or pervasive nature that:

(a) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being; or

(b) reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety]. *In addition, such term shall include a verified incident or series of related incidents of harassment or bullying that occur off school property, meets the definition in subclause (1)(viii)(c)(iii) of this subdivision, and is the subject of a written or oral complaint to the superintendent, principal, or their designee, or other school employee.* Such conduct shall include, but is not limited to, threats, intimidation or abuse based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender*,* or sex; provided that nothing in this subdivision shall be construed to prohibit a denial of admission into, or exclusion from, a course of instruction based on a person's gender that would be permissible under Education Law sections 3201-a or 2854(2)(a) and Title IX of the Education Amendments of 1972 (20 U.S.C. section 1681, et seq.), or to prohibit, as discrimination based on disability, actions that would be permissible under section 504 of the Rehabilitation Act of 1973.

(2) Reporting of incidents to the superintendent, principal, or designee.

(i) School employees who witness harassment, bullying, and/or discrimination or receive an oral or written report of harassment, bullying, and/or discrimination shall promptly orally notify the principal, superintendent, or their designee not later than one school day after such employee witnesses or receives a report of harassment, bullying, and/or discrimination, and.

(ii) such school employee shall also file a written report in a manner prescribed by, as applicable, the school district, board of cooperative educational services (BOCES) or charter school with the principal, superintendent, or their designee no later than two school days after making an oral report.

(iii) the principal, superintendent or the principal's or superintendent's designee shall lead or supervise the thorough investigation of all reports of harassment, bullying and/or discrimination, and ensure that such investigation is completed promptly after receipt of any written reports made under Education Law section 13.

(iv) When an investigation verifies a material incident of harassment, bullying, and/or discrimination, the superintendent, principal, or designee shall take prompt action, consistent with the district's code of conduct including but not limited to the provisions of section 100.2(l)(2)(ii)(h), reasonably calculated to end the harassment, bullying, and/or discrimination, eliminate any hostile environment, create a more positive school culture and climate, prevent recurrence of the behavior, and ensure the safety of the student or students against whom such behavior was directed.

(v) The principal, superintendent, or their designee shall notify promptly the appropriate local law enforcement agency when it is believed that any harassment, bullying or discrimination constitutes criminal conduct.

(vi) The principal shall provide a regular report on data and trends related to harassment, bullying, and/or discrimination to the superintendent. For the purpose of this subdivision, the term "regular report" shall mean at least once during each school year, and in a manner prescribed by, as applicable, the school district, BOCES or charter school.

(3) Reporting of *material* incidents *to the commissioner*.

(i) For the [2012-2013] *2013-2014* school year and for each succeeding school year thereafter, each school district, board of cooperative educational services (BOCES) and charter school shall submit to the commissioner an annual report of material incidents of [discrimination and/or] harassment*, bullying, and/or discrimination,* that occurred in such school year, in accordance with Education Law section 15 and this subdivision. Such report shall be submitted in a manner prescribed by the commissioner, on or before the basic educational data system (BEDS) reporting deadline or such other date as determined by the commissioner.

(ii) For purposes of reporting pursuant to this subdivision, a school district, BOCES or charter school shall include in its annual report all material incidents of [discrimination and/or] harassment*, bullying, and/or discrimination* that:

(a) are the result of the investigation of a written or oral complaint made to the *superintendent,* [school] principal *or their designee,* [or other school administrator responsible for school discipline,] or to any other employee; or

(b) are otherwise directly observed by such *superintendent,* principal or [administrator,] *their designee,* or by any other employee regardless of whether a complaint is made.

(iii) Such report shall include information describing the specific nature of the incident, including, but not limited to:

(a) the type(s) of bias involved (actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, sex, or other). Where multiple types of bias are involved, they shall all be reported;

(b) whether the incident resulted from student and/or employee conduct;

(c) whether the incident involved physical contact and/or [verbal] threats, intimidation or abuse*, including cyberbullying as defined in Education Law section 11(8)*;

(d) the location where the incident occurred (on school property or at a school function*, or off school property, where applicable*).

[(3)] *(4)* Protection of people who report discrimination and/or harassment.

(i) Pursuant to Education Law section 16, any person having reasonable cause to suspect that a student has been subjected to [discrimination and/or] harassment*, bullying, and/or discrimination* by an employee or student, on school grounds or at a school function, who acting reasonably and in good faith, either reports such information to school officials, to the commissioner, or to law enforcement authorities or otherwise initiates, testifies, participates or assists in any formal or informal proceedings under this subdivision, shall have immunity from any civil liability that may arise from the making of such report or from initiating, testifying, participating or assisting in such formal or informal proceedings.

(ii) No school district, BOCES or charter school, or an employee thereof, shall take, request or cause a retaliatory action against any such person who, acting reasonably and in good faith, either makes such a report or initiates, testifies, participates or assists in such formal or informal proceedings.

(iii) Pursuant to Education Law section 13, retaliation by any school employee or student shall be prohibited against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 100.2(kk)(2) and (3).

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on February 13, 2013, nonsubstantial revisions were made to the proposed rule as follows.

In paragraph 100.2(kk)(2), the proposed rule included two subparagraphs that were both labeled as (iii). The second subparagraph (iii) has been relabeled (iv), and the subsequent subparagraphs (iv) and (v) have been relabeled (v) and (vi).

In clause 100.2(kk)(3)(iii)(c), the term "verbal" was deleted in order to ensure terminological consistency with clause 100.2(kk)(1)(viii)(d).

The above revisions require that the Paperwork section in the previously published Regulatory Impact Statement be revised to read as follows:

6. PAPERWORK:

For the 2013-2014 school year and for each succeeding school year thereafter, each school district, board of cooperative educational services (BOCES) and charter school shall submit to the Commissioner an annual report of material incidents of harassment, bullying and discrimination that occurred in such school year.

A school district, BOCES or charter school shall include in its annual report all material incidents of harassment, bullying and discrimination that:

(a) are the result of the investigation of a written or oral complaint made to the superintendent, principal, or their designee, or to any other employee; or

(b) are otherwise directly observed by such superintendent, principal or their designee, or by any other employee regardless of whether a complaint is made.

The report shall include information describing the specific nature of the incident, including, but not limited to:

(a) the type(s) of bias involved (actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender, sex or other). Where multiple types of bias are involved, they shall all be reported;

(b) whether the incident resulted from student and/or employee conduct;

(c) whether the incident involved physical contact and/or threats, intimidation or abuse, including cyberbullying, and

(d) the location where the incident occurred (on school property and/or at a school function, or off school property, where applicable).

No school district, BOCES or charter school, or an employee thereof, shall take, request or cause a retaliatory action against any such person who, acting reasonably and in good faith, either makes such a report or initiates, testifies, participates or assists in such formal or informal proceedings. Retaliation by any school employee or student shall be prohibited against any individual, who, in good faith reports or assists in the investigation of harassment, bullying and/or discrimination.

Each school district, BOCES and charter school shall annually submit its report on material incidents of harassment, bullying and discrimination in a manner prescribed by the commissioner, on or before the basic educational data system (BEDS) reporting deadline or such other date as determined by the Commissioner.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on February 13, 2013, nonsubstantial revisions were made to the proposed rule as set forth in the Revised Regulatory Impact Statement submitted herewith.

The changes require that the Compliance Requirement section of the previously published Regulatory Flexibility Analysis be revised as follows:

2. COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to, and to otherwise implement, Chapter 102 of the Laws of 2012, by establishing requirements for reporting incidents of harassment, bullying (including cyberbullying) and discrimination to school authorities and local law enforcement agencies, and for reporting material incidents of harassment, bullying/cyberbullying and discrimination to the Commissioner. The proposed amendment will not impose any additional compliance requirements on school districts, BOCES or charter schools beyond those imposed by the statute.

Consistent with Chapter 102, the proposed amendment revises the regulation to add provisions for reporting of incidents of harassment, bullying/cyberbullying and discrimination to the superintendent, principal, or their designee, including requirements that:

(1) School employees who witness harassment, bullying, and/or discrimination or receive an oral or written report of such acts shall promptly orally notify the principal, superintendent, or their designee not later than one school day after such employee witnesses or receives a report of such acts, and shall also file a written report with the principal, superintendent, or their designee no later than two school days after making an oral report.

(2) The principal, superintendent or the principal's or superintendent's designee shall lead or supervise the thorough investigation of all reports of harassment, bullying and/or discrimination, and ensure that such investigation is completed promptly after receipt of any written reports.

(3) When an investigation verifies a material incident of harassment, bullying, and/or discrimination, the superintendent, principal, or designee shall take prompt action, reasonably calculated to end the harassment, bullying, and/or discrimination, eliminate any hostile environment, create a more positive school culture and climate, prevent recurrence of the behavior, and ensure the safety of the student or students against whom such behavior was directed.

(4) The principal, superintendent, or their designee shall notify promptly the appropriate local law enforcement agency when it is believed that any harassment, bullying or discrimination constitutes criminal conduct.

(5) The principal shall provide a regular report, at least once during each school year, on data and trends related to harassment, bullying, and/or discrimination to the superintendent.

(6) Pursuant to Education Law section 13, retaliation by any school employee or student shall be prohibited against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.

For the 2013-2014 school year and for each succeeding school year thereafter, each school district, board of cooperative educational services (BOCES) and charter school shall submit to the Commissioner an annual report of material incidents of harassment, bullying and discrimination that occurred in such school year.

A school district, BOCES or charter school shall include in its annual report all material incidents of harassment, bullying and discrimination that:

(a) are the result of the investigation of a written or oral complaint made to the superintendent, principal, or their designee, or to any other employee; or

(b) are otherwise directly observed by such superintendent, principal or their designee, or by any other employee regardless of whether a complaint is made.

The report shall include information describing the specific nature of the incident, including, but not limited to:

(a) the type(s) of bias involved (actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender, sex or other). Where multiple types of bias are involved, they shall all be reported;

(b) whether the incident resulted from student and/or employee conduct;

(c) whether the incident involved physical contact and/or threats, intimidation or abuse, including cyberbullying, and

(d) the location where the incident occurred (on school property and/or at a school function, or off school property, where applicable).

No school district, BOCES or charter school, or an employee thereof, shall take, request or cause a retaliatory action against any such person who, acting reasonably and in good faith, either makes such a report or initiates, testifies, participates or assists in such formal or informal proceedings. Retaliation by any school employee or student shall be prohibited against any individual, who, in good faith reports or assists in the investigation of harassment, bullying and/or discrimination.

Each school district, BOCES and charter school shall annually submit its report on material incidents of harassment, bullying and discrimination in a manner prescribed by the commissioner, on or before the basic educational data system (BEDS) reporting deadline or such other date as determined by the Commissioner.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on February 13, 2013, nonsubstantial revisions were made to the proposed rule as set forth in the Revised Regulatory Impact Statement submitted herewith.

The changes require that the Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services section of the previously published Rural Area Flexibility Analysis be revised to read as follows:

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

The proposed amendment is necessary to conform the Commissioner's Regulations to, and to otherwise implement, Chapter 102 of the Laws of 2012, by establishing requirements for reporting incidents of harassment, bullying (including cyberbullying) and discrimination to school authorities and local law enforcement agencies, and for reporting material incidents of harassment, bullying/cyberbullying and discrimination to the

Commissioner. The proposed amendment will not impose any additional compliance requirements on school districts, BOCES or charter schools beyond those imposed by the statute.

Consistent with Chapter 102, the proposed amendment revises the regulation to add provisions for reporting of incidents of harassment, bullying/cyberbullying and discrimination to the superintendent, principal, or their designee, including requirements that:

(1) School employees who witness harassment, bullying, and/or discrimination or receive an oral or written report of such acts shall promptly orally notify the principal, superintendent, or their designee not later than one school day after such employee witnesses or receives a report of such acts, and shall also file a written report with the principal, superintendent, or their designee no later than two school days after making an oral report.

(2) The principal, superintendent or the principal's or superintendent's designee shall lead or supervise the thorough investigation of all reports of harassment, bullying and/or discrimination, and ensure that such investigation is completed promptly after receipt of any written reports.

(3) When an investigation verifies a material incident of harassment, bullying, and/or discrimination, the superintendent, principal, or designee shall take prompt action, reasonably calculated to end the harassment, bullying, and/or discrimination, eliminate any hostile environment, create a more positive school culture and climate, prevent recurrence of the behavior, and ensure the safety of the student or students against whom such behavior was directed.

(4) The principal, superintendent, or their designee shall notify promptly the appropriate local law enforcement agency when it is believed that any harassment, bullying or discrimination constitutes criminal conduct.

(5) The principal shall provide a regular report, at least once during each school year, on data and trends related to harassment, bullying, and/or discrimination to the superintendent.

(6) Pursuant to Education Law section 13, retaliation by any school employee or student shall be prohibited against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.

For the 2013-2014 school year and for each succeeding school year thereafter, each school district, board of cooperative educational services (BOCES) and charter school shall submit to the Commissioner an annual report of material incidents of harassment, bullying and discrimination that occurred in such school year.

A school district, BOCES or charter school shall include in its annual report all material incidents of harassment, bullying and discrimination that:

(a) are the result of the investigation of a written or oral complaint made to the superintendent, principal, or their designee, or to any other employee; or

(b) are otherwise directly observed by such superintendent, principal or their designee, or by any other employee regardless of whether a complaint is made.

The report shall include information describing the specific nature of the incident, including, but not limited to:

(a) the type(s) of bias involved (actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender, sex or other). Where multiple types of bias are involved, they shall all be reported;

(b) whether the incident resulted from student and/or employee conduct;

(c) whether the incident involved physical contact and/or threats, intimidation or abuse, including cyberbullying, and

(d) the location where the incident occurred (on school property and/or at a school function, or off school property, where applicable).

No school district, BOCES or charter school, or an employee thereof, shall take, request or cause a retaliatory action against any such person who, acting reasonably and in good faith, either makes such a report or initiates, testifies, participates or assists in such formal or informal proceedings. Retaliation by any school employee or student shall be prohibited against any individual, who, in good faith reports or assists in the investigation of harassment, bullying and/or discrimination.

Each school district, BOCES and charter school shall annually submit its report on material incidents of harassment, bullying and discrimination in a manner prescribed by the commissioner, on or before the basic educational data system (BEDS) reporting deadline or such other date as determined by the Commissioner.

Revised Job Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on February 13, 2013, nonsubstantial revisions were made to the proposed rule as set forth in the Revised Regulatory Impact Statement submitted herewith.

The proposed amendment, as so revised, relates to reporting requirements under the Dignity for All Students Act (L. 2010, Ch. 482) and is applicable to school districts, boards of cooperative educational services and charter schools. The proposed revised amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed revised amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is the 4th or 5th year after the year in which this rule is being adopted. This review period, justification for proposing same, and invitation for public comment thereon, were contained in a RFA, RAFA or JIS:

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on February 13, 2013, the State Education Department received the following comments.

1. COMMENT:

The definition of ''discrimination'' in section 100.2(kk)(1)(vii) is inadequate and should be improved.

DEPARTMENT RESPONSE:

The comment is beyond the scope of the proposed amendment. The discrimination definition in section 100.2(kk)(1)(vii) has remained unchanged since its adoption by the Board of Regents in 2012, and has not been proposed for amendment pursuant to the current pending rule making.

The purpose of the proposed amendment is to conform the Commissioner's Regulations to, and otherwise implement, the reporting requirements of the Dignity for All Students Act (L.2010, Ch 482 - ''Dignity Act''), as amended by Chapter 102 of the Laws of 2012. Consistent with Chapter 102, the proposed amendment revises the regulation to add provisions for reporting of incidents of harassment, bullying/cyberbullying and discrimination to the superintendent, principal, or their designee.

