

# 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.

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## Office of Alcoholism and Substance Abuse Services

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

#### Appeals, Hearings and Rulings

**I.D. No.** ASA-45-13-00002-P

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

**Proposed Action:** This is a consensus rule making to repeal Part 368 and amend Part 831 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.07(c), 19.09(b), 19.40, 32.07(a) and 32.02

**Subject:** Appeals, Hearings and Rulings.

**Purpose:** Consolidates into Part 800s regulations promulgated prior to two divisions (DSASA and DAAA) becoming one Office.

**Text of proposed rule:** REPEAL 14 NYCRR PART 368; AMEND 14 NYCRR PART 831

APPEALS, [AND] HEARINGS, and RULINGS  
(Statutory authority: Mental Hygiene Law, § 19.09, § 31.04(c)(7), *State Administrative Procedure Law*, § 204)

Section 831.1 Applicability.

If the Commissioner gives notice of any action pursuant to provisions of this Title for which an opportunity to be heard is provided, the provisions of this Part shall apply. Notice shall include the time within which a hearing must be requested.

831.2 Request for hearing, scheduling and notice.

(a) If the party provided notice as described in section 831.1 of this Part desires a hearing, such party shall submit a written request for a hearing to the Commissioner within 10 business days of receipt of the notice.

(b) Within 20 days of receipt of a request for hearing, the Commissioner shall provide notice to the requesting party of the date and location of the hearing, to be held without undue delay.

(c) Notice of the hearing shall be served on the party, either by hand delivery, certified mail or other verifiable written communication, at least 10 days before the scheduled hearing date and shall specify the time and place of the hearing, the names of the person who will conduct the hearing, and include a basis for action taken. If required by law or by consent or permission, a written answer shall be provided at least three days before the scheduled hearing date.

831.3 Rights of parties.

(a) Each party shall have the right to be represented by counsel.

(b) Upon request of any party, the Hearing Officer may permit discovery which shall be limited to the production of documents and other tangible things.

(c) Any party may request that the Hearing Officer recuse him/herself from the proceeding when the party believes that the Hearing Officer has a conflict of interest which would render him/her unable to provide a fair and impartial recommendation to the Commissioner. The Hearing Officer's refusal determination shall be final. If a Hearing Officer recuses him/herself, the Commissioner shall appoint a new Hearing Officer and promptly reschedule the hearing.

(d) Each party shall have the right to present evidence and cross-examine witnesses.

831.4 Conduct of hearing.

(a) Presentation of case.

(1) The Office shall have the right to present its prima facie case first and shall also have the right to rebuttal, at the conclusion of the other party's case, at which any and all witnesses and/or other evidence pertinent to the case may be additionally presented.

(2) The party requesting the hearing shall present its case at the conclusion of the case presented by the office.

(b) Burden of Proof. The burden of proof shall be on the party requesting the hearing to show by a preponderance of the evidence that the Commissioner's decision is not in conformity with the standards and criteria set forth in the applicable laws and provisions of this Title.

(c) Hearings shall be open to the public unless otherwise ordered by the Commissioner or Hearing Officer due to the protection of patient's rights or upon a showing of other compelling reasons.

(d) The Hearing Officer shall not communicate ex parte, either directly or indirectly, in connection with any issue that relates to the merits of a pending adjudicatory proceeding unless all parties have first been given notice of the intended communication and an opportunity to participate.

831.5 Powers of hearing officers.

(a) The Hearing Officer shall have the power to administer oaths and affirmations, issue subpoenas and otherwise control the conduct of the hearing.

(b) The Hearing Officer shall not be bound by the rules of evidence observed by courts, except that the rules of privilege recognized by law shall be respected.

(c) The Hearing Officer, with the consent of all parties, may waive any time requirement provided for in this Part.

(d) The Hearing Officer may consult on questions of law with the office's counsel or another designated Office attorney, provided that said attorney has not been engaged in investigative or prosecuting functions in connection with the proceeding under consideration or a factually related adjudicatory proceeding.

831.6 Post-hearing procedure.

(a) The Hearing Officer shall fix the time, not to exceed 15 days from the date of the hearing transcript, within which the parties may provide the Hearing Officer with written memoranda in support of their positions.

(b) Within 20 days of the date fixed for submission of written memoranda, the Hearing Officer shall submit a final report of findings and recommendations to the Commissioner with the entire record of the hearing.

(c) The Commissioner shall render a final decision in writing within 10 days of receipt of the Hearing Officer's report. In the event that the Commissioner renders a final decision that conflicts with the Hearing Officer's recommendations, the Commissioner shall set forth the reasons for the decision.