2. COMMENT:

There is a mislabeling in section 100.2(kk)(2), consisting of two subparagraphs both being labeled (iii).

DEPARTMENT RESPONSE:

Nonsubstantial changes have been made to section 100.2(kk)(2) to correct the mislabeling.

3. COMMENT:

Section 100.2(kk)(3)(ii)(a) should be revised to indicate that the incidents being reported have been verified as the result of the investigation.

DEPARTMENT RESPONSE:

Section 100.2(kk)(3)(ii) relates to the reporting of material incidents of harassment, bullying and/or discrimination to the Commissioner. Section 100.2(kk)(1)(ix) defines a "material incident of harassment, bullying, and/or discrimination" as a "single verified incident or a series of related verified incidents. . . [emphasis added].'' Therefore, there is no need to restate "verified" elsewhere in the rule.

4. COMMENT:

The provision in section 100.2(kk)(3)(b) that requires reporting of material incidents of harassment, bullying and/or discrimination that ''are otherwise directly observed by such superintendent, principal or their designee, or by any other employee regardless of whether a complaint is made'' is problematic because if they observed such incidents, they are required to make a written report (which seems to mean the same thing as filing a complaint); and even if such incidents were directly observed, wouldn't an investigation still be necessary to ensure they perceived the incident correctly and that the incident was indeed a ''material'' incident?

DEPARTMENT RESPONSE:

The comment appears to reflect confusion about the differences in reporting requirements at the local level versus the State level. Education Law § 13 contains various reporting requirements and each of these reporting requirements have their own sets of obligations. Education Law § 13(1)(c) requires school employees who witness harassment, bullying or discrimination, or receive an oral or written report of harassment, bullying or discrimination, to promptly orally notify the principal, superintendent or the principal's or superintendent's designee not later than one day after such school employee witnesses or receives a report of harassment, bullying or discrimination and to file a written report with the principal, superintendent or the principal's or superintendent's designee not later than two days after making such report. This provision does not contain the word ''verified'' and, thus, the statute requires the reporting of all incidents at this stage of the process regardless of whether the incident has been ''verified as the result of an investigation'' as the comment is proposing here. Proposed 8 NYCRR § 100.2(kk)(2)(i) and (ii) implement these statutory requirements.

Education Law § 13(1)(d) then requires the principal, superintendent or the principal or superintendent's designee to lead or supervise the thor-

ough investigation of all reports of harassment, bullying and discrimination, and to ensure that such investigation is completed promptly after receipt of any written reports made under this section. This provision also does not contain the word ''verified.'' Proposed 8 NYCRR § 100.2(kk)(2)(iii) implements these statutory requirements.

Education Law § 13(1)(e) requires the school, when an investigation reveals any such verified harassment, bullying or discrimination, to take prompt actions reasonably calculated to end the harassment, bullying or discrimination, eliminate any hostile environment, create a more positive school culture and climate, prevent reoccurrence of the behavior, and ensure the safety of the student or students against whom such harassment, bullying or discrimination was directed. This is the first time the words ''verified'' and ''investigation'' are used together in this section of the Dignity statute. Pursuant to this statutory provision, schools are required to take certain actions only after an investigation verifies that an incident of harassment, bullying or discrimination has occurred. Proposed 8 NYCRR § 100.2(kk)(2)(iv) implements these statutory requirements.

Pursuant to the definition of ''material incidents of harassment, bullying and/or discrimination'' in section 100.2(kk)(1)(ix), only those directly-observed incidents that are verified through investigation are required to be reported to the Commissioner of Education pursuant to 100.2(kk)(3).

5. COMMENT:

There needs to be resolution of the apparent inconsistency between the VADIR system, which requires school districts to report in item 20 incidents of bullying and harassment that haven't necessarily been founded, and the Dignity Act reporting system, which requires reporting of verified incidents of harassment, bullying and/or discrimination.

DEPARTMENT RESPONSE:

The comment is beyond the scope of the proposed rule making, the purpose of which is to conform the Commissioner's Regulations to, and otherwise implement, the reporting requirements of the Dignity for All Students Act (L.2010, Ch 482 - ''Dignity Act''), as amended by Chapter 102 of the Laws of 2012. Consistent with Chapter 102, the proposed amendment revises the regulation to add provisions for reporting of incidents of harassment, bullying/cyberbullying and discrimination to the superintendent, principal, or their designee.

In any event, the resolution of any perceived inconsistency between the VADIR and Dignity Act reporting systems would be more appropriately addressed in guidance than in regulation. Although the intent of VADIR and the Dignity Act are related to each other in some ways, their requirements, including, but not limited to, reporting requirements, and definitions are separate and distinct from one another. Thus, the Department determined that, due to these differences, the Dignity Act's reporting system should be separate and distinct from the VADIR system.

6. COMMENT:

Section 100.2(kk)(3)(iii)(a) of the proposed rule continues to be a concern. Asking school districts to report by the type of bias involved in such detail will generate data that isn't meaningful. The differences between race, color, national origin, and ethnic group are difficult to recognize. It would make more sense to collapse the twelve reporting categories into six: (1) race – ethnicity – national origin; (2) religion – religious practice; (3) weight; (4) disability; (5) sex – gender – sexual orientation; and (6) other. In addition the proposed rule doesn't indicate who determines the category (the complainant, the investigator, or the Dignity Act Coordinator).

DEPARTMENT RESPONSE:

Section 15 of the Dignity Act statue, as amended by Chapter 102 of the Laws of 2012, requires the Commissioner to create a procedure under which material incidents of harassment, bullying and discrimination are reported to the Department on at least an annual basis, and further provides that "[s]uch procedure shall provide that such reports shall, whenever possible, also delineate the specific nature of such incidents of harassment, bullying and discrimination. . ." Combining the categories specified in the statute will contradict the intent of this section, which is to define the underlying basis for material incidents of harassment, bullying, and/or discrimination. It is the responsibility of the school district submitting the report to the Department to determine whether an incident involves one or more of the specified categories. The Department has issued guidance that provides some definitions for these terms that the school district can use to determine what category or categories and incident should be reported in.

7. COMMENT:

The proposed rule does not make clear that schools will need to make reports that include information describing the specific nature of incidents of discrimination and harassment, including the type of bias involved (including multiple forms of bias), whether the incident resulted from student or employee conduct, the nature of the incident, and the location of the incident. School districts will need to make a report once per year, however the guidance and reporting mechanism should provide schools with the ability to conduct a real time analysis of data collected about their school climate.

DEPARTMENT RESPONSE:

The Department disagrees. Since its adoption in 2012, section 100.2(kk)(3)(iii) has required the annual report to the Department to include information describing the specific nature of incidents including: (a) the type(s) of bias involved (including multiple types of bias); (b) whether the incident resulted from student and/or employee conduct; (c) whether the incident involved physical contact and/or verbal threats, intimidation or abuse; and (d) the location where the incident occurred. Furthermore, in order to conform the regulation to Chapter 102 of the Laws of 2012, the proposed amendment would also require reporting of cyberbullying and, where applicable, incidents occurring off school property.

The exact method used within a school district to record data in real time is a local decision. However, the proposed amendment does require the principal to provide a regular report on data and trends related to harassment, bullying, and/or discrimination to the superintendent of schools.

8. COMMENT:

The proposed amendment would impose additional burdensome administrative requirements on charter schools. Charter schools should be exempt from reporting requirements under Sections 100.2(kk)(2)(i)-(ii); 100.2(kk)(2)(v); and 100.2(kk)(3) for the following reasons: No duplicative obligation to report both verbally and in writing should be imposed on school staff; it is unreasonable to provide a written report prior to an investigation; and SED lacks the authority to dictate who at a charter school is required to take on administrative burdens such as report writing. No written reporting requirements reside with our instructional staff.

DEPARTMENT RESPONSE:

The citations noted reflect the language and requirements in the statute, which require school employees who witness harassment, bullying or discrimination, or receive an oral or written report of such conduct, to promptly orally, notify the principal, superintendent or designee and file a written report [Education Law § 13(1)(c)]; require the principal, superintendent or designee to notify promptly the appropriate law enforcement agency when it is believed that any harassment, bullying or discrimination constitutes criminal conduct [Education Law § 13(1)(i)]; and require the annual reporting of material incidents of harassment, bullying and/or discrimination (Education Law § 15). In addition, Education Law § 2854(1)(b) provides that charter schools shall meet the same health and safety, civil rights, and student assessment requirements applicable to other public schools, except as otherwise specifically provided in Article 56 of the Education Law. The Dignity Act imposes certain health, safety and civil rights requirements on public schools. The Department lacks authority to revise statutory requirements and/or exempt charter schools from these requirements.

NOTICE OF ADOPTION

Local High School Equivalency Diplomas Based Upon Experimental Programs

I.D. No. EDU-07-13-00015-A

Filing No. 427

Filing Date: 2013-04-23

Effective Date: 2013-05-08

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

Action taken: Amendment of section 100.8 of the Commissioner's Regulations (8 NYCRR).

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided, 208 (not subdivided), 209 (not subdivided), 305(1), (2), 309 (not subdivided) and 3204(3)

Subject: Local high school equivalency diplomas based upon experimental programs.

Purpose: To extend until 6/30/15 the provision for awarding local high school equivalency diplomas based upon experimental programs.

Text or summary was published in the February 13, 2013 issue of the Register, I.D. No. EDU-07-13-00015-P.

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

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2016, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment
The agency received no public comment.

Department of Environmental Conservation

NOTICE OF ADOPTION

Revise 6 NYCRR Subpart 750-1 and 6 NYCRR Subparts 360-1, 360-4 and 360-5

I.D. No. ENV-49-12-00012-A
Filing No. 414
Filing Date: 2013-04-18
Effective Date: 60 days after filing except for sections 750-1.2, 750-1.7 and 750-1.21 which are effective May 8, 2013

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

Action taken: Amendment of sections 360-1.3, 360-4.2, 360-5.3, 360-5.5, 360-5.6, 750-1.2, 750-1.7 and 750-1.21 of Title 6 NYCRR.

Statutory authority: 33 U.S.C. 1251, et seq. (Federal Water Pollution Control Act); Environmental Conservation Law, art. 3, title 3, art. 17, titles 3, 5, 7, 8; art. 27, titles 1, 3, 5, 7, 9, 13, art. 70, title 1 and sections 1-0101, 8-0113, 11-0325, 19-0301, 19-0303, 19-0304 and 19-0306

Subject: Revise 6 NYCRR Subparts 750-1, 360-1, 360-4 and 360-5.

Purpose: Remove requirement that certain CAFOs maintain ECL SPDES permit coverage; revise land application, storage and composting rules.

Substance of final rule: Subpart 750-1

The proposed rule making amends provisions of 6 NYCRR Subpart 750-1 to eliminate the requirement that non-discharging Animal Feeding Operations (AFOs) with 200-299 mature dairy cows, milked or dry, obtain ECL CAFO SPDES permit coverage unless the Department designates the facility to be a CAFO. The rule making defines the different types of CAFOs (which previously were not defined in Department regulations) to clarify those facilities subject to regulation under state law. Under the rule making, non-discharging AFOs with 200-299 mature dairy cows are excluded from the definition of "Medium CAFO." Consequently, these AFOs would not be required to obtain ECL CAFO SPDES permit coverage unless: 1) the facility requests and is granted permit coverage as a Small CAFO or 2) the facility is designated to be a Small CAFO by the Department. The proposed rule making revisions to Subpart 750-1 do not change the federal definition of a Large, Medium or Small CAFO or to limit, in any way, the scope of federal law. Instead, the proposed Subpart 750-1 changes exempt non-discharging AFOs with 200-299 mature dairy cows from the requirement to obtain an ECL CAFO SPDES permit unless designated, while clarifying that although ECL CAFO SPDES permit coverage for these facilities would be discontinued, state law is still more stringent than federal law. This is the case because unlike federal law which generally regulates discharges from point sources, state law regulates the creation of point sources even if there is not a discharge. The specific substantive revisions to 6 NYCRR Subpart 750-1 are summarized below.

Paragraph (21) of Subdivision 750-1.2 (a) is revised to define the term "CAFO" and the different categories of CAFOs for purposes of state law. The term "Large CAFO" is defined in Section 750-1.2 (a) (21) to align with the federal definition set forth in 40 CFR § 122.23 (b) (4). The term "Medium CAFO" is defined to include all AFOs with 200-699 mature dairy cows except that a non-discharging AFO with 200-299 mature dairy cows would not be classified as a CAFO unless the facility elected to seek coverage or was designated a CAFO in which case it would be considered a Small CAFO throughout permit coverage. The proposed definition of Medium CAFO remains more stringent than federal law because the universe of facilities subject to regulation is still greater under state law. Under federal law, all non-discharging AFOs are exempt from being required to obtain a permit, regardless of size. The Department's proposed regulations, however, provide that AFOs with 300 or more mature dairy cows, milked or dry, are considered CAFOs that are required to obtain SPDES permit coverage irrespective of discharge. The rulemaking would align State law more closely to federal law for non-discharging AFOs with 200-299 mature dairy cows because these facilities would no longer required to obtain CAFO SPDES permit coverage. However, consistent with federal law, Paragraph (21) of Subdivision 750-1.2 (a) also makes explicit that the Department may designate an Animal Feeding Operation (AFO), including those AFOs between 200-299 mature dairy cows as a Small CAFO. Under the ECL, if an AFO is designated as a Small CAFO, it is a defined point source that is required to have a SPDES permit even if there is not a discharge. Furthermore, the proposed rule clarifies that the revision does not impact the Department's existing authority to enter, inspect and collect information. The overall effect of these changes, both the definition and the exception, is to: (1) require permit coverage of all CAFOs that discharge; (2) require permit coverage for dairy CAFOs above the threshold of 300 mature dairy cows irrespective of discharge; and (3) exempt from permit coverage AFOs with 200-299 mature dairy cows, whether milked or dry, without a discharge, unless the facility elects to seek coverage or is designated as a Small CAFO.

Subdivision (c) of Section 750-1.7 has been amended to incorporate 6 NYCRR Part 621 as part of a permit application requirement for CAFOs. This change would specifically apply to those CAFOs required to obtain an ECL CAFO SPDES permit. Paragraph (4) of Subdivision 750-1.21 (b) has also been revised to clarify the Department's authority to issue a SPDES General Permit for CAFOs that do not discharge, by deleting the word "discharge." Subdivision 750-1.21 (b) would now explicitly authorize a general permit for discharges or potential discharges from CAFOs.

Subparts 360-4 and 360-5

The proposed rule making makes a number of substantive changes to Subpart 360-4 (Land Application and Associated Storage Facilities) and Subpart 360-5 (Composting and Other Class A Organic Waste Processing Facilities). As discussed in greater detail below, these revisions establish criteria for anaerobic digestion (AD) facilities, provide exemptions from permit and registration requirements for specified activities at farms and CAFOs, and make other changes to these Subparts to promote sound environmental practices and reduce regulatory overlap.

6 NYCRR Section 360-4.2 (a) (1), as currently in effect, states that land application facilities for animal manure and associated bedding material are exempt from the requirements of Subpart 360-4. The proposed rule defines the term "bedding material" for purposes of the exemption to clarify that this exemption applies to common bedding material used at farms (e.g., hay, straw, sawdust, wood shavings, newsprint, sand, and materials approved pursuant to a beneficial use determination). This revision provides clarity but is not a change to the current regulatory program.

6 NYCRR Section 360-4.2 (a) (4) is added to exempt land application facilities for undigested food and fecal material emanating from New York State-owned or licensed fish hatcheries from the requirements of Subpart 360-4 where the waste is applied at or below agronomic rates. This new exemption allows the Department to dispose of fish hatchery waste in a responsible manner. Under current regulation, these activities require registration but this is not needed since they are small scale and are controlled by Department staff.

6 NYCRR Section 360-4.2 (a) (5) is added to create an exemption for a land application facility or manure storage facility on a Part 750 permitted CAFO that also involves food processing waste or other waste if the waste handling is addressed in a CNMP. The exemption does not apply if the waste contains any human fecal matter or if the amount of non-manure waste placed in the storage facility exceeds 50% of the total volume of waste placed in the storage facility on an annual basis. The term "CNMP" is defined in Section 360-4.2 (a) (5) rather than citing NRCS Code NY312 because Code NY312 might not be relied upon in the future. Section 360-1.3 (b) (4) has been revised to delete the reference to Code NY312 and to add Code NY313 as a reference.

6 NYCRR Subdivision 360-4-2(a) has been revised to effectuate the exemptions described above -- Sections Section 360-4.2 (a) (4) and (5) -- on the effective date of this proposed rulemaking by deregistering those facilities that were previously registered provided that all required annual reports for the facility have been submitted to the department.

6 NYCRR Section 360-4.2 (b) (1) (vii), is revised to clarify the standards that apply to storage facilities. These changes reflect the current manner that these facilities are regulated under Part 360.

6 NYCRR Section 360-5.3 (a) (1) is revised to provide an exemption from Subpart 360-5 for a composting facility that accepts crop residues and to clarify that the exemption from Subpart 360-5 applies to farms.

6 NYCRR Section 360-5.3 (a) (2) is revised to specify that the exemption from Subpart 360-5 applies to either processed or unprocessed yard waste and to indicate that precipitation, surface water, and groundwater that come in contact with yard waste or the resultant compost is not leachate, but must be managed in an acceptable manner to the Department.

6 NYCRR Section 360-5.3 (a) (4) adds an exemption from Subpart 360-5 for certain composting facilities for animal mortalities located on a farm or CAFO and Section 360-5.3 (a) (5) adds an exemption from Subpart 360-5 for AD facilities that accept specified farm waste. Certain activities associated with AD facilities are also exempted, including CAFOs implementing a CNMP for manure, food processing waste, fats, oil, grease, and other wastes without human fecal matter, provided that non-

manure waste is less than 50%, by volume, of the waste placed in the AD unit on an annual basis. This section also exempts land application of solids and liquids from AD facilities and other activities relating to dewatered solids.

6 NYCRR Section 360-5.3 (b) (1) (iv) is added to expand the eligibility for registration (rather than requiring a permit) for organic processing facilities for animal mortalities or parts generated from a farm, slaughterhouse, butcher or other generator; and Section 360-5.3 (b) (1) (v) establishes eligibility for registration for composting facilities for dewatered solids from an AD that is subject to registration. Furthermore, Section 360-5.3 (b) has been revised to create eligibility for registration for AD facilities that accept less than 50 tons of waste per day not containing human fecal matter provided that certain operating conditions are met. AD facilities accepting any waste containing human fecal matter or accepting 50 tons or more of waste per day must obtain a permit. Moreover, while land application of solids and liquids generated from an AD facility would require registration, land application that occurs at a Part 750 permitted CAFO is exempt if land application is addressed in a CNMP.

6 NYCRR Section 360-5.5 (b) is revised to exempt AD digestate used on farms from pathogen reduction alternatives under this subdivision. Section 360-5.5 (d) (14) is added to establish specific criteria, including pathogen reduction, for the operation of AD facilities that accept sanitary waste.

6 NYCRR Section 360-5.6 makes certain revisions with respect to source separated organics processing facilities. Specifically, the revisions include permit application requirements, pathogen and vector attraction criteria, pollutant limits and product use for material distributed to the public, and design criteria and operational requirements. Subdivision (f) is added to set forth AD criteria.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 360-1.3(b)(4), 360-4.2(a)(5), (b), 360-5.3(a)(2), (4), 750-1.2(a)(21), 750-1.5(a)(12) and 750-1.24(c).

Text of rule and any required statements and analyses may be obtained from: Robert Simson, New York State Department of Environmental Conservation, 625 Broadway, 4th Floor, Albany, N.Y. 12233, (518) 402-8271, email: rjsimson@gw.dec.state.ny.us

Additional matter required by statute: Incorporation by Reference Certification

Summary of Revised Regulatory Impact Statement

The proposed rulemaking modifies the Department of Environmental Conservation's (Department) existing 6 NYCRR Part 750 regulations to address the regulatory definition of Concentrated Animal Feeding Operations (CAFOs) and State Pollutant Discharge Elimination System (SPDES) permitting requirements for CAFOs. The proposed rulemaking also modifies 6 NYCRR Part 360 to address new solid waste management technologies, such as setting criteria for anaerobic digesters, while eliminating obsolete and duplicative requirements.

Statutory Authority and Legislative Objectives. The Department's statutory authority to undertake amendments to Part 750 is found in Environmental Conservation Law (ECL) Article 3, Title 3; Article 17, Titles 3, 5, 7, 8; Article 70, Title 1; and the Federal Water Pollution Control Act, 33 USC 1251, et seq. Animal Feeding Operations (AFOs) are lots or facilities where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility [40 CFR § 122.23 (b)]. CAFOs are primarily defined based upon their animal threshold numbers, and are categorized as either large, medium or small. Under federal law, to meet the definition of a Medium CAFO there must also be a discharge of pollutants into the waters of the United States. Furthermore, based on recent case law and a federal rule change, CAFOs can only be required to obtain SPDES permit coverage under the Clean Water Act (CWA) if there is a discharge into the waters of the United States.

Conversely, the ECL provides the Department with authority to regulate the creation of a point source even if there is no discharge. ECL § 17-0701 (1) (a) states that, "it shall be unlawful for any person, until a written SPDES permit therefore has been granted … to: (a) make or cause to make or use any outlet or point source for the discharge of sewage, industrial waste, or other wastes or the effluent there from, into the waters of this state…." (emphasis added). ECL § 17-0105 (16) defines a CAFO as a point source. Currently, unlike federal law, the Department classifies Medium CAFOs - by permit -based solely upon the animal thresholds set forth in the federal regulations, irrespective of whether there is a discharge. Accordingly, under its authority to regulate the creation of a point source, the Department issues an ECL CAFO SPDES general permit for CAFOs that do not discharge.

The ECL CAFO General Permit requires the development and implementation of a site specific Comprehensive Nutrient Management Plan (CNMP). CNMPs are developed in accordance with conservation practice standards established by the Natural Resources Conservation Service (NRCS) to identify pollutant sources on the farm and recommend BMPs to prevent or minimize water pollution. The CNMP prescribes cyclical manure management techniques through recycling of manure and other organic wastes into soil.

ECL § 1-0101 (3) broadly sets forth the legislative objectives to achieve "social, economic and technological progress for present and future generations" while guaranteeing beneficial use of the environment without risk to health and safety when undertaking regulatory action. This proposed rulemaking clarifies the scope of the Department's regulatory authority regarding Medium CAFOs by including a definition for Medium CAFOs consistent with federal requirements, while explicitly exempting those AFOs (200-299 mature dairy cows) that do not discharge from needing SPDES general permit coverage. Furthermore, the proposed rules provide flexibility by allowing non-discharging AFOs with 200-299 mature dairy cows to voluntarily seek CAFO SPDES permit coverage and by enabling the Department to designate AFOs as Small CAFOs.

The proposed rulemaking to amend Subparts 360-4 and 360-5 is also consistent with the public policy objectives that the Legislature sought to advance. ECL § 3-0301 (1) (f) provides the Department with the power to "[f]oster and promote sound practices for the use of agricultural land, river valleys, open land, and other areas of unique value." ECL § 27-0101 also sets forth the intent "to encourage the development of economical projects for the present and future collection, treatment and management of solid and hazardous waste in such a manner as will assure full consideration of all aspects of planning for proper and effective solid and hazardous waste disposal." Moreover, the State Administrative Procedure Act § 202-a (3) (f) encourages agencies to "minimize the impact" of duplication or overlap between regulatory rules. The Department's statutory authority to promulgate amendments to Part 360 is found in ECL § 1-0101; Article 3, title 3; Article 27, titles 1, 3, 5, 7, 9, and 13; Article 70, title 1; and Sections 8-0113, 11-0325, 19-0301, 19-0303, 19-0304 and 19-0306.

Part 360 provides regulatory oversight for solid waste management facilities in the State. Under existing regulations, if the waste management on a farm is confined to the farm and involves only waste (manure, crop residues) produced on such farm, the activities are exempt from Part 360. Conversely, if a farm accepts nutrient-based wastes from off-site, such as food processing wastes from yogurt producers, Part 360 criteria apply. Food processing waste may be land applied, placed in a manure lagoon, or added to a farm anaerobic digester to boost gas production.

Under the existing Part 360 regulations, there is overlap between the solid waste requirements and requirements for CAFOs permitted under Part 750. For example, land application of whey obtained from an outside source requires both registration under Part 360 and compliance with the requirements set forth in a SPDES permit. This duplication is unnecessary and burdensome on the affected farms, and provides no additional environmental protection. The primary changes to Part 360 eliminate this overlap by exempting these activities from Part 360. Part 360 is also being revised to add specific criteria for anaerobic digestion ("AD") facilities. The lack of criteria and applicable standards in the current Part 360 regulations has led to confusion -- primarily in the farming community.

The changes would clarify that Part 360 exempts farm ADs for agricultural waste and includes a tiered structure based on size for the acceptance of off-site waste. This will help promote the development of ADs on farms which will advance manure management and provide an avenue for whey management. Accordingly, pursuant to this rulemaking, 6 NYCRR § § 360-4.2 (a) (5) and 360-5.3(a) (4), (5) would be revised, to create an exemption from registration or permitting for a land application facility, manure storage facility or an AD facility associated with a Part 750 permitted CAFO, if the waste handling is addressed in a CNMP. Similarly, Section 360-5.5 (b) would be revised to exempt AD digestate used on farms from pathogen reduction alternatives.

Other changes to Part 360 would exempt land application facilities for undigested food and fecal material emanating from New York State owned or licensed fish hatcheries from the requirements of Subpart 360-4 where the waste is applied at or below agronomic rates; outline the eligibility for registration for organics processing facilities for animal mortalities or parts generated from a farm; establish eligibility for registration for composting facilities for dewatered solids from an AD facility that is subject to registration and AD facilities that accept less than 50 tons of waste per day that does not contain human fecal matter provided that certain operating conditions are met; and make revisions to application requirements, pathogen and vector attraction criteria, pollutant limits and product use for material distributed to the public, and design criteria and operational requirements with respect to source separate organics processing and AD facilities.

Needs and Benefits. By relieving non-discharging AFOs with 200-299 mature dairy cows from the obligation to obtain SPDES general permit coverage, smaller non-discharging dairy farms would be less restricted in

deciding whether to expand their herds. Increased milk production associated with expanded dairy farms is expected to create jobs both in the dairy service sector and the agricultural service industries. The establishment of larger farms and increased yogurt production will dictate the need for additional management infrastructure for manure and whey. Anaerobic digesters located on farms provide a superior method to manage both manure and whey, by providing the yogurt manufacturers with a long term, viable method to recycle this material and by providing the farm with income from tipping fees and increased electricity production. The Part 360 revisions would promote the establishment of anaerobic digesters on farms by exempting some AD facilities from permit requirements, establishing registration criteria for those AD facilities that require registration, and providing a clearer regulatory path for those AD facilities that would still need a Part 360 permit.

Costs. There are no significant costs anticipated for the regulated community. The proposed rulemaking is expected to reduce costs for the regulated community by reducing regulatory overlap.

Local Government Mandates. There are no programs, services, duties or responsibilities imposed by the rule upon any county, city, town, village, school district, fire district or other special district. However, there may be some increased costs to local governments associated with water bodies that are subject to Total Maximum Daily Loads (TMDLs), if the proposed change in the Department's CAFO permitting program results in a shift of wasteload allocation from CAFOs in general to other types of facilities, such as wastewater treatment plants.

Paperwork. AFOs that are no longer required to obtain an ECL CAFO SPDES permit and that opt to discontinue permit coverage must file a one page Notice of Termination form with the NYSDEC. There are no other reporting requirements required as a result of this rule.

Duplication. The proposed changes to Subpart 750-1 clarify the different regulatory requirements for CAFOs that meet the federal definition of a Medium CAFO as compared to those CAFOs regulated pursuant to the ECL, thereby avoiding any duplication between the federal standards and the State standards. In addition, the proposed changes to Subparts 360-4 and 360-5 address unnecessary overlap between the regulations governing land application in Part 360 and Part 750 permit requirements for CAFOs.

Alternatives. The Department examined the no regulatory action alternative, but this alternative is not as likely to achieve the economic benefits and regulatory efficiencies associated with the rule making. The Department also considered exempting from permit coverage those AFOs from 200-299 without a discharge, but requiring mandatory enrollment in the Agricultural Environmental Management (AEM) Program. Like the no-action alternative, this alternative may also fall short of meeting the rulemaking goals of expanding milk production to foster the yogurt industry in New York because it would essentially substitute one set of mandatory requirements with another. Similarly, the Department rejected a third alternative that would exempt from permit coverage those AFOs from 200-299 without a discharge but require mandatory enrollment in the Department of Agriculture and Markets' Agricultural Environmental Management (AEM) Program for facilities located in watersheds with an impaired waterbody. This patchwork approach would be difficult to employ. Finally, the Department considered terminating the ECL Permit program and simply administering the CWA permit and its corresponding standards. The Department rejected this alternative because it would not provide the necessary environmental protection, as the potential for a significant environmental impact from a discharge also proportionally grows by the increase in the number of mature dairy cows.

Federal Standards. The proposed rule change is consistent with federal standards because the applicable regulatory provisions and permit program for CAFOs that meet the federal definition and that fall under the CWA remain unchanged by this proposed rulemaking. With respect to the proposed changes to Subparts 360-4 and 360-5, there are no federal regulations for the facilities and activities contained in the proposed rulemaking.

Compliance Schedule. This rule eliminates permitting requirements for current non-discharging Medium CAFOs with 200-299 mature dairy cows, as well as regulatory overlap between Part 750 and Part 360. Therefore, no additional time is needed to achieve compliance with the rule. With respect to the changes to Part 360, the regulated community will be required to comply with these revisions within 60 days from the filing of the rule.

Revised Regulatory Flexibility Analysis

No changes were made to the previously published Regulatory Flexibility Analysis. The changes made to the last published rule do not necessitate revision to the previously published Regulatory Flexibility Analysis.

Revised Rural Area Flexibility Analysis

1. 'Types and Estimated Numbers of Rural Areas.' This rule applies to the entire State and impacts all rural areas of the State.

2. 'Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services.' The rule will reduce reporting, recordkeeping or other compliance requirements. No professional services will be needed in rural areas to comply with the rule.

3. 'Costs.' There are no initial capital costs or annual costs to comply with the rule.