831.7 Verbatim record.

(a) A verbatim recording of the proceedings shall be made by whatever means the Office deems appropriate.

(b) A transcription of the recording shall be made available to any party requesting it upon payment of the party of the cost of transcription. If more than one party requests the transcript, the cost will be allocated among the parties.

(c) The office may waive the transcript cost on a showing of hardship. Requests for transcripts and for waiver of transcript costs must be made in writing to the Commissioner and must be submitted no later than the first day of the hearing.

831.8 Hearing record.

The hearing record shall include: the notice of proposed action, the request for the hearing, the notice of hearing including the report of finds, motions submitted and rulings thereon, the recording of transcript of the testimony taken at the hearing, exhibits, stipulations and memoranda of law filed in connection with the hearing, the Hearing Officer's report of findings and recommendations to the Commissioner, and the Commissioner's final ruling.

831.9 Administrative appeals.

(a) Where an opportunity for an administrative appeal is afforded pursuant to the provisions of this Title, the provisions of this Section shall apply.

(b) All requests for administrative appeals shall be in writing and delivered by registered mail to the Commissioner within thirty business days of receipt of the applicable agency decision.

(c) A request for an administrative appeal shall include a written detailed statement of the factual issues in dispute.

(d) Administrative appeals shall be based upon the written submissions of the party requesting the appeal and any relevant agency documentation. The burden of proof on appeal shall be on the party requesting the appeal to demonstrate that the agency's action is not in conformance with the applicable regulatory standards.

(e) The Commissioner may, in his or her sole discretion, hold a conference including all relevant parties.

(f) Within 30 business days of receipt of the request for administrative appeal, or within fifteen days after the conference as set forth in subdivision (e) of this Section, the Commissioner will issue a final determination in writing. Formal notification of the determination shall be sent to the party requesting the appeal by certified mail, return receipt requested.

(g) The determination after administrative review of the appeal shall be final and is not subject to further administrative review.

831.10 Declaratory rulings.

(a) Pursuant to section 204 of the administrative procedure law, persons may petition the Office for a declaratory ruling on the applicability of any regulation or statute enforceable by the Office.

(b) Procedure. Petitions must be in writing and addressed to Counsel, New York State Office of Alcoholism and Substance Abuse, 1450 Western Ave., Albany, NY 12203, by certified mail, return receipt requested. Petitions must contain the following:

- (1) name and address of petitioner;
- (2) a statement requesting a declaratory ruling, specifying the rule or statutory provision for which the declaratory ruling is requested;
- (3) a statement of relevant facts and circumstances, and full disclosure of petitioner's interest; and
- (4) verification under oath by petitioner of all facts and assertions therein.

(c) Ruling. Counsel shall issue and mail to petitioner, certified mail, return receipt requested, a declaratory ruling within 60 days of the receipt of a completed petition, or a statement declining to issue a declaratory ruling. Rulings shall be available for public inspection at the Office.

(d) Conditions. No correspondence or opinion issued by the Office shall be construed as a declaratory ruling unless it is identified as a declaratory ruling and is issued in response to a petition pursuant with this section.

(e) Nothing in this section shall be construed to prohibit the determination of the validity or applicability of the regulation in any other action or proceeding in which its invalidity or inapplicability is asserted, and nothing in this section shall be construed to limit any rights which may exist under article 78 of the civil practice law and rules.

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

14 NYCRR Part 368, Declaratory Rulings, is a regulation still effective, but remaining to be consolidated into the Part 800 series of 14 NYCRR created when the two Divisions (DSAS and DAAA) of the Office of Alcoholism and Substance Abuse within the Department of Mental Hygiene were joined to create the current Office of Alcoholism and Substance Abuse Services.

This proposal would repeal Part 368 and incorporate its provisions into the current Part 831 ("Appeals and Hearings"). The substance of the regulation is not changed; only its location in the Mental Hygiene Title of Chapter 14.

This rule making is filed as a Consensus rule on the grounds no person is likely to object because its purpose is to continue the process of repealing and consolidating regulations once applicable to two separate divisions and now applicable to one Office.

#### Job Impact Statement

A Job Impact Statement is not being submitted with this notice because the repeal of regulations related to Declaratory Rulings and relocating it into an existing Part 831 does not create any impact on jobs and employment opportunities. The finding is based on the fact that the existing Part 368 does not require any action outside of the agency that is not already required; relocating the text to another Part of 14 NYCRR does not change the requirements of Part 368 that are already in regulation.

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

#### Repeal of 14 NYCRR Parts 10, 51, 71, and 103

I.D. No. ASA-45-13-00018-P

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

**Proposed Action:** This is a consensus rule making to repeal Parts 10, 51, 71 and 103 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.07(c), 19.09(b), 19.40, 32.07(a) and 32.02

**Subject:** Repeal of 14 NYCRR Parts 10, 51, 71, and 103.

**Purpose:** To repeal several outdated regulations.

**Text of proposed rule:** • Part 10 of Title 14 NYCRR is repealed.

- Part 51 of Title 14 NYCRR is repealed.
- Part 71 of Title 14 NYCRR is repealed.
- Part 103 of Title 14 NYCRR is repealed.

**Text of proposed rule and any required statements and analyses may be obtained from:** Sara E. Osborne, Sr. Attorney, NYS Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: Sara.Osborne@oasas.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 regulations that are obsolete; therefore, no party is likely to object.

14 NYCRR Parts 10, 51, 71 and 103 were promulgated in the 1970's by the Department of Mental Hygiene. When these regulations were promulgated the Office of Mental Retardation and Developmental Disabilities (now known as the Office for People With Developmental Disabilities, or "OPWDD"), the Office of Mental Health (OMH), and the Office of Alcoholism and Substance Abuse (now known as the Office of Alcoholism and Substance Abuse Services, or "OASAS"), were all a part of the Department of Mental Hygiene, and none had its own rule making authority. In 1977, the New York State Mental Hygiene Law was recodified, and the Department of Mental Hygiene was divided into three autonomous agencies, all of which have independent rule making authority.

OPWDD, OMH and OASAS have reviewed the following regulations and determined that they are outdated and are no longer applicable to the agencies. All three autonomous offices are proposing a repeal of the following obsolete rules:

Part 10 – Insurance Coverage for Diagnosis and Treatment of Mental, Nervous and Emotional Disorders. This Part consists of definitions that are no longer current. Relevant definitions that pertain to Title 14 NYCRR have been added to the applicable Part. In addition, Part 10 includes references to the DSM-II, which has been revised several times since the

1970's. The most current edition, the DSM-V, was published in early 2013. The agencies believe this Part is unnecessary and appropriate for repeal.

**Part 51 – Prior Approval of the Commissioner.** This Part is out of date, and all three agencies have incorporated updated provisions into existing regulations. OPWDD superseded Part 51 with 14 NYCRR Part 620, Certification of Need for Administrative Review Projects, Substantial Review Projects and Terms of Approval for Acquisition of Property or Construction. OMH superseded this Part with 14 NYCRR Part 551, Prior Approval Review for Quality and Appropriateness. OASAS regulations are found at 14 NYCRR Part 810, Establishment, Incorporation and Certification of Providers of Chemical Dependence Services and 14 NYCRR Part 814, General Facility Requirements.

**Part 71 – Visitation and Inspection of Facilities.** OPWDD notes that requirements applicable to visitation and inspection of facilities are found in Article 16 of the NYS Mental Hygiene Law and considers that the provisions of Article 16 are sufficient to address this topic. OPWDD considers the provisions of Part 71 which are not duplicative of the Article 16 provisions to be out of date and unnecessary. OMH superseded this Part by 14 NYCRR Part 553, Visitation and Inspection of Facilities. OASAS provisions are found in Article 32 of the NYS Mental Hygiene Law and 14 NYCRR Part 810, Establishment, Incorporation and Certification of Providers of Chemical Dependence Services.

**Part 103 – Unified Services Plans.** References to the Unified Services Plan were deleted from Mental Hygiene Law by Chapter 111 of the Laws of 2010; therefore, this Part is no longer applicable to any of the three agencies and is appropriate for repeal.

**Statutory Authority:** Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner of the Office of Alcoholism and Substance Abuse Services to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

#### **Job Impact Statement**

A job impact statement is not being submitted because it is evident from the subject matter of the rule making that there will be no impact on jobs and employment opportunities. The consensus rule merely repeals several outdated regulations.

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## Office of Children and Family Services

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### NOTICE OF ADOPTION

#### **Prohibition of Discrimination on the Basis of Sexual Orientation, Gender Identity or Expression**

**I.D. No.** CFS-32-13-00007-A

**Filing No.** 1002

**Filing Date:** 2013-10-22

**Effective Date:** 2013-11-06

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

**Action taken:** Amendment of sections 180.5 and 82-1.5 of Title 9 NYCRR; amendment of sections 421.3, 421.4, 421.16; and addition of section 441.24 to Title 18 NYCRR.