4. 'Minimizing Adverse Impact.' The rule is expected to have a positive economic impact on rural areas by encouraging the expansion of Animal Feeding Operations (AFOs) since the threshold at which non-discharging Medium Concentrated Animal Feeding Operations (CAFOs) are required to obtain an ECL SPDES Permit is being increased from 200 to 300 mature dairy cows. As these dairy farms increase the size of their herds, milk production will increase, creating new on farm jobs and increasing employment in the agricultural services industry, dairy processing industry, and food processing service industry. In terms of adverse environmental impacts on rural areas, dairy farms with less than 300 mature dairy cows are still required to fully comply with other environmental laws and regulations. There is an increased risk, however, that removing the requirement of permit coverage for Medium CAFOs with 200-299 mature dairy cows could lead dairy farms already in this size range (and smaller CAFOs expanding to this size) to relax, discontinue, or fail to implement structural and non-structural Best Management Practices. This could result in discharges causing adverse impacts to ground and surface water, including fish and aquatic habitats. Medium CAFOs that are no longer required to maintain permit coverage may still voluntarily maintain permit coverage or voluntarily participate in the Agricultural Environmental Management (AEM) program administered by New York State Department of Agriculture and Markets. In addition, the Department would have the ability to designate an AFO as a Small CAFO thereby subjecting it to the Department's SPDES permit program.

5. 'Rural Area Participation.' The New York State Department of Environmental Conservation (NYSDEC) has complied with SAPA § 202-bb(7) by assuring that public and private interests in rural areas have been given an opportunity to participate in the rule making process. This participation has occurred through publication of the notice of proposed rulemaking in the State Register and through meeting and interaction with a CAFO Work Group composed of individuals from the following organizations:

- New York State Department of Agriculture and Markets
- New York State Department of Health
- Cornell University
- Environmental Advocates of New York
- Citizens Campaign for the Environment
- New York Farm Bureau
- Northeast Dairy Producers Association
- Certified Planners
- CAFO farmers
- NYSDEC central office and regional staff

The NYSDEC also met with the Sierra Club, Riverkeeper, and the National Resource Defense Council with respect to the proposed rulemaking. The Department offered to meet with the New York League of Conservation Voters, but the invitation was not accepted. Furthermore, the NYSDEC accepted public comments to the Notice of Proposed Rulemaking and is providing responses to the comments that were received. A public hearing was also held. Finally, the following documents required by the State Environmental Quality Review Act (SEQRA) were published in the Environmental Notice Bulletin: Environmental Assessment Form, Positive Declaration, Draft Environmental Impact Statement, and Final Environmental Impact Statement.

Revised Job Impact Statement

No changes were made to the previously published Job Impact Statement. The changes made to the last published rule do not necessitate revision to the previously published Job Impact Statement.

Assessment of Public Comment

The New York State Department of Environmental Conservation (Department or DEC) issued a Notice of Proposed Rulemaking on December 5, 2012, to revise 6 NYCRR Subpart 750-1 to eliminate the requirement that non-discharging Animal Feeding Operations (AFOs) with 200-299 mature dairy cows, milked or dry, obtain ECL CAFO SPDES permit coverage. In addition to revisions to 6 NYCRR Subpart 750-1, the Department published notices for proposed revisions to Subpart 360-4 (Land Application and Associated Storage Facilities) and Subpart 360-5 (Composting and Other Class A Organic Waste Processing Facilities). These revisions establish criteria for anaerobic digestion (AD) facilities, provide exemptions from permit and registration requirements for specified activities at farms and CAFOs, and make other changes to these Subparts to promote sound environmental practices and reduce regulatory overlap. In conjunction with this proposed rulemaking, the Department prepared a draft Environmental Impact Statement (dEIS), and publically noticed its modified ECL CAFO SPDES permit (General Permit No. GP-0-09-001) on December 19, 2012.

The proposed rulemaking and modification to the ECL CAFO SPDES permit is intended to provide regulatory relief to a portion of the dairy

community; this action allows them to meet expected demand from the growing yogurt industry, while ensuring that the risks posed to the environment will be manageable. Public comments were accepted from December 5, 2012 until January 22, 2013 for the proposed rulemaking and the dEIS; and from December 19, 2012, until January 21, 2013 for the proposed modification to the ECL CAFO SPDES permit. The Department held four public hearings on January 4, 2013 and heard from 21 speakers at the public hearings, and received approximately 50 additional comments.

Comment: NYSDEC's proposal to revise 6 NYCRR Part 750 and the general permit to relieve Medium CAFOs of permit requirements that ensure compliance with effluent limitations, and to relieve currently permitted Medium CAFOs from existing effluent limitations, violates the Clean Water Act's anti-backsliding provision.

Response: The Clean Water Act's anti-backsliding provision (33 U.S.C. § 1342 [o]) provides that, subject to certain exceptions, a NPDES permit may not be renewed, reissued or modified to contain effluent limitations that are less stringent than the comparable effluent limitations in the previous permit. Under the revised rule making, the Department is not making any change to effluent limitations. Instead, the Department is defining the term "CAFO" for purposes of state law in a manner that remains more stringent than the federal standard. The effect of the rule making is that non-discharging AFOs with 200-299 mature dairy cows are no longer required to maintain ECL CAFO SPDES permit coverage. This group of AFOs already is not required to obtain NPDES CAFO permit coverage under federal law because the Clean Water Act only regulates CAFOs that discharge (Waterkeeper; 33 U.S.C. § 1342 [a] [1]). Thus, the rulemaking merely aligns state law more closely with federal law for this group of non-discharging AFOs. This is accomplished by defining the term "CAFO" in the revised rulemaking (which was previously not defined in Department regulations) to exclude these smaller non-discharging AFOs. Under the ECL, a "concentrated animal feeding operation" is defined to be a "point source" (ECL 17-0105 [16]), but the term "CAFO" is not defined. Therefore, the Department is free to define this term in a manner that is no less stringent than the federal standard. If the Department were to match the federal standard, all non-discharging AFOs, regardless of herd size, would be exempt from permit coverage. Rather than adopt the federal standard, the Department's rulemaking is narrowly tailored to achieve the important economic benefits described in the EIS while maintaining a higher level of oversight with respect to non-discharging CAFOs with 300 or more cows which produce larger quantities of waste.

Comment: NYSDEC lacks the authority to finalize certain modifications to the general permit that are less protective of water quality than are legally required. The proposed definition of discharge is not consistent with federal or state law. The proposed definition of agricultural stormwater is not consistent with federal law.

Response: The Department's definition of "discharge" has been revised in the general permit and is consistent with federal and state law. The definition now states that discharge means "any release of any pollutant, including but not limited to manure, litter, process wastewater, food processing waste, digestate, or releases from feed storage areas to waters of the State."

The Department's definition of "agricultural stormwater" has also been revised and is consistent with federal law. Agricultural stormwater discharge means a precipitation-related discharge of manure, litter or process wastewater where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, with site specific conservation practices to control runoff, appropriate testing of manure, litter, process wastewater and soil, and adequate documentation and recordkeeping.

Comment: NYSDEC lacks the authority to categorically exempt CAFOs from the SPDES program without assessing whether pollution and/or pollutants will discharge or run into waters of the state from an outlet, a point source or any source which impairs water quality. NYSDEC cannot relieve Medium CAFOs of the obligation to prepare and implement a nutrient management plan and at the same time, presume that such CAFOs will not discharge.

Response: 6 NYCRR § 750-1.2 (a) (21) has been revised to state, in pertinent part, that a "Medium CAFO" is "an AFO that stables or confines. . . 200 to 699 mature dairy cows, whether milked or dry, except that an AFO that stables or confines 200-299 mature dairy cows, whether milked or dry that does not cause a discharge would not be considered a Medium CAFO." Furthermore, this section provides that AFOs with 200-299 mature dairy cows "may request CAFO SPDES permit coverage and, if permit coverage is granted, the AFO would be considered a Small CAFO throughout permit coverage." Finally, the rulemaking states that the Department may designate an AFO that is not a Medium or Large CAFO to be a Small CAFO. Therefore, state law remains more stringent than federal law. Federal law exempts all non-discharging AFOs, regardless of herd size, from the requirement to maintain Clean Water Act CAFO SPDES permit coverage. State law, on the other hand, provides that a non-discharging AFO with 300 or more mature dairy cows is considered a "CAFO" that is therefore a "point source" under ECL 17-0105 (16) required to obtain ECL CAFO SPDES permit coverage. Under the rule making, state law now aligns more closely with federal law because a non-discharging AFO with 200-299 mature dairy cows would no longer be required to maintain CAFO SPDES permit coverage unless it designated to be a Small CAFO by the Department. Facilities no longer required to maintain CAFO SPDES permit coverage would still required to comply with all applicable environmental laws and regulations. Therefore, it should not be presumed that these facilities will violate the law based solely upon the nature of their business. Importantly, the Department retains authority to require CAFO SPDES permit coverage for these facilities if: 1) an improper discharge occurs that falls outside the agricultural stormwater discharge exemption or 2) designation as a Small CAFO is deemed appropriate, irrespective of discharge. Finally, the Department retains the authority to evaluate the status of unpermitted AFOs where there is evidence that a discharge, other than an agricultural stormwater discharge, may be occurring (see e.g. ECL 3-0301 [2] [g]).

Comment: NYSDEC's proposal to deregulate Medium Dairy CAFOs with 200 to 299 cows violates the Clean Water Act's and New York State's antidegradation policies and the Clean Water Act's anti-backsliding provisions and impaired waterbody requirements. The proposed deregulation of CAFOs violates antidegradation protections. The proposed deregulation of CAFOs violates Tier One Antidegradation Protections. The Proposed Deregulation of CAFOs Violates Tier Two Antidegradation Protections.

Response: The Department's revised rule making does not violate the Clean Water Act's and New York State's antidegradation policies. Under the revised rule making, non-discharging dairy AFOs with 200-299 mature dairy cows are not classified as "CAFOs" and therefore are not a "point sources" required to maintain ECL SPDES permit coverage. Excluding these AFOs from the CAFO definition is no less stringent than federal definition pertaining to CAFOs of this size (see 40 CFR 122.23 [b] [6] [i], [ii]) and is consistent with federal law which generally regulates discharges of pollutants (33 U.S.C. § 1342 [a]; Waterkeeper). Antidegradation prevents the degradation of water quality. The rulemaking does not establish less stringent effluent limits, but rather makes a regulatory change that eliminates the ECL SPDES permit requirement based upon: 1) an animal range 200-299 mature dairy cows and 2) the absence of a discharge. The revised rulemaking does not violate Tier One antidegradation protections since it cannot be assumed that existing stream water uses and the level of water quality necessary to protect these uses will be compromised by removing the permit requirement. Likewise, the revised rules do not violate Tier Two antidegradation protections which are intended to preserve high quality waters because removing a permit requirement does not equate to degradation of water quality. As previously explained, the revised rulemaking also does not violate the Clean Water Act's anti-backsliding provision (33 U.S.C. 1342 [o]).

Comment: NYSDEC's proposal to deregulate Medium Dairy CAFOs constitutes a substantial revision to its SPDES program requiring EPA review and approval following public notice and comment.

Response: EPA review and approval is not required for changes to our state program. The Department's rule making only affects DEC's state permit program and does not affect DEC's administration of the CWA CAFO general permit. The proposed definition of CAFO remains more stringent than the federal standard. The Summary of Express terms indicates that "the proposed rule making revisions to Subpart 750-1 are not intended to make any changes with respect to the federal definition of a Large, Medium or Small CAFO or to limit, in any way, the scope of federal law. Instead, the proposed Subpart 750-1 changes exempt non-discharging AFOs with 200-299 mature dairy cows from the requirement to obtain an ECL CAFO SPDES permit unless designated, while clarifying that although ECL CAFO SPDES permit coverage for these facilities would be discontinued, state law is still more stringent than federal law." To the extent that referencing federal laws and regulations implicates the Department's federal SPDES program, the rulemaking has been revised to remove the revision to 6 NYCRR § 750-1.24 (c).

In Waterkeeper Alliance v. EPA, 2005 U.S. App. LEXIS 6533 (2005), the Second Circuit Court of Appeals held that EPA is only authorized to regulate CAFOs that discharge. In response to this decision, EPA changed its federal rules and no longer requires CAFOs that "propose to discharge" to apply for a NPDES permit. Furthermore, federal rules have removed language allowing CAFOs the option to voluntarily certify that they do not discharge. The Department's rulemaking only impacts AFOs with 200-299 mature dairy cows that do not discharge. Therefore, the proposed rule making does not affect implementation of the federal permit program. Indeed, the Department administers two types of general permits: 1) the Clean Water Act CAFO general permit for CAFOs that discharge and 2) the ECL CAFO permit for CAFOs that do not discharge. Thus, the

proposed rule making is not a "program revision" under 40 CFR 123.62 because it only applies to non-discharging facilities that are beyond the scope of the Clean Water Act. Similarly, the Department need not obtain prior EPA approval for modifications to its ECL CAFO SPDES general permit because this permit merely implements ECL requirements. Indeed, the ECL CAFO SPDES general permit specifically relies upon Article 17, Title 7 of the ECL for authority to require coverage. Title 7, unlike Title 8, of Article 17 is based on State authority not Federal.

NOTICE OF ADOPTION

Indirect Sources of Air Contamination

I.D. No. ENV-06-13-00005-A
Filing No. 415
Filing Date: 2013-04-19
Effective Date: 30 days after filing

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

Action taken: Repeal of Part 203; and amendment of Parts 200 and 621 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301 and 19-0303

Subject: Indirect Sources of Air Contamination.

Purpose: Part 203 is a regulation that applies to any new or modified indirect source of air contamination south of 60th Street Manhattan.

Text or summary was published in the February 6, 2013 issue of the Register, I.D. No. ENV-06-13-00005-P.

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

Text of rule and any required statements and analyses may be obtained from: Michael Sheehan, PE, NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8396, email: airregs@gw.dec.state.ny.us

Additional matter required by statute: Pursuant to Article 8 of the State Environmental Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file.

Initial Review of Rule
As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2016, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment
The agency received no public comment.

Department of Health

EMERGENCY RULE MAKING

Reduction to Statewide Base Pricing

I.D. No. HLT-19-13-00011-E
Filing No. 430
Filing Date: 2013-04-23
Effective Date: 2013-04-23

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

Action taken: Amendment of section 86-1.6 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807-c(35)

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

Specific reasons underlying the finding of necessity: It is necessary to issue the proposed regulations on an emergency basis in order to achieve targeted savings.

Public Health Law section 2807-c(35)(b) specifically provides the Commissioner of Health with authority to issue hospital inpatient rate-setting regulations as emergency regulations.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of the associated Medicaid State Plan Amendment.

Subject: Reduction to Statewide Base Pricing.

Purpose: Continues a reduction to the statewide base price for inpatient services.

Text of emergency rule: Pursuant to the authority vested in the Commissioner of Health by section 2807-c(35)(b) of the Public Health Law, Subdivision (c) of section 86-1.16 of Subpart 86-1 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, to be effective upon publication of the Notice of Adoption in the New York State Register, to read as follows:

(c) *(1)* For the period effective July 1, 2011 through March 31, 2012, the statewide base price shall be adjusted such that total Medicaid payments are decreased by $24,200,000.

(2) For the period May 1, 2012 through March 31, 2013 and for state fiscal year periods on and after April 1, 2013, the statewide base price shall be adjusted such that total Medicaid payments are decreased for such period and for each such state fiscal year period by $19,200,000.

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 July 21, 2013.

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

Regulatory Impact Statement

Statutory Authority:

The requirement to implement a modernized Medicaid reimbursement system for hospital inpatient services based upon 2005 base year operating costs pursuant to regulations is set forth in Section 2807-c(35) of the Public Health Law, which states that the Commissioner has the authority to set regulations for general hospital inpatient rates and such regulations shall include but not be limited to a case-mix neutral Statewide base price. Such Statewide base price will exclude certain items specified in the statute and any other factors as may be determined by the Commissioner.