**Statutory authority:** Executive Law, sections 503 and 532-e; and Social Services Law, sections 20(3)(d), 462(1), 372-b(3), 372-e(2), 378(5), 409 and 409-a

**Subject:** Prohibition of discrimination on the basis of sexual orientation, gender identity or expression.

**Purpose:** Prohibits discrimination on the basis of sexual orientation, gender identity or expression in essential social services.

**Text or summary was published** in the August 7, 2013 issue of the Register, I.D. No. CFS-32-13-00007-P.

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

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

#### **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 Office of Children and Family Services (OCFS) received two comments on the proposed regulations regarding changes to Parts 180 and 182-1 of Title 9 of the NYCRR, and Parts 421, 423 and 441 of Title 18 of the NYCRR to include protections for Lesbian, Gay, Bisexual, Transgendered and Questioning (LGBTQ) Individuals, one from a group comprised of various LGBTQ advocates and another from two members of the Legislature.

One commenter recommended that the regulations clarify the definition of gender identity. The regulations were not revised in response to this comment because the Office believes that the terms in question are presently adequately defined.

Both commenters noted that the proposed changes to Part 421 only address discrimination against prospective adoptive parents, and do not address adoption services provided to biological parents, youth or other family members. The regulations were not revised in response to this comment. OCFS intends to address these comments in an administrative directive to be released by OCFS.

Both commenters also noted that the non-discrimination language in different sections of the proposed regulations varies and suggest that they be changed to be consistent. One commenter specifically suggested that OCFS amend Part 441.19 broaden the non-discrimination clause in this section. The regulations were not revised in response to this comment because OCFS believes that the changes to Part 441.24 adequately address these concerns.

One commenter requested that OCFS clarify the expectations of provider agencies and mandate training for staff on working with LGBTQ youth and adults. The regulations were not revised in response to this comment because OCFS did not want to impose an additional mandate on agencies.

One commenter suggested that OCFS require provider agencies to adopt a grievance procedure for discrimination based complaints. The regulations were not revised in response to this comment because OCFS did not want to impose an additional mandate on agencies.

Another comment suggested that OCFS require provider agencies to perform an annual review and report regarding their compliance with non-discrimination regulations. Additionally, this comment suggested that OCFS should take actions including termination of contracts or barring providers from being utilized unless they create a grievance procedure for discrimination based complaints and report upon this annually. The regulations were not revised in response to this comment because OCFS did not want to impose an additional mandate on agencies.

One commenter suggested that OCFS include a non-discrimination policy in the list of policies that child care agencies are required to maintain under 18 NYCRR 441.4. The regulations were not revised in response to this comment because OCFS did not want to impose an additional mandate on agencies.

One commenter suggested that OCFS should additionally amend Part 441.4 to require provider agencies to inform employees about nondiscrimination regulations and monitor their compliance with them. The regulations were not revised in response to this comment because OCFS did not want to impose an additional mandate on agencies.

One commenter suggested that OCFS amend Part 441.8 to include discrimination as a part of the definition of abuse or maltreatment of children. The regulations were not revised in response to this comment because OCFS believes that the existing language in Part 441.8 would adequately address these concerns.

Another commenter suggested that OCFS amend Part 423.4 to make it consistent with other sections. The regulations were not revised in response to this comment because OCFS did not want to impose an additional mandate on agencies.

One commenter suggested that OCFS amend Part 441.15 to include a prohibition against discrimination in special services provided by contractors or service providers outside of the provider agency. The regulations were not revised in response to this comment because OCFS did not want to impose an additional mandate on agencies.

One commenter suggested that OCFS amend Parts 180.5(b)(2)(iii) to specifically require supervisors in detention facilities to be responsible for protecting youth from discrimination. The regulations were not revised in response to this comment to provide detention facilities flexibility in how they effectuate this regulation.

One commenter suggested that OCFS amend Part 182-1.5 to require training on cultural awareness. The regulations were not revised in response to this comment because OCFS did not want to impose an additional mandate on agencies.

One commenter suggested alternate language for the nondiscrimination clause proposed for Part 182-1.5. The regulations were not revised in response to this comment because the Office believes that the existing language is adequately worded.