Legislative Objectives:

The Legislature and Medicaid Redesign Team adopted a proposal to reduce unnecessary cesarean deliveries to promote quality care and reduce unnecessary expenditures. Due to industry concerns with the initial proposal, it was determined that a more clinically sound method needed to be developed. To generate immediate savings, however, a $24.2 million gross ($12.1 million State share) reduction in the statewide base price was implemented for 2011-12 while an obstetrical workgroup worked to develop a more clinically sound approach to meet Legislative objectives. Based on the results of workgroup meetings, a new proposal was developed which achieved less savings than required by the Financial Plan ($5 million gross/$2.5 million State share). Therefore, this amendment continues the base price reduction at $19.2 million gross ($9.6 million State share) to account for the difference.

Needs and Benefits:

The proposed amendment appropriately implements the provisions of Public Health Law section 2807-c(35)(b)(xii), which authorizes the Commissioner to address the inappropriate use of cesarean deliveries. Cesarean deliveries are surgical procedures that inherently involve risks; however, elective cesarean deliveries increase the risks unnecessarily. Therefore, high rates of cesarean deliveries are increasingly viewed as indicative of quality of care issues.

Due to industry concerns with the initial proposal, it was determined that a more clinically sound approach to meeting Legislative objectives needed to be developed. To generate immediate savings, however, a $24.2 million gross ($12.1 million State share) reduction in the statewide base price was implemented for 2011-12 while an obstetrical workgroup worked to develop such an approach. Based on the results of those meetings, a new proposal was developed which achieved less savings than required by the Financial Plan ($5 million gross/$2.5 million State share). Therefore, this amendment continues the base price reduction at $19.2 million gross ($9.6 million State share) to account for the difference for periods subsequent to the 2011-12 state fiscal year.

COSTS:

Costs to State Government:

There are no additional costs to State government as a result of this amendment.

Costs of Local Government:

There will be no additional cost to local governments as a result of these amendments.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of this amendment.

Local Government Mandates:

The proposed amendments do not impose any new programs, services,

duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

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

Duplication:

These regulations do not duplicate existing State and Federal regulations.

Alternatives:

No significant alternatives are available at this time. In collaboration with the hospital industry, the State developed a more clinically sound method to achieve savings. However, this amount was less than was required by the Financial Plan. Thus, there is no option to not act on this initiative since the Enacted Budget assumed savings that total $24.2 million.

Federal Standards:

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

Compliance Schedule:

The proposed amendment to section 86-1.16 requires that the statewide base price be reduced by $19,200,000 for the period May 1, 2012, through March 31, 2013 and for each state fiscal year period thereafter.

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments:

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

Health care providers subject to the provisions of this regulation under section 2807-c(35) of the Public Health Law will see a minimal decrease in funding as a result of the reduction in the statewide base price.

This rule will have no direct effect on Local Governments.

Compliance Requirements:

No new reporting, record keeping or other compliance requirements are being imposed as a result of these rules. Affected health care providers will bill Medicaid using procedure codes and ICD-9 codes approved by the American Medical Association, as is currently required.

The rule should have no direct effect on Local Governments.

Professional Services:

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

Compliance Costs:

As a result of the new provision of 86-1.16, overall statewide aggregate hospital Medicaid revenues for hospital inpatient services will decrease in an amount corresponding to the total statewide base price reduction.

Economic and Technological Feasibility:

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

Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements.

Small Business and Local Government Participation:

Hospital associations participated in discussions and contributed comments through the State's Medicaid Redesign Team process regarding these changes.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

This rule applies uniformly throughout the state, including rural areas. Rural areas are defined as counties with a population less than 200,000 and counties with a population of 200,000 or greater that have towns with population densities of 150 persons or fewer per square mile. The following 43 counties have a population of less than 200,000 based upon the United States Census estimated county populations for 2010 (http://quickfacts.census.gov). Approximately 17% of small health care facilities are located in rural areas.

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

The following counties have a population of 200,000 or greater and towns with population densities of 150 persons or fewer per square mile. Data is based upon the United States Census estimated county populations for 2010.

Albany County	Monroe County	Orange County
Broome County	Niagara County	Saratoga County
Dutchess County	Oneida County	Suffolk County
Erie County	Onondaga County	

Compliance Requirements:

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

Professional Services:

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

Compliance Costs:

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

Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements.

Rural Area Participation:

This amendment is the result of discussions with industry associations as part of the Medicaid Redesign team process. These associations include members from rural areas. As well, the Medicaid Redesign Team held multiple regional hearings and solicited ideas through a public process.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent from the nature and purpose of the proposed rule that it will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulation revises the final statewide base price for the period beginning May 1, 2012, through March 31, 2013 and for each state fiscal year thereafter.

NOTICE OF ADOPTION

Quality Assurance Requirements for Medical Use of Radioactive Materials and Radiation Therapy

I.D. No. HLT-40-12-00001-A

Filing No. 428

Filing Date: 2013-04-23

Effective Date: 2013-05-08

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

Action taken: Amendment of Part 16 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 225

Subject: Quality Assurance Requirements for Medical Use of Radioactive Materials and Radiation Therapy.

Purpose: Update and enhance the safety and quality assurance standards concerning use of ionizing radiation and radioactive materials.

Substance of final rule: The regulatory proposal would revise Part 16 of 10 NYCRR as described in more detail below.

Subdivision (c) of section 16.1 is revised to update the address and phone number of the Department of Health's Bureau of Environmental Radiation Protection and to allow certain reports to be filed electronically with the Department.

Paragraph (15) of subdivision (a) of section 16.2 is amended to make the definition of ''byproduct material'' comparable to the definition of byproduct material in NRC regulations.

Paragraph (134) of subdivision (a) of section 16.2, which contains an outdated definition of the term ''tutelage,'' is repealed.

Subdivision (a) of section 16.24 is repealed and replaced with a new subdivision (a), which includes updated quality assurance standards for licensees or registrants authorized to administer external beam therapy or brachytherapy to human beings. The new subdivision includes quality standards appropriate for newer, more complex radiation therapy treatment systems and also requires additional verification of radiation set-up equipment and treatment plans prior to administering radiation treatments to patients. New subdivision (a) also requires quality assurance programs to cover data communication/transfer between component systems of planning and treatment delivery systems to ensure complete (uncorrupted) data transfer. Additionally, the new section requires licensees and registrants to credential individuals involved in quality assurance testing, treatment planning, and radiation treatment of patients. Finally, new subdivision (a) requires licensees and registrants to be accredited in radiation oncology by the American College of Radiology or the American College of Radiation Oncology, or another equivalent accrediting organization, within 18 months of the effective date of the regulation.

Section 16.100 is repealed and replaced with a new section 16.100 to update the licensing requirements for licensure of radioactive materials.

Sections 16.120 and 16.121 are repealed and replaced with a new section 16.120 which sets forth the licensing requirements for human use of radioactive material.

Section 16.122 is repealed. The requirements for teletherapy units are included in the proposed new section 16.123.

Current section 16.123 is repealed and replaced with a new section 16.123. The new version updates the standards for the medical use of radioactive materials, consistent with the federal Nuclear Regulatory Commission (NRC) regulations governing the medical use of radioactive materials; updates definitions to be consistent with federal regulatory definitions; updates the training and experience requirements for physicians, pharmacists and medical physicists who use radioactive materials for medical purposes; and revises and creates new categories of medical use licenses. The new section 16.123 incorporates certain federal regulatory requirements by reference; it also establishes regulatory requirements specific to New York State that are consistent with the federal regulatory requirements.

The proposed section 16.2 will have a significant impact on physicians who wish to use radiopharmaceuticals for diagnostic nuclear medicine and nuclear cardiology. The current section requires 200 hours of classroom training. By removing this requirement and incorporating the federal classroom training requirements set forth in 10 CFR Part 35, the required classroom and laboratory training hours will be reduced to 80 hours for physicians applying for authorized user status for diagnostic uses. In addition, these physicians would be allowed to obtain the practical training component in a private medical practice setting. Currently such training can be obtained only at a medical institution (hospital). By incorporating the training requirements established in 10 CFR Part 35, the total number of training hours for physicians who use radioactive materials will remain at 700 hours.

Relative to the new categories of medical use licenses, the new section 16.123 includes a category that covers gamma knife radiosurgery units and high dose rate remote afterloaders. Quality assurance requirements are modified to reflect the revised and new categories. The dose limits for members of the public and occupationally exposed individuals are modified to exclude exposure from individuals administered radioactive material and released in accordance with regulations.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 16.1, 16.24, 16.100, 16.123, 16.121 and 16.2.

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

Revised Regulatory Impact Statement

Statutory Authority:

The Public Health and Health Planning Council is authorized by § 225(4) of the Public Health Law (PHL) to establish, amend and repeal provisions of the State Sanitary Code (SSC), subject to the approval of the Commissioner of Health. PHL § § 225(5)(p) and (q) and 201(1)(r) authorize the Commissioner to promulgate SSC regulations to protect the public from the adverse effects of ionizing radiation. Pursuant to these regulations, as set forth in 10 NYCRR Part 16, the Department of Health (Department), licenses or registers health care providers to use radioactive materials and ionizing radiation emitting equipment on patients.

The federal Atomic Energy Act of 1954 (the Act), codified at 42 USC § § 2021, et. seq. authorizes the United States Nuclear Regulatory Commission (NRC) to regulate the use of radioactive materials. The Act also authorizes ''Agreement States'' to regulate the use of radioactive materials in lieu of the NRC, provided that the ''Agreement State'' promulgates regulations that are comparable to or exceed NRC's regulatory standards. New York State is an ''Agreement State'' within the meaning of the Act. New York's regulatory standards for the use of radioactive materials in 10 NYCRR Part 16 must therefore meet or exceed comparable NRC regulatory standards. The Act governs only to the use of radioactive materials; it does not apply to x-rays or radiation therapy equipment that emit only x-rays.

Legislative Objectives:

The legislative intent of PHL § § 225(5) and 201(1)(p) and (q) is to protect the public from the adverse effects of ionizing radiation. Promulgating regulations to ensure safe and effective clinical uses of radioactive material and radiation producing equipment is consistent with this legislative objective.

Needs and Benefits:

The NRC has relinquished its authority to regulate the use of radioactive materials in New York State to the Department. The Act requires New York to adopt and enforce regulatory standards for the use of radioactive materials that are comparable to or exceed federal regulatory standards that apply to the use of radioactive materials. The Department regulates the use of radioactive material at approximately 1100 facilities, including approximately 450 health care facilities. The Department's regulations are designed to require the delivery of quality care while protecting people and the environment from the harmful effects of radiation. In order to ensure that New York retains its authority under federal law to regulate the use of radioactive material, the Department's regulations must be amended to conform more closely to current federal regulatory standards. The proposed regulations incorporate by reference many of the NRC regulatory standards that govern the medical use of radioactive materials. In areas where the NRC regulations are not incorporated, the Department has promulgated comparable regulations.

In recent years, technology and equipment used to deliver radiation therapy to cancer patients, including systems used to plan and execute radiation therapy treatment, have become significantly more complex. Recently developed radiation therapy systems more effectively deliver high dose rate treatments to precisely defined three-dimensional tumor volumes while sparing dose to healthy tissue. Patients benefit significantly when, as is the case in the vast majority of such radiation treatments, the dose is delivered as intended. However, radiation treatment errors can cause serious consequences for patients and in extreme cases, death. An analysis of the causes of medical adverse events (radiation therapy misadministrations) reported to the Department within the past eight years has identified common errors and causes of errors that may be preventable with the implementation of more comprehensive quality assurance programs. When the current regulations for quality assurance for external beam and brachytherapy were implemented in 1993, radiation therapy equipment was much simpler in design and function, and there were fewer units in service. Most radiation therapy treatments were delivered in a hospital setting. Today there are greater numbers of patients receiving radiation therapy, and more patients are treated in freestanding radiation therapy centers. There are more medical therapy accelerators in use. Newer radiation treatment systems are very complex; these systems rely on computer networks and electronic data storage and movement. DOH regulates approximately 120 medical facilities that provide radiation therapy. The current regulations need to be revised to effectively address quality assurance requirements for newer systems, to ensure implementation of strategies to prevent the occurrence of misadministrations and ensure those facilities meet current standards of care.

Costs:

The Department estimates that regulated parties that use radioactive materials will not incur any additional costs in order to comply with the proposed changes to 10 NYCRR § 16.123. In most instances, the proposed regulatory amendments will reduce costs and regulatory burdens for physicians who are required to qualify as ''authorized users'' of radioactive materials for diagnostic purposes. The current section requires 200 hours of classroom training. By removing this requirement and incorporating the federal classroom training requirements set forth in 10 CFR Part 35, the required classroom and laboratory training hours will be reduced to 80 hours for physicians applying for authorized user status for diagnostic uses. In addition, these physicians would be allowed to obtain the practical training component in a private medical practice setting. Currently such training can be obtained only at a medical institution (hospital). By incorporating the training requirements established in 10 CFR Part 35, the total number of training hours for physicians who use radioactive materials will remain at 700 hours.

This will result in lower costs for classroom training (tuition/course fee) and associated travel/lodging expenses, and will reduce the time a physician would be away from his/her clinical practice to obtain the required classroom training. The current regulations specify that such training must be obtained at a medical institution, or hospital. However, under the training requirements established in 10 CRF Part 35, which will be incorporated by the new regulation, physicians will have the option to obtain the

required work experience portion of the training (620 hours) at non-institutional facilities. Costs associated with complying with the quality assurance testing for therapeutic devices, including high-dose rate brachytherapy and teletherapy should not increase or change, because the current license conditions contain these same quality assurance requirements.

The Department estimates that the cost to regulated parties that use external beam therapy or manual brachytherapy to comply with proposed 10 NYCRR § 16.24 will be limited to the fee to become accredited in radiation oncology by either the American College of Radiology (ACR), the American College of Radiation Oncology (ACRO) or an equivalent organization as approved by the Department. The cost for accreditation is approximately $9,500 for each three-year period. However, approximately half of the affected regulated parties are either currently accredited or have an application pending with ACR or ACRO on their own accord. Many that are not accredited use the services of outside radiation oncologists and medical physicists to audit their radiation therapy quality assurance program on an annual basis. The costs for annual outside audits are estimated to cost several thousands of dollars. The proposed regulation would remove the need for outside audits, although they could be conducted to meet the requirement for an annual audit. Under the proposed rule, either an internal or an external audit may be used to fulfill the annual audit requirement. Costs saved by elimination of the requirement for outside audits are expected to offset a portion of the costs that will be incurred for accreditation. The other proposed changes to 10 NYCRR § 16.24 will impose very little or no cost to regulated parties since existing facility staff can comply with the new quality assurance requirements.

Local Government Mandates:

These proposed regulations apply to two State University hospitals, a Department operated hospital and hospitals operated by public benefit corporations. These hospitals are currently accredited by the ACR. No other additional costs are associated with implementation of these requirements. Registrants and licensees, including the hospitals operated by state and local governments, are currently required to retain all quality assurance documents for review by the department. The additional records and filing is estimated to be a small incremental amount. Affected parties will need to complete an application for accreditation initially and every three years thereafter. The radiation oncology accrediting bodies are transitioning to an on-line application process to minimize time and effort for parties seeking accreditation.

Paperwork:

Department regulations (10 NYCRR Part 16) require registrants and licensees to maintain a variety of records relating to the use of ionizing radiation for review by the Department. The Department estimates that licensees and registrants may have a small amount of additional documentation to create, maintain or file. Affected parties will have to complete an application for radiation oncology accreditation. However, the accrediting bodies are transitioning to an online application process to minimize time and effort for regulated parties seeking accreditation.

The proposed regulations will not affect license documents issued by the Department to current licensees, registrants or authorized users. The Department plans to provide updated license guidance to new applicants to facilitate completion of an application based on the new requirements.