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## Department of Civil Service

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

#### Jurisdictional Classification

**I.D. No.** CVS-45-13-00007-P

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

**Proposed Action:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To delete positions from the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading "Office of General Services," by decreasing the number of positions of Promotion and Public Affairs Agent from 16 to 15 and Regional Director Public Buildings Management from 2 to 1.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.state.ny.us

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

#### Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

#### Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

#### Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

#### Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

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

#### Jurisdictional Classification

**I.D. No.** CVS-45-13-00008-P

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

**Proposed Action:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify positions in the non-competitive class.

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Financial Services, by increasing the number of positions of Insurance Frauds Investigator 1 from 22 to 32.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.state.ny.us

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

#### Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

#### Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

#### Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

#### Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

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

#### Jurisdictional Classification

**I.D. No.** CVS-45-13-00009-P

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

**Proposed Action:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To delete a position from and classify a position in the non-competitive class.

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Division of Criminal Justice Services," by deleting therefrom the position of Supervisor Forensic Services (DNA) (1) and by adding thereto the position of Supervisor Forensic Laboratory Accreditation Program (1).

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.state.ny.us

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

#### Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

#### Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

#### Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

#### Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously

printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

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

**Jurisdictional Classification**

**I.D. No.** CVS-45-13-00010-P

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

**Proposed Action:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To add subheadings and classify positions in the non-competitive class.

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in Westchester County under the subheading “Department of Correction,” by adding thereto the positions of Director – Pastoral Care, Chaplain(s) and Assistant(s) to Chaplain; by adding thereto the subheading “Department of Information Technology,” and the position of Information Technology Intern(s); under the subheading “Department of Laboratories and Research,” by adding thereto the positions of Director of Forensic Sciences, Assistant Director(s) of Forensic Sciences, Senior Forensic Specialist(s), Forensic Science Specialist(s), Forensic Scientist(s), Assistant Forensic Scientist(s) and Forensic Scientist Trainee(s); and, by adding thereto the subheading “Department of Public Works and Transportation” and the position of Deputy Commissioner of Public Works and Transportation.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.state.ny.us

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

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

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

**Jurisdictional Classification**

**I.D. No.** CVS-45-13-00011-P

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

**Proposed Action:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading “Office of General Services,” by adding thereto the position of Special Counsel.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.state.ny.us

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

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

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

**Jurisdictional Classification**

**I.D. No.** CVS-45-13-00012-P

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

**Proposed Action:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Public Service, by increasing the number of positions of Director Public Service Programs from 9 to 10.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.state.ny.us

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

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was

previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

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

**Jurisdictional Classification**

**I.D. No.** CVS-45-13-00013-P

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

**Proposed Action:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading "Justice Center for the Protection of People with Special Needs," by adding thereto the position of Director Internal Audit.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.state.ny.us

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

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

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

**Jurisdictional Classification**

**I.D. No.** CVS-45-13-00014-P

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

**Proposed Action:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading "Division of Homeland Security and Emergency Services," by adding thereto the position of Director Internal Audit.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.state.ny.us

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

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

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

**Jurisdictional Classification**

**I.D. No.** CVS-45-13-00015-P

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

**Proposed Action:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To delete a position from and classify a position in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Labor under the subheading "Administration - General," by deleting therefrom the position of Special Office Assistant and by increasing the number of positions of Confidential Assistant from 1 to 2.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Ilene Lees, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: ilene.lees@cs.state.ny.us

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

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-02-13-00002-P, Issue of January 9, 2013.

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## State Commission of Correction

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### NOTICE OF ADOPTION

**Electronic Submission of Grievances****I.D. No.** CMC-35-13-00006-A**Filing No.** 995**Filing Date:** 2013-10-16**Effective Date:** 2013-11-06

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

**Action taken:** Amendment of sections 7032.5 and 7032.8 of Title 9 NYCRR.

**Statutory authority:** Correction Law, section 45(4), (6) and (15)

**Subject:** Electronic submission of grievances.

**Purpose:** To allow local correctional facilities to submit inmate grievances electronically.

**Text or summary was published** in the August 28, 2013 issue of the Register, I.D. No. CMC-35-13-00006-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Brian M. Callahan, General Counsel, New York State Commission of Correction, Alfred E. Smith State Office Building, 80 S. Swan Street, 12th Floor, Albany, New York 12210, (518) 485-2346, email: Brian.Callahan@scoc.ny.gov

**Initial Review of Rule**

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 5th year after the year in which this rule is being adopted.

**Assessment of Public Comment**

The agency received no public comment.