Duplication:

There is no duplication of the proposed regulatory requirements by any federal, state or local agency for licensees, registrants or authorized users subject to 10 NYCRR Part 16. New York State entered into an agreement with the federal government on October 15, 1962, by which the federal government discontinued its regulatory authority over the use of radioactive materials and New York assumed such authority. The Atomic Energy Act does not govern use of x-ray emitting equipment.

Alternatives:

There are no suitable alternatives to the revisions to these proposed regulations. As discussed above, the Atomic Energy Act (42 USC § 2021 et. seq.) requires Agreement States such as New York to adopt and implement regulatory standards that meet or exceed comparable federal standards.

Federal Standards:

These proposed revisions to 10 NYCRR § 16.123 incorporate by reference certain federal requirements specified in 10 CFR Part 35.

Compliance Schedule:

The proposed regulatory amendments will be effective upon publication of a Notice of Adoption in the State Register. However, proposed 10 NYCRR § 16.24(a)(6) requires that licensees and registrants apply for accreditation in radiation oncology with the American College of Radiology or the American College of Radiation Oncology or another accrediting organization approved by the Department within 90 days of the regulation's effective date and to become accredited and maintain such accreditation within 18 months of such effective date.

Revised Regulatory Flexibility Analysis

Effect on Small Business:

The Department has issued radioactive materials licenses to approximately 350 private medical practices. These licensees would be affected by the proposed revisions to 10 NYCRR § 16.123. The Department estimates that there will be no new costs for these licensees and in some instances, regulated parties may save money by complying with the updated standards in proposed 10 NCRR § 16.123. The Department expects the cost to comply with the new training and experience requirements for physicians who wish to become authorized for certain medical uses will be reduced in most situations. Specifically the required classroom and laboratory training hours will be reduced from 200 to 80 hours for physicians applying for authorized user status for diagnostic uses. The total number or training hours will remain at 700 hours. This will result in lower costs for classroom training (tuition/course fee) and associated travel/lodging expenses, and will reduce the time a physician would be away from his/her clinical practice to obtain the required classroom training. Physicians will have the option to obtain the required work experience portion of the training (620 hours) at non-institutional facilities. The current requirements specify that such training must be obtained at a medical institution (hospital).

The proposed changes to 10 NYCRR § 16.24 would apply to approximately 60 medical private practices. The draft proposed rule was sent to all medical therapy accelerator facilities, including the small businesses (non-institutions) for comments. One facility manager stated that they support the accreditation requirement although it can be a hardship to practices like hers. However the manager's facility was already accredited and has application pending to maintain accreditation. No other facility expressed any anticipated hardship with the proposed rule.

Compliance Requirements:

Licensees and applicants will need to become familiar with the new requirements and modify their quality assurance policies and procedures accordingly. Those who are not currently accredited will need to do so within 18 months of the effective date of the rule.

Professional Services:

The vast majority of facilities have in-house staff that perform quality assurance testing and operate radiation emitting technology. The Department does not expect that it would be necessary for licensees to use additional professional services for completion of applications for accreditation or to implement the quality assurance requirements.

Capital Costs and Annual Costs of Compliance:

The amortized annual cost is estimated to be approximately $3,200 per year for accreditation (based on a three-year accreditation cost of $9,500). However, approximately 50 percent of the facilities are either currently accredited or have an application for accreditation pending; therefore, they will not incur any additional costs. There are no capital costs associated with this regulation.

Economic and Technological Feasibility:

There are no capital costs or new technology required to comply with the proposed rule.

Minimizing Adverse Impact:

Facilities will have 90 days to apply and 18 months to become accredited. This will allow a facility adequate time to select the accreditation body of their choice, complete an application and budget funds for the accreditation fee. The Department has held several discussions with the proposed accrediting bodies, and has accompanied their auditors during accreditation surveys. These interactions were conducted to ensure that the bodies have the capacity to handle an influx of applications for accreditation and that the organizations operate in a professional and constructive manner, have an efficient process, and have an overall effect of improving patient safety. Further the requirement for external annual audits was eliminated which would offset the cost of accreditation.

Small Business Input:

A copy of the draft proposed rule was sent to all medical therapy accelerator facilities, which includes both private practices and hospital-based radiation therapy treatment clinics. Seven facilities submitted comments. Only one commenter addressed the cost for accreditation, however, she stated that she supports the accreditation requirement. Several comments were in regard to clarification on a few aspects of the proposed language. Guidance, which will assist the affected facilities in implementation and compliance with the new requirements, will be developed and provided to affected facilities.

Revised Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

There are 105 affected facilities located in 46 rural areas (33 counties with a population of less than 200,000 and 13 counties with certain townships with a population density of more than 150 persons per square mile).

Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

There are no new reporting requirements contained in the proposed regulations. No additional professional service costs are anticipated. Facilities will be required to maintain records of quality assurance test results and accreditation documents for review by the Department's inspectors.

Compliance with the recordkeeping requirements will require only a minor incremental amount of time and effort for affected facilities.

Cost:

The cost to comply with the accreditation requirement will be approximately $9,500 every three years. This will affect approximately 50 percent of the facilities that will be subject to the proposed 10 NYCRR § 16.24(e), because approximately 50 percent of the facilities are either currently accredited or have an application for accreditation pending. Facilities that are currently accredited or have an application pending have done so in part to satisfy the current audit requirements in section 16.24. Such facilities have selected the option to conduct annual internal audits (by in-house staff) and have periodic audits performed by the ACR or ACRO. Such facilities will not effectively see an increase in their operating budgets to comply with the new accreditation requirement as they have already chosen to become accredited and have budgeted for the associated cost.

Minimizing Adverse Impact:

Facilities will have 18 months to become accredited. This will allow a facility adequate time to select the accreditation body of their choice, complete an application and budget funds for the accreditation fee. The Department has held several discussions with the proposed accrediting bodies, and has accompanied their auditors during accreditation surveys. These interactions were conducted to ensure that the bodies have the capacity to handle an influx of applications for accreditation and that the organizations operate in a professional and constructive manner, have an efficient process, and have an overall effect of improving patient safety.

Rural Area Participation:

A copy of a draft proposed rule was sent to all medical therapy accelerator facilities, which includes both private practices and hospital-based radiation therapy treatment clinics. Seven facilities commented. One commenter addressed the cost for accreditation but indicated they understood the value of accreditation. A few commenters requested minor clarification on a few aspects of the proposed language.

Revised Job Impact Statement

Nature of Impact:

It is anticipated that no jobs will be adversely affected by this rule. Radiation therapy providers in New York will need to become familiar with and implement the new regulatory requirements set forth in proposed 10 NYCRR § 16.24. The proposed regulations do not significantly change the training or experience requirements of radiation therapy facility staff. Medical providers authorized to use radioactive materials would need to become familiar with and implement the new regulatory requirements set forth in proposed 10 NYCRR § 16.123. The Department anticipates that few if any persons will be adversely affected. Licensee staff, specifically those designated as the radiation safety officer, medical physicist, nuclear pharmacist, and authorized user will need to become familiar with the new requirements.

Categories and Numbers Affected:

There are approximately 120 radiation therapy facilities that would be subject to the rule. Half of these are hospitals or their satellite facilities, and the other half are non-institutional entities. There are approximately 450 medical use of radioactive materials licensees.

Regions of Adverse Impact:

No areas will be adversely affected.

Minimizing Adverse Impact:

There are no alternatives to the proposed regulations. The Department will revise guidance to assist all licensees, including those in rural areas, with implementation of the proposed regulations.

Self-Employment Opportunities:

The rule is expected to have minimal impact on self-employment opportunities since the majority of providers that will be affected by the rule are not sole proprietorships.

Assessment of Public Comment

The public comment period ended on November 19, 2012. The Department received one comment from Virtual Radiologic (VRad). VRad requested that the Department consider repealing the definition of "use" of radioactive materials under 10 NYCRR 16.2(137)(iii), which provides that "use" includes the interpretation of the results of diagnostic procedures.

It is not necessary to make this change at this time. The proposed regulations relies on the separate definition of "medical use" set forth in section 16.123(b)(4). That section provides: "Medical use means the intentional internal or external administration of byproduct material or the radiation from byproduct material to patients or human research subjects under the supervision of an authorized user." The new definition does not include the interpretation of diagnostic studies as medical use. Accordingly, VRad's concern does not need to be addressed, and a change will not be made to these provisions.

Higher Education Services Corporation

NOTICE OF ADOPTION

Tuition Assistance Program Award Determinations

I.D. No. ESC-07-13-00006-A

Filing No. 429

Filing Date: 2013-04-23

Effective Date: 2013-05-08

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

Action taken: Repeal of section 2202.7 of Title 8 NYCRR.

Statutory authority: Education Law, sections 667 and 655(4)

Subject: Tuition Assistance Program award determinations.

Purpose: To repeal section 2202.7 of Title 8 of the NYCRR.

Text or summary was published in the February 13, 2013 issue of the Register, I.D. No. ESC-07-13-00006-P.

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

Text of rule and any required statements and analyses may be obtained from: Cheryl B. Fisher, NYS Higher Education Services Corporation, 99 Washington Avenue, Room 1315, Albany, NY 12255, (518) 474-5592, email: regcomments@hesc.ny.gov

Assessment of Public Comment

The agency received no public comment.

Office of Mental Health

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Family-Based Treatment Provisions

I.D. No. OMH-19-13-00003-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 Parts 587, 593 and 594 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, section 7.09

Subject: Family-Based Treatment Provisions.

Purpose: Repeal provisions with respect to Family-Based Treatment - programs ceased on March 31, 2013.

Text of proposed rule: 1. Subparagraph (vi) of paragraph (4) of subdivision (c) of Section 587.4 of Title 14 NYCRR is amended to read as follows:

(vi) rehabilitation services provided to a resident of OMH rehabilitation treatment services [and family based treatment programs];

2. Paragraph (5) of subdivision (a) of Section 593.4 of Title 14 NYCRR is amended to read as follows:

(5) A residential program for children and adolescents, for purpose of this Part, means [family based treatment,] teaching family home and community residence programs licensed pursuant to Part 594 of this Title.

3. Paragraphs (1) and (2) of subdivision (b) of Section 593.7 of Title 14 NYCRR are amended to read as follows:

(1) A full monthly rate will be paid for services provided to an eligible resident in residence for at least 21 days in a calendar month, who has received at least four contacts with a staff person of the program. For a [family-based treatment program or a] teaching family home program, a youth shall have received at least 11 contacts, at least three of which must be provided by authorized program staff other than the [professional family or] teaching parents. At least four different community rehabilitative services must have been provided.

(2) A half monthly rate will be paid for services provided to an eligible resident in residence for at least 11 days in a calendar month, who

has received at least two contacts with a staff person of the program. For a [family-based treatment program or a] teaching family home program, a youth shall have received at least six contacts, at least two of which must be provided by authorized program staff other than the [professional family or] teaching parents. At least two different community rehabilitation services must have been provided.

4. Subdivision (c) of Section 593.7 of Title 14 NYCRR is amended to read as follows:

(c) The rates for each approved residential program for adults [as well as] *and* community residence programs for children [and family based treatment programs] shall be established by the Office of Mental Health, subject to the approval of the Director of the Budget, pursuant to the following criteria:

NOTE: PARAGRAPHS (1) –(3) OF THIS SUBDIVISION REMAIN UNCHANGED.

5. Subdivision (b) of Section 594.1 of Title 14 NYCRR is amended to read as follows:

(b) It is the purpose of these regulations to establish standards for licensed housing programs which provide residential treatment alternatives for children and youth who require such treatment in this setting due to a serious emotional disturbance. This Part sets forth standards for licensed housing for [four] *three* types of residential options: [family-based treatment homes,] teaching family homes, community residences, (including the Community Residence for Eating Disorder Integrated Treatment "CREDIT" Program), and Crisis Residences.

6. Subdivision (a) of Section 594.3 of Title 14 NYCRR is amended to read as follows:

(a) This Part applies to the operation or proposed operation of a licensed housing program, including [family-based treatment,] teaching family home, crisis residence, and community residence programs, including Community Residence for Eating Disorder Integrated Treatment (CREDIT) programs, for children and adolescents licensed pursuant to article 31 of the Mental Hygiene Law.

7. Subparagraph (i) of paragraph (2) of subdivision (a) of Section 594.4 of Title 14 NYCRR is amended to read as follows:

(i) for persons admitted to licensed housing programs[,] (including [family-based treatment,] teaching family homes, community residence programs that are not CREDIT programs, or State operated licensed housing programs for children and adolescents), an individual who has attained at least the 5th birthday but not the 18th; or

8. Paragraph (10) of subdivision (a) of Section 594.4 of Title 14 NYCRR is repealed and paragraphs (11) through (14) are renumbered as (10) through (13).

9. Paragraph (1) of subdivision (g) of Section 594.5 of Title 14 NYCRR is repealed and paragraphs (2) and (3) are renumbered as (1) and (2).

10. Subparagraph (ii) of paragraph (7) of subdivision (b) of Section 594.6 of Title 14 NYCRR is amended to read as follows:

(ii) written personnel policies which provide for screening of employees [and FBT parents] through the New York Statewide Central Register of Child Abuse and Maltreatment, verification of employment history, personal references, work record and qualifications, as well as requesting the Office to perform criminal history record checks in accordance with Part 550 of this Title;

11. Subdivisions (c) and (d) of section 594.8 of Title 14 NYCRR are amended to read as follows:

(c) The provider of a [family-based treatment,] teaching family home[,] or community residence[,] that is not a CREDIT program[,] must establish an intake committee to review the applications of children and adolescents referred for admission to the program from the youth's home single point of access process (or similar successor process) and determine the eligibility for admission to such program. The intake committee shall, at a minimum, include appropriate representation from the residential program and other agencies impacting the care and treatment of the child such as, but not limited to, the local governmental unit, social service district, school district, and family and consumer representation.

(d) A referral for admission to a [family-based treatment,] teaching family home or community residence program that is not a CREDIT program shall be submitted to the provider from the youth's home single point of access process (or similar successor process). Each referral must contain the following documents, and all assessments must have occurred within the last 90 days, except for the educational assessment which must have occurred within the last year:

NOTE: PARAGRAPHS (1) –(7) OF THIS SUBDIVISION REMAIN UNCHANGED.

12. Subdivision (f) of Section 594.8 of Title 14 NYCRR is repealed and subdivisions (g) through (l) are amended and re-lettered as follows:

(f)[For family-based treatment programs, the provider shall establish a policy that articulates the criteria to be used to match the child with FBT parents.

(g)] Prior to placement, each youth referred to a [family-based treatment,] teaching family home[,] *or* community residence, including a CREDIT program, shall be afforded at least one pre-placement visit to the [FBT family's home,] teaching family home or community residence. Where appropriate, the family shall also be afforded such opportunity.

[(h)]*(g)* Determination of eligibility for acceptance in the [family-based treatment,] teaching family home[,] *or* community residence, including a CREDIT program*,* must be made, once all intake materials have been received, within 10 working days.

[(i)]*(h)* If the child is not accepted into the [family-based treatment,] teaching family home or community residence that is not a CREDIT program, the provider shall send a notice of rejection to the youth's home single point of access committee (or similar successor process entity) and the child or adolescent's parent or guardian, accompanied by an explanation of the rejection and suggestion for other treatment alternatives. If the child is not accepted into a CREDIT program, the CREDIT program will send the notice of rejection to the referral source in a timely manner, but in no event not later than seven days after request has been made.