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## Education Department

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### EMERGENCY RULE MAKING

**Coursework or Training in Harassment, Bullying and Discrimination Prevention and Intervention****I.D. No.** EDU-32-13-00006-E**Filing No.** 998**Filing Date:** 2013-10-21**Effective Date:** 2013-10-21

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

**Action taken:** Amendment of sections 80-1.13, 80-3.5, 80-5.14 and 80-5.22 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 14(5), 207(not subdivided), 305(1), (2), 3004(1), 3007(not subdivided); and L. 2013, ch. 90

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

**Specific reasons underlying the finding of necessity:** The Dignity for All Students Act (DASA) added Article 2 to the Education Law (Education Law §§ 10 through 18), to require, among other things, school districts to create policies and guidelines to be used in school training programs to

discourage the development of discrimination or harassment and to enable employees to prevent and respond to discrimination or harassment. These provisions took effect on July 1, 2012.

Thereafter, in June 2012, the Legislature enacted Chapter 102 of the Laws of 2012, which amended the Dignity Act to include a requirement that school professionals applying for a certificate or license on or after July 1, 2013 complete training on the social patterns of harassment, bullying and discrimination.

In response to the new law, the Department consulted with a work group, which was comprised of representatives of teachers, administrators, school social workers, school counselors, school guidance counselors, school psychologists, superintendents, school boards, teacher education program faculty, GLESN and Empire Pride Agenda to seek recommendations on how many hours and the types of training needed to ensure that school personnel have adequate training in harassment, bullying and discrimination. The work group recommended that the following actions be taken:

- Part 52 of the Commissioner's Regulations be amended to require teacher and school leadership preparation programs to include at least six hours of training in Harassment, Bullying and Discrimination Prevention and Intervention.

- A new Subpart 57-4 of the Commissioner's Regulations shall be added to establish standards under which the Department will approve providers of this training.

- Part 80 of the Commissioner's Regulations be amended to require that anyone applying for an administrative or supervisory service, classroom teaching service or school service certificate or license on or after July 1, 2013, shall have completed at least six clock hours of coursework or training in Harassment, Bullying and Discrimination Prevention and Intervention.

At its May meeting, the Board of Regents adopted regulations to implement the recommendations of the Work Group. However, since the Department was consulting with Work Group for the last several months to develop a syllabus for the 6-hour training course and the syllabus and provider applications only became available in the last couple of months, there was not sufficient access to the training before the July 1 deadline. As a result, on June 30, 2013, the Governor signed Chapter 90 of the Laws of 2013, extending the timeframe for school professionals to complete the training until December 31, 2013. The proposed amendment implements the new law, by extending the timeframe to complete the training from July 1 to December 31, 2013.

Emergency action is necessary for preservation of the general welfare to immediately implement the new law and to ensure that applicants for certification are notified that the deadline for the training requirements has been extended from July 1, 2013 to December 31, 2013.

Emergency action is also necessary for the preservation of the general welfare to immediately implement the new law and to ensure that the emergency rule adopted at the July Regents meeting remains continuously in effect until it can be adopted as a permanent rule. The proposed amendment was adopted as an emergency rule at the July Regents meeting and became effective on July 23, 2013. A Notice of Proposed Rule Making was published in the State Register on August 7, 2013. Because the Board of Regents meets at scheduled intervals, the earliest the proposed amendment can be presented for permanent 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 § 202(4-a) is the October Regents meeting. However, the July emergency rule will expire on October 20, 2013 and the proposed amendment will not be effective as a permanent rule until November 6, 2013. An emergency rule otherwise ensure that the emergency rule adopted at the July Regents meeting, as so revised, remains continuously in effect until it can be presented and made effective as a permanent rule on November 6, 2013.

**Subject:** Coursework or training in harassment, bullying and discrimination prevention and intervention.

**Purpose:** To conform the Commissioner's Regulations to Education Law section 14(5), as amended by chapter 90 of the Laws of 2013.

**Text of emergency rule:** 1. Section 80-1.13 of the Regulations of the Commissioner of Education is amended, effective October 21, 2013, as follows:  
80-1.13 Required study in harassment, bullying and discrimination prevention and intervention.

All candidates for a certificate or license valid for an administrative or supervisory service, classroom teaching service or school service who apply for a certificate or license on or after [July 1, 2013] *December 31, 2013*, shall have completed at least six clock hours, of which at least three hours must be conducted through face-to-face instruction, of course work or training in harassment, bullying and discrimination prevention and intervention, as required by section 14 the Education Law, which is provided by a registered program leading to certification pursuant to sec-

tion 52.21 of this Title or other approved provider pursuant to Subpart 57-4 of this Title.

2. Subparagraph (i) of paragraph (1) of subdivision (b) of section 80-3.5 of the Regulations of the Commissioner of Education is amended, effective October 21, 2013, as follows:

(i) Education. The candidate shall complete at least two clock hours of course work or training regarding the identification and reporting suspected child abuse or maltreatment, in accordance with requirements of section 3004 of the Education Law. In addition, the candidate who applies for the certificate on or after February 2, 2001, shall complete at least two clock hours of coursework or training in school violence prevention and intervention, as required by section 3004 of the Education Law, which is provided by a provider approved or deemed approved by the department pursuant to Subpart 57-2 of this Title. A candidate who applies for the certificate on or after [July 1, 2013] *December 31, 2013*, shall also complete at least six clock hours, of which at least three hours must be conducted through face-to-face instruction, of coursework or training in harassment, bullying and discrimination prevention and intervention, as required by section 14 the Education Law.

3. Subparagraph (i) of paragraph (2) of subdivision (b) of section 80-3.5 of the Regulations of the Commissioner of Education is amended, effective October 21, 2013, as follows:

(i) Education. The candidate shall complete at least two clock hours of course work or training regarding the identification and reporting suspected child abuse or maltreatment, in accordance with requirements of section 3004 of the Education Law. In addition, the candidate who applies for the certificate on or after February 2, 2001, shall complete at least two clock hours of coursework or training in school violence prevention and intervention, as required by section 3004 of the Education Law, which is provided by a provider approved or deemed approved by the department pursuant to Subpart 57-2 of this Title. A candidate who applies for the certificate on or after [July 1, 2013] *December 31, 2013*, shall also complete at least six clock hours, of which at least three hours must be conducted through face-to-face instruction, of coursework or training in harassment, bullying and discrimination prevention and intervention, as required by section 14 the Education Law.

4. Paragraph (1) of subdivision (b) of section 80-5.14 of the Regulations of the Commissioner of Education is amended, effective October 21, 2013, to read as follows:

(1) Education. A candidate shall hold a graduate academic or graduate professional degree from a regionally accredited institution of higher education or from an institution authorized by the Board of Regents to confer degrees. A candidate shall complete study in the means for identifying and reporting suspected child abuse and maltreatment, which shall include at least two clock hours of coursework or training in the identification and reporting of suspected child abuse or maltreatment in accordance with the requirements of section 3004 of the Education Law. In addition, the candidate who applies for the certificate on or after February 2, 2001, shall complete at least two clock hours of coursework or training in school violence prevention and intervention, as required by section 3004 of the Education Law, which is provided by a provider approved or deemed approved by the department pursuant to Subpart 57-2 of this Title. A candidate who applies for the certificate on or after [July 1, 2013] *December 31, 2013*, shall also complete at least six clock hours, of which at least three hours must be conducted through face-to-face instruction, of coursework or training in harassment, bullying and discrimination prevention and intervention, as required by section 14 the Education Law.

5. Subparagraph (i) of paragraph (2) of subdivision (a) of section 80-5.22 of the Regulations of the Commissioner of Education is amended, effective October 21, 2013, as follows:

(i) Education. A candidate shall hold a graduate degree in science, technology, engineering or mathematics from a regionally or nationally accredited institution of higher education, a higher education institution that the commissioner deems substantially equivalent, or from an institution authorized by the Board of Regents to confer degrees. A candidate shall complete study in the means for identifying and reporting suspected child abuse and maltreatment, which shall include at least two clock hours of coursework or training in the identification and reporting of suspected child abuse or maltreatment in accordance with the requirements of section 3004 of the Education Law. In addition, the candidate shall complete at least two clock hours of coursework or training in school violence prevention and intervention, as required by section 3004 of the Education Law, which is provided by a provider approved or deemed approved by the department pursuant to Subpart 57-2 of this Title. A candidate who applies for the certificate on or after [July 1, 2013] *December 31, 2013*, shall also complete at least six clock hours, of which at least three hours must be conducted through face-to-face instruction, of coursework or training in harassment, bullying and discrimination prevention and intervention, as required by section 14 the Education Law.

*This notice is intended* to serve only as a notice of emergency adoption.

This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-32-13-00006-EP, Issue of August 7, 2013. The emergency rule will expire December 19, 2013.

**Text of rule and any required statements and analyses may be obtained from:** Mary Gammon, State Education Department, Office of Higher Education, State Education Building Annex, Room 979, 89 Washington Ave., Albany, NY 12234, (518) 486-3633, email: [privers@mail.nysed.gov](mailto:privers@mail.nysed.gov)

#### **Regulatory Impact Statement**

##### **1. STATUTORY AUTHORITY:**

Education Law section 14(5) requires the Commissioner of Education to prescribe regulations to require that school professionals applying on or after July 1, 2013 for a certificate or license, including but not limited to a certificate or license valid for service as a classroom teacher, school counselor, school psychologist, school social worker, school administrator or supervisor or superintendent of schools to complete training on the social patterns of harassment, bullying and discrimination. Chapter 90 of the Laws of 2013 amended Education Law section 14(5) to require such training for school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013.