[(j)]*(i)* Each provider shall develop a discharge policy and specific discharge criteria. The discharge policy shall indicate that the provider will begin discharge planning upon a child or adolescent's admission to the program. Although discharge planning shall begin prior to the youth's 18th birthday, the youth may remain in the program for up to one year following the 18th birthday, if clinically appropriate. The discharge plan must set forth the resident's functional levels and family and community supports needed to enable the youth to move home or live independently. Additionally, the discharge plan must identify goals for the youth to work towards which will strengthen his or her success upon discharge.

[(k)]*(j)* As part of the discharge planning process, for both planned and unplanned discharges, the provider shall ensure that each child or adolescent and family is linked with the appropriate services needed for the youth to successfully transition into the community or other appropriate alternative. Attempts should be made to ensure that the discharge process allows for gradual transition to the child's discharge living environment.

[(l)]*(k)* [Family-based treatment, teaching] *Teaching* family homes and community residences, including CREDIT programs, shall maintain contact with youth and family for up to 90 days after discharge for the purpose of providing support during transition to the discharge living environment.

13. Subdivisions (a), (c), and (d) of Section 594.10 of Title 14 NYCRR are amended to read as follows:

(a) Services provided within a [family-based treatment,] teaching family home or community residence, including a CREDIT program, shall be provided in accordance with a service plan developed within four weeks of admission to the program. In the case of a community residence that is a CREDIT program or a crisis residence, the initial service plan must be developed within three days of admission. At the time of admission, an admission note must be prepared and signed by a qualified mental health staff person which, at a minimum, indicates a description of the strengths and needs of the youth, as well as a brief description of the services necessary to meet these needs during the initial period after admission.

(c) Progress notes shall be recorded by authorized program staff members. Such notes shall be prepared at least monthly for all programs other than crisis residence and CREDIT programs, and shall indicate the type of services which have been provided, any significant events which have occurred, progress towards achieving goals of the service plan and, if appropriate, any recommendations for changes to the goals and objectives of the service plan. For [family-based treatment and] teaching family programs, these notes must be based upon daily logs maintained by [FBT or] teaching parents which are reviewed weekly by program staff. For the crisis residence and CREDIT programs, progress notes shall be completed weekly.

(d) The individualized service plan shall be reviewed at least every three months for all programs other than the crisis residence and CREDIT programs with the initial review occurring three months from the date of admission. For crisis residence and CREDIT programs, the service plan must be reviewed weekly. For all programs, review shall include participation of staff [and FBT families] involved in the provision of services to the resident, the resident and/or, if appropriate, the resident's family or other collateral. Such review shall include the following:

NOTE: PARAGRAPHS (1) –(3) OF THIS SUBDIVISION REMAIN UNCHANGED.

14. Subdivisions (j) and (k) of Section 594.11 of Title 14 NYCRR are repealed and subdivision (l) is re-lettered accordingly as subdivision (j). The paragraphs and subparagraphs accompanying subdivision (l) – now known as subdivision (j) - remain unchanged.

15. Subdivision (b) of Section 594.13 of Title 14 NYCRR is repealed and subdivisions (c) and (d) are re-lettered as (b) and (c) respectively.

16. Subparagraph (i) of paragraph (3) of subdivision (a) of Section 594.16 of Title 14 NYCRR is amended to read as follows:

(i) [Family-based treatment, teaching] *Teaching* family homes and community residences shall meet the requirements of the appropriate chapter LSC for one- and two-family dwellings.

17. Paragraph (1) of subdivision (b) of Section 594.16 of Title 14 NYCRR is amended to read as follows:

(1) Single bedrooms for teaching family homes, community residences and crisis residences shall be at least 90 square feet (exclusive of closets) and a multiple bedroom shall provide at least 75 square feet per resident. [Single bedrooms for family-based treatment programs shall be at least 70 square feet (exclusive of closets) and a multiple bedroom shall provide at least 60 square feet per resident.]

Text of proposed rule and any required statements and analyses may be obtained from: Sue Watson, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: Sue.Watson@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 repeal outdated references to an OMH-licensed program that is no longer in existence; therefore, no person is likely to object.

OMH has completed a two-year phase out of the Family Based Treatment (FBT) Program effective March 31, 2013. The FBT program had served as one component of the system of care for children and youth with serious emotional disturbances. However, in recent years the need for out-of-home residential placements for young children through programs such as FBT has decreased significantly. Many FBT programs had experienced high vacancy rates, and provider capacity declined more than 50 percent over the past decade. As a result, OMH targeted the elimination of the FBT program rather than seeking additional across-the-board cuts for children's programs. All FBT programs officially ceased operation on March 31, 2013. During the two-year phase out of the program, OMH worked closely with young people, families, community-based providers and other child-serving systems to ease the transition process and develop community-based services to support children remaining in their homes with their families. The FBT program was referenced in a number of OMH regulations. This rule making serves to eliminate this reference from the affected Parts.

Statutory Authority: Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his/her jurisdiction.

Job Impact Statement

A Job Impact Statement has not been submitted with this notice. The purpose of this rule making is to eliminate references to a program no longer in existence; therefore this proposed rule will have no impact on jobs and employment opportunities.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Operation of Residential Treatment Facilities for Children and Youth

I.D. No. OMH-19-13-00004-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 584 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 31.04 and 31.26

Subject: Operation of Residential Treatment Facilities for Children and Youth.

Purpose: Add fire safety and smoking provisions; update information regarding facility construction and design; correct minor errors.

Text of proposed rule: 1. Subdivisions (a) and (d) of Section 584.2 of Title 14 NYCRR are amended to read as follows:

(a) Sections 7.09 and 31.04 of the Mental Hygiene Law grant the Commissioner of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his/her jurisdiction and to set standards of quality and adequacy of facilities, equipment, personnel, services, records and programs for the rendition of services for [the mentally ill] *persons with mental illness,* pursuant to an operating certificate.

(d) Sections 31.05, 31.07, 31.09, 31.11 and 31.19 of the Mental Hygiene Law authorize the commissioner or his or her representative to examine and inspect such facilities to determine their suitability and operation. Sections [31.15] *31.16* and 31.17 authorize the commissioner to suspend, revoke or limit any operating certificate.

2. Subdivision (b) of Section 584.3 of Title 14 NYCRR is amended to read as follows:

(b) These regulations do not apply to hospitals operated by the Office of Mental Health, or to hospitals issued an operating certificate by the Office of Mental Health pursuant to Part [82]*582* of this Title.

3. Section 584.19 of Title 14 NYCRR is amended to read as follows:

584.19 Premises.

The following standards shall apply to the physical plant or physical facilities of a residential treatment facility:

(a) [As used in this Part, physical plant or physical facilities of a residential treatment facility shall meet the standards set forth in Part 77 and Part 78 of this Title] *Construction standards.*

(1) Facilities shall be and remain in compliance with applicable sections of the 2010 edition of the Guidelines for Design and Construction of Health Care Facilities published by the Facility Guidelines Institute with assistance from the United States Department of Health and Human Services, provided, however, that this provision shall apply only to facilities which undertake construction or major renovations on or after the effective date of this paragraph. Facilities which have been constructed or have completed major renovations prior to that date in accordance with Part 77 of this Title shall be deemed to be in compliance with this paragraph.

(2) The design of the facility shall meet the requirements of the applicable sections of the Americans with Disabilities Act and the ADA Standards for Accessible Design and implementing regulations found at 28 CFR Parts 35 and 36.

(3) Waivers of up to [25] *10* percent of the square footage for bedroom space will be considered by the Office of Mental Health upon application from the agency.

(b) [The following standards shall apply to the physical plant or physical facilities of a residential treatment facility:] *Fire safety.*

(1) All buildings containing sleeping quarters for children shall be protected by a fire detection system or a sprinkler system installed throughout. All buildings used by children, but not containing sleeping quarters for them, shall be protected throughout by a sprinkler system, fire detection system, or manually operated fire alarm system. All areas of high fire hazard in all buildings used by children, whether or not they contain sleeping quarters for them, shall be protected by a sprinkler system and be separated from other areas by substantial, fire-resistant construction.

(2) All fire protection systems and equipment shall be installed according to recommendations of the National Fire Protection Association, and shall be inspected at least quarterly by a person who is expert in the installation, operation and inspection of such systems and equipment. A record of these inspections shall be kept by the [institution] *facility. Facilities shall immediately correct any deficiency noted during inspection and testing.*

(3) Each residential treatment facility shall request an annual inspection of each building used by children and its fire protection equipment by local fire authorities and/or the residential treatment facility's fire and casualty insurance carrier, who shall be requested to give the [institution] *facility* a written report of their findings. This report shall be kept on file on the premises until replaced by the next annual report of inspection. The residential treatment facility shall be responsible for correcting any fire hazards called to its attention throughout such inspection, and for keeping a written record on file of the action taken and when.

(4) Fire safety training. Facilities shall provide fire safety training to all staff. Newly hired staff shall be trained upon hiring and existing staff trained at least annually. Fire safety training shall include, but not be limited to:

(i) fire prevention;
(ii) discovering a fire;
(iii) operating the fire alarm system;
(iv) use of firefighting equipment; and
(v) building evacuation including fire drill protocols which identify staff roles.

(5) Fire drills. On a quarterly basis, facilities shall conduct fire drills in each building that houses patients. At least 50 percent of such drills must be unannounced.

(i) For each quarter, each such building must have a minimum of one practice fire drill per shift.

(ii) Facilities must direct all staff members on all shifts to participate in fire drills.

(iii) Drills shall be scheduled at varying times during a shift.

(iv) Use of alternative exits shall be practiced during fire drills.

(v) Whenever practicable, drills shall involve the actual evacuation of patients to an assembly point as specified in the evacuation plan. Consistent with the Life Safety Code standards, in larger facilities that are subdivided into separate smoke compartments to limit the spread of fire and smoke and move patients without leaving the building or changing floors, evacuation may include the relocation of patients to such compartments.

(vi) Properly documented actual or false alarms may be used for up to 50 percent of required drills for each shift, if all elements of the facility's fire plan were implemented.

(vii) Facilities must document and maintain records regarding fire drill performance which include an evaluation of the results of each fire drill, any corrective action that may be required, and completion of steps taken to achieve such corrective action.

(c) [Each living unit shall provide for the comfort and privacy of the residents and shall be limited in size to 14 residents.] *Prohibited items.*

(1) The following items are prohibited from use within the structure:

(i) devices for heating, cooking, or lighting which use kerosene, gasoline, wood, or alcohol;

(ii) portable electric hot plates; and

(iii) barbeque grills. The use of barbeque grills is permissible when used outside of buildings but not within 30 feet of any structure including overhangs, canopies or awnings.

(2) The use of portable space heating devices is prohibited in patient sleeping and treatment areas of the facility, as well as in the facility administration offices. Use of a portable space heating device in any other building on the grounds of a facility shall be in accordance with guidelines of the Office, provided that:

(i) the unit has an Underwriters Laboratories (UL) certification mark;

(ii) the unit is thermostat-controlled and has a tip-over cutoff device;

(iii) the unit is plugged directly into a wall receptacle (no extension cords);

(iv) combustible materials are not stored around or near the unit;

(v) at least a three-foot clearance around the unit is maintained; and

(vi) the unit is not placed underneath a desk, furniture or other combustible items.

(d) Smoking. Facilities must not permit smoking within any buildings on the grounds of the facility. If smoking is permitted on the grounds of the facility, it shall be contained to a specific location(s) equipped with an approved non-combustible ash receptacle. Smoking shall not be permitted within 30 feet of any building structure, including overhangs, canopies or awnings.

[(d)]*(e) Medication storage.* If medications are stored on the premises of the residential treatment facility, the residential treatment facility shall provide for controlled access maintenance of supplies in accordance with all applicable Federal and State laws and regulations.

(1) There shall be a single medication storage area within a single unit of the residential treatment facility.

(2) Medication shall be stored in a sturdy metal or sturdy wooden cabinet without glazing which shall be locked except when medication is needed. Controlled substances shall be stored in double-locked cabinets[.] *as follows:*

(i) Schedule I, II, III and IV controlled substances shall be kept in stationary, double-locked cabinets. Both inner and outer cabinets shall have key-locked doors with separate keys. Spring locks or combination dial locks are not acceptable.

(ii) Schedule V controlled substances shall be stored in a stationary, secure, locked cabinet of substantial construction.

(3) Refrigerators used for storage of medication shall not be used for the storage of food or beverages unless the medication is stored in separate locked compartment within the refrigerator.

[(e)]*(f) Each living unit shall provide for the comfort and privacy of the residents and shall be limited in size to 14 residents.* The premises shall be reasonably maintained to ensure access to services by all residents.

Text of proposed rule and any required statements and analyses may be obtained from: Sue Watson, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: Sue.Watson@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.

Regulatory Impact Statement

1. Statutory Authority: Sections 7.09 and 31.04 of the Mental Hygiene Law grant the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction, and to set standards of quality and adequacy of facilities, equipment, personnel, services, records and programs for the rendition of services for persons diagnosed with mental illness, pursuant to an operating certificate.

Section 31.26 of the Mental Hygiene Law provides for the establishment of the subclass of hospitals known as residential treatment facilities for children and youth, which provide active treatment under the direction of a physician for individuals who are under 21 years of age.

2. Legislative Objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. The New York State Clean Indoor Air Act (Public Health Law, Article 13-E) prohibits smoking in virtually all workplaces, including residential health-care facilities, unless separately designated smoking areas for adult patients are provided. The proposed rule establishes smoking and fire safety provisions for residential treatment facilities for children and youth licensed by the Office of Mental Health (Office), thereby furthering the legislative policy of providing high quality mental health services to individuals with mental illness in a safe and secure environment.

3. Needs and Benefits: Current regulations governing the operation of residential treatment facilities for children and youth mandate that all facilities must be safe and suitable for the comfort and care of patients. The proposed amendments are needed to clearly state the expectations of the Office with respect to fire safety. The inclusion of fire safety provisions is directed toward staff improvement and increased knowledge. This regulatory change is designed to ensure that staff can and will successfully manage a fire emergency. Requirements include completion of fire safety training for all staff, conducting of practice fire drills, testing of fire safety equipment, and a prohibition on the use of certain devices for heating, cooking or lighting. These requirements are consistent with the New York State Building Code and the accreditation standards of The Joint Commission.

The rule includes provisions that prohibit smoking within buildings. Smoking, if permitted on the grounds of the facility, will be limited to a specific location that has an approved non-combustible ash receptacle.

The proposal also updates references regarding facility construction and design, and corrects minor errors in existing regulations pertaining to legal authority and applicability.

4. Costs:

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

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

(c) Costs to regulated parties: There is no anticipated cost associated with implementation of these amendments.

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

6. Paperwork: This rule should not have a significant increase in the paperwork requirements of providers.

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

8. Alternatives: The only alternative to the regulatory amendment would be inaction. The Office is charged with the responsibility of ensuring a safe and secure environment for persons receiving mental health services. Existing regulations do not clearly specify the Office's expectations with respect to fire safety and smoking within buildings, nor do they include up-to-date information regarding the physical construction and design of facilities. Residential treatment facilities that have been issued an operating certificate by the Office must be aware of these expectations; therefore, that alternative was not considered.

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

10. Compliance Schedule: These regulatory amendments are effective immediately upon adoption.

Regulatory Flexibility Analysis

The proposed rule establishes smoking and fire safety provisions for residential treatment facilities licensed by the Office of Mental Health, updates references regarding facility construction and design, and makes minor corrections to existing regulations. As there will be no adverse economic impact on small businesses or local governments as a result of these amendments, a regulatory flexibility analysis is not submitted with this notice.

Rural Area Flexibility Analysis

The amendments to Part 584 of Title 14 NYCRR serve to establish smoking and fire safety provisions for residential treatment facilities licensed

by the Office of Mental Health, update references with respect to facility construction and design, and make minor corrections to existing regulations. The proposed rule will not impose any adverse economic impact on rural areas; therefore, a Rural Area Flexibility Analysis is not submitted with this notice.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because it is evident from the subject matter that there will be no adverse impact on jobs and employment opportunities as a result of these proposed amendments. The rule making serves to establish smoking and fire safety provisions for residential treatment facilities licensed by the Office of Mental Health, update references regarding facility construction and design, and make minor correction to existing regulations.

Public Service Commission

NOTICE OF ADOPTION

Approval of Authorization to Defer Incremental Expenses Incurred in Storm Restoration Work

I.D. No. PSC-52-11-00013-A
Filing Date: 2013-04-22
Effective Date: 2013-04-22

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

Action taken: On 4/18/13, the PSC adopted an order approving a petition authorizing Central Hudson Gas & Electric Corporation to defer incremental electric storm restoration expenses related to Tropical Storm Irene on August 27-28, 2011.

Statutory authority: Public Service Law, section 66(9)

Subject: Approval of authorization to defer incremental expenses incurred in storm restoration work.

Purpose: To approve the authorization of the company to defer incremental expenses incurred in storm restoration work.

Substance of final rule: The Commission, on April 18, 2013 adopted an order authorizing Central Hudson Gas & Electric Corporation to defer $8,919,779 of incremental electric storm restoration expenses related to Tropical Storm Irene, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(11-E-0651SA1)

NOTICE OF ADOPTION

Denial of Request to Defer Incremental Expenses Incurred in Storm Restoration Work

I.D. No. PSC-21-12-00010-A
Filing Date: 2013-04-22
Effective Date: 2013-04-22

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

Action taken: On 4/18/13, the PSC adopted an order denying a petition by Central Hudson Gas & Electric Corporation to defer incremental electric storm restoration expenses related to a Nor'easter snow storm on October 29, 2011.

Statutory authority: Public Service Law, section 66(9)

Subject: Denial of request to defer incremental expenses incurred in storm restoration work.

Purpose: To deny the company's request to defer incremental expenses incurred in storm restoration work.

Substance of final rule: The Commission, on April 18, 2013 adopted an order denying the request of Central Hudson Gas & Electric Corporation for deferral and recovery of incremental costs relating to the Nor'easter snow storm on October 29, 2011, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(12-M-0204SA1)

NOTICE OF ADOPTION

Minor Rate Filing

I.D. No. PSC-40-12-00009-A
Filing Date: 2013-04-22
Effective Date: 2013-04-22

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

Action taken: On 4/18/13, the PSC adopted an order approving a filing by Reserve Gas Company, Inc. to increase annual revenues by $116,000 or 7.78%.

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

Subject: Minor rate filing.

Purpose: To approve the increase in annual revenues by $116,000 or 7.78%.

Substance of final rule: The Commission, on April 18, 2013 adopted an order approving the filing of Reserve Gas Company, Inc. to increase its annual gas revenues by $116,000 or 7.78%, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(12-G-0404SA1)

NOTICE OF ADOPTION

Water Rates and Charges

I.D. No. PSC-43-12-00004-A
Filing Date: 2013-04-19
Effective Date: 2013-04-19

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

Action taken: On 4/18/13, the PSC adopted an order allowing Rolling Meadows Water Corporation to increase its annual revenues by $34,291, or 7.60%, effective May 1, 2013.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

Subject: Water rates and charges.

Purpose: To allow Rolling Meadows to increase its annual revenues by $34,921, or 7.60%.

Substance of final rule: The Commission, on April 18, 2013 adopted an

order allowing Rolling Meadows Water Corporation to increase its annual revenues by $34,291, or 7.60% and directing the company to file amendments to its tariff schedule PSC No. 4 – Water, effective May 1, 2013 establishing the authorized rates, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(12-W-0445SA1)

NOTICE OF ADOPTION

Approval of the Issuance of Securities and to Enter into Derivative Instruments

I.D. No. PSC-01-13-00016-A

Filing Date: 2013-04-22

Effective Date: 2013-04-22

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

Action taken: On 4/18/13, the PSC adopted an order approving a petition authorizing the issuance of up to $518 million of securities and to enter into derivative instruments.

Statutory authority: Public Service Law, section 69

Subject: Approval of the issuance of securities and to enter into derivative instruments.

Purpose: To approve the issuance of securities and to enter into derivative instruments.

Substance of final rule: The Commission, on April 18, 2013 adopted an order approving the petition of Rochester Gas and Electric Corporation to issue $518 million of long-term indebtedness, preferred stock and hybrid securities and to enter into derivative instruments, not later than December 31, 2015, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(12-M-0561SA1)

NOTICE OF ADOPTION

Approval of Revisions to ConEdison's Demand Response Programs

I.D. No. PSC-03-13-00001-A

Filing Date: 2013-04-19

Effective Date: 2013-04-19

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

Action taken: On 4/18/13, the PSC adopted an order approving Consolidated Edison Company of New York, Inc.'s (ConEdison) petition proposing revisions to its demand response programs.

Statutory authority: Public Service Law, sections 65 and 66(12)

Subject: Approval of revisions to ConEdison's demand response programs.

Purpose: To approve the revisions to ConEdison's demand response programs.

Substance of final rule: The Commission, on April 18, 2013 adopted an order approving a petition filed by Consolidated Edison Company of New York, Inc. seeking modifications and tariff revisions to its Demand Response programs, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(09-E-0115SA10)

NOTICE OF ADOPTION

Approving NYSEG's Emergency Economic Development Programs, with Modifications, for Customers Recovering from Superstorm Sandy

I.D. No. PSC-04-13-00008-A

Filing Date: 2013-04-23

Effective Date: 2013-04-23

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

Action taken: On 4/18/13, the PSC adopted an order approving a petition by New York State Electric and Gas Corporation (NYSEG) approving Emergency Economic Development Programs with modifications to assist customers in recovering from Superstorm Sandy.

Statutory authority: Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(1), (3), (5), (10), (12) and (12-b)

Subject: Approving NYSEG's Emergency Economic Development Programs, with modifications, for customers recovering from Superstorm Sandy.

Purpose: To approve NYSEG's Emergency Economic Development Programs, with modifications, for customers recovering from Superstorm Sandy.

Substance of final rule: The Commission, on April 18, 2013 adopted an order approving the petition of New York State Electric & Gas Corporation's request to utilize three Emergency Economic Development Programs, with modifications, to assist customers recovering from Superstorm Sandy, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(12-E-0550SA1)

NOTICE OF ADOPTION

Approving the Waiver of the Retirement Notice Period So the Danskammer Facility May be Transferred and Demolished

I.D. No. PSC-05-13-00006-A

Filing Date: 2013-04-22

Effective Date: 2013-04-22

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

Action taken: On 4/18/13, the PSC adopted an order approving a petition by Dynegy Danskammer LLC for a waiver of the retirement notice period for the Danskammer Generation Facility located in Newburgh, New York so that the facility may be transferred and demolished.

Statutory authority: Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(1), (3), (5), (8), (10) and 70

Subject: Approving the waiver of the retirement notice period so the Danskammer Facility may be transferred and demolished.

Purpose: To approve the waiver of the retirement notice period so the Danskammer Facility may be transferred and demolished.

Substance of final rule: The Commission, on April 18, 2013 adopted an order approving the petition of Dynegy Danskammer LLC, for a waiver of the retirement notice period for the Danskammer Generation Facility located in Newburgh, New York so that the facility may be transferred and demolished, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(13-E-0012SA1)

NOTICE OF ADOPTION

Approval, with Modifications, of a Deferred Payment Agreements Pilot Program

I.D. No. PSC-06-13-00010-A

Filing Date: 2013-04-18

Effective Date: 2013-04-18

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

Action taken: On 4/18/13, the PSC adopted an order, with modifications, approving the tariff filing of National Fuel Gas Distribution Corporation PSC No. 8—Gas, to establish a pilot program allowing customers to electronically sign a Deferred Payment Agreement.

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

Subject: Approval, with modifications, of a Deferred Payment Agreements pilot program.

Purpose: To approve, with modifications, a Deferred Payment Agreements pilot program.

Substance of final rule: The Commission, on April 18, 2013, adopted an order approving, with modifications, National Fuel Gas Distribution Corporation's amendments to PSC No. 8—Gas, to establish a pilot program allowing customers to electronically sign a Deferred Payment Agreement, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(13-G-0016SA1)

NOTICE OF ADOPTION

Approving the Transfer of Ownership Interests of the Roseton Generating Station

I.D. No. PSC-06-13-00011-A

Filing Date: 2013-04-22

Effective Date: 2013-04-22

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

Action taken: On 4/18/13, the PSC adopted an order approving a petition by Dynegy Roseton LLC to transfer the ownership interests in the Roseton Generating Station to CCI Roseton LLC.

Statutory authority: Public Service Law, section 70

Subject: Approving the transfer of ownership interests of the Roseton Generating Station.

Purpose: To approve the transfer of ownership interests of the Roseton Generation Station.

Substance of final rule: The Commission, on April 18, 2013 adopted an order approving the petition by Dynegy Roseton LLC for the transfer of ownership interests in the Roseton Generating Station to CCI Roseton LLC, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(13-E-0019SA1)

NOTICE OF ADOPTION

Approval of Emergency Rule As a Permanent Rule

I.D. No. PSC-06-13-00013-A

Filing Date: 2013-04-18

Effective Date: 2013-04-18

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

Action taken: On 4/18/13, the PSC adopted an order approving an emergency rule as a permanent rule for a temporary waiver of certain tariff provisions of BUG & KeySpan d/b/a National Grid NY for temperature controlled service customers affected by Superstorm Sandy.

Statutory authority: Public Service Law, sections 5, 65 and 66

Subject: Approval of emergency rule as a permanent rule.

Purpose: To adopt emergency rule as a permanent rule.

Substance of final rule: The Public Service Commission, on April 18, 2013, adopted an order approving an emergency rule as a permanent rule, for a temporary waiver of certain tariff provisions of The Brooklyn Union Gas Company d/b/a National Grid, NY and KeySpan Gas East Corporation d/b/a National Grid related to temperature controlled gas service customers that were affected by Superstorm Sandy.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(13-G-0006EA1)

NOTICE OF ADOPTION

Approval of Tariff Amendments Regarding Monthly Charge for Cellular Communications

I.D. No. PSC-07-13-00019-A

Filing Date: 2013-04-18

Effective Date: 2013-04-18

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

Action taken: On 4/18/13, the PSC adopted an order approving the tariff filing of Central Hudson Gas & Electric Corporation to modify Service Classification Nos. 3 and 13 regarding monthly charge for cellular communications.

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

Subject: Approval of tariff amendments regarding monthly charge for cellular communications.

Purpose: To approve the tariff amendments regarding monthly charge for cellular communications.

Substance of final rule: The Commission, on April 18, 2013, adopted an order approving a tariff filing by Central Hudson Gas and Electric Corporation to modify Service Classification Nos. 3 and 13 regarding the incremental monthly charge of cellular communications, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(13-E-0033SA1)

NOTICE OF ADOPTION

Reliability Contingency Plans

I.D. No. PSC-08-13-00009-A

Filing Date: 2013-04-23

Effective Date: 2013-04-23

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

Action taken: On 4/18/13, the PSC adopted an order making determinations regarding a filing by Consolidated Edison Company of New York, Inc. (Con Ed) and New York Power Authority (NYPA) to advance transmission, energy efficiency and demand response projects.

Statutory authority: Public Service Law, sections 4(1), 5(1)(b), (2), 65(1), 66(1), (2), (4), (5), (9) and (12)

Subject: Reliability contingency plans.

Purpose: To make determinations with regard to the February 1, 2013 filing by Con Ed and NYPA.

Substance of final rule: In an order issued on April 19, 2013, the Public Service Commission (Commission) made several determinations with regard to the Indian Point reliability contingency plan filing made by Consolidated Edison Company of New York, Inc. and the New York Power Authority (NYPA) on February 1, 2013 (Filing). With respect to items 2(b) and 2(c) on pages 3-4 of the Filing, the Commission directed Con Edison and New York State Electric and Gas Corporation to coordinate with Central Hudson Gas & Electric Corporation and NYPA, and to undertake the preliminary planning activities related to the three Transmission Owner Transmission Solutions, subject to conditions. With respect to item 2(d) on page 4 of the Filing, the Commission addressed the recovery of prudently incurred costs related to the three Transmission Owner Transmission Solutions up to $10 million. With respect to item 2(e) on page 4 of the Filing, the Commission declined to find that the three Transmission Owner Transmission Solutions are public policy projects that meet the public policy requirements of the State.

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

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(12-E-0503SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Delivery of Supply

I.D. No. PSC-19-13-00007-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 whether to grant, modify or deny a tariff filing by KeySpan Gas East Corporation d/b/a National Grid proposing revisions to Service Classification (SC) No. 8—Seller Service.

Statutory authority: Public Service Law, sections 65 and 66(12)

Subject: Delivery of supply.

Purpose: To grant, modify or deny a tariff filing proposing revisions to SC No. 8—Seller Service.

Substance of proposed rule: The Public Service Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by KeySpan Gas East Corporation d/b/a National Grid (the Company) to revise Service Classification (SC) No. 8—Seller Service. The tariff modification is to remove language under SC No. 8 that states a Seller must deliver supply to the Company by means of Tier 1 released capacity. The amendments have an effective date of August 1, 2013. 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.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, 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.

(13-G-0180SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Water Service Termination Hours

I.D. No. PSC-19-13-00008-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 petition by Floradan Estates Inc. proposing revisions to the Company's rules and regulations contained in P.S.C. No. 3—Water.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

Subject: Water service termination hours.

Purpose: To expand the hours for water service terminations.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part a petition by Floradan Estates Inc., proposing to revise the Company's rules and regulations contained in P.S.C. No 3—Water. The purpose of this petition is to either allow the Company to extend the weekday hours that the Company may terminate water service or to allow Saturday water service terminations.

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.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, 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.

(13-W-0167SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Delivery of Supply

I.D. No. PSC-19-13-00009-P

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

Proposed Action: The Commission is considering whether to grant, modify or deny a tariff filing by The Brooklyn Union Gas Company d/b/a National Grid proposing revisions to Service Classification (SC) No. 19—Seller Transportation Aggregation Service.

Statutory authority: Public Service Law, sections 65 and 66(12)

Subject: Delivery of supply.

Purpose: To grant, modify or deny a tariff filing proposing revisions to SC No. 19—Seller Transportation Aggregation Service.

Substance of proposed rule: The Public Service Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by The Brooklyn Union Gas Company d/b/a National Grid (the Company) to revise Service Classification (SC) No. 19 – Seller Transportation Aggregation Service. The tariff modification is to remove language under SC No. 19 that states a Seller must deliver supply to the Company by means of Tier 1 released capacity. The amendments have an effective date of August 1, 2013. 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.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, 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.

(13-G-0179SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Waiver of 16 NYCRR Sections 894.1 Through 894.4(b)(2)

I.D. No. PSC-19-13-00010-P

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

Proposed Action: The Public Service Commission is considering a Petition from the Town of Warren, NY, to waive 16 NYCRR sections 894.1 through 894.4 pertaining to the franchising process for the Town of Warren, NY.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 16 NYCRR sections 894.1 through 894.4(b)(2).

Purpose: To allow the Town of Warren, NY, to waive certain preliminary franchising procedures to expedite the franchising process.

Substance of proposed rule: The Public Service Commission is considering whether to approve, modify, or reject the Petition of the Town of Warren, NY, to waive Sections 894.1, 894.2, 894.3, and 894.4 regarding franchising procedures for the Town of Warren, Herkimer County, New York.

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.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, 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.

(13-V-0165SP1)