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

Education Law section 305(1) empowers the Commissioner of Education to be the chief executive officer of the state system of education and of the Board of Regents and authorizes the Commissioner to enforce laws relating to the educational system and to execute educational policies determined by the Regents. Section 305(2) authorizes the Commissioner to have general supervision over all schools subject to the Education Law.

Education Law section 3004(1) of the Education Law authorizes the Commissioner 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.

Education Law section 3007 authorizes the Commissioner to endorse a diploma or certificate issued in another state.

##### **2. LEGISLATIVE OBJECTIVES:**

The proposed amendment is consistent with the above statutory authority and is necessary to implement Education Law 14(5), as amended by Chapter 90 of the Laws of 2013, to require school professionals applying for a certificate or license on or after December 31, 2013 to complete training on the social patterns of harassment, bullying and discrimination.

##### **3. NEEDS AND BENEFITS:**

The Dignity for All Students Act (DASA) added Article 2 to the Education Law (Education Law §§ 10 through 18), to require, among other things, school districts to create policies and guidelines to be used in school training programs to discourage the development of discrimination or harassment and to enable employees to prevent and respond to discrimination or harassment. These provisions took effect on July 1, 2012.

Thereafter, in June 2012, the Legislature enacted Chapter 102 of the Laws of 2012, which amended the Dignity Act to include a requirement that school professionals applying for a certificate or license on or after July 1, 2013 complete training on the social patterns of harassment, bullying and discrimination.

In response to the new law, the Department consulted with a work group, which was comprised of representatives of teachers, administrators, school social workers, school counselors, school guidance counselors, school psychologists, superintendents, school boards, teacher education program faculty, GLESN and Empire Pride Agenda to seek recommendations on how many hours and the types of training needed to ensure that school personnel have adequate training in harassment, bullying and discrimination. The work group recommended that the following actions be taken:

- Part 52 of the Commissioner's Regulations be amended to require teacher and school leadership preparation programs to include at least six hours of training in Harassment, Bullying and Discrimination Prevention and Intervention.
- A new Subpart 57-4 of the Commissioner's Regulations shall be added to establish standards under which the Department will approve providers of this training.
- Part 80 of the Commissioner's Regulations be amended to require that anyone applying for an administrative or supervisory service, classroom teaching service or school service certificate or license on or after July 1, 2013, shall have completed at least six clock hours of coursework or training in Harassment, Bullying and Discrimination Prevention and Intervention.

At its May meeting, the Board of Regents adopted regulations to implement the recommendations of the Work Group. However, since the Department was consulting with the Work Group for the last several months to develop a syllabus for the 6-hour training course and the syl-

labus and provider applications only became available in the last couple of months, there was not sufficient access to the training before the July 1 deadline. As a result, on June 30, 2013, the Governor signed Chapter 90 of the Laws of 2013, which amends Education Law section 14(5) to require such training for school professionals applying for a certificate or license on or after December 31, 2013, instead of July 1, 2013. The proposed amendment implements the new law, by making the training requirement applicable to school professionals applying for a certificate or license on or after December 31, 2013.

#### 4. COSTS:

- (a) Costs to State government: none.
- (b) Costs to local governments: none.
- (c) Cost to private regulated parties: none.
- (d) Costs to regulating agency for implementing and continued administration of the rule: none.

The proposed amendment does not impose any costs on the State, local governments, private regulated parties or the State Education Department. The proposed amendment merely conforms the Commissioner's Regulations to Education Law section 14(5), as amended by Chapter 90 of the Laws of 2013, by making the training requirement on the social patterns of harassment, bullying and discrimination applicable to school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013.

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon local governments. The proposed amendment merely conforms the Commissioner's Regulations to Education Law section 14(5), as amended by Chapter 90 of the Laws of 2013, by making the training requirement on the social patterns of harassment, bullying and discrimination applicable to school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013.

#### 6. PAPERWORK:

The proposed amendment does not impose any new paperwork or record keeping requirements. The proposed amendment merely conforms the Commissioner's Regulations to Education Law section 14(5), as amended by Chapter 90 of the Laws of 2013, by making the training requirement on the social patterns of harassment, bullying and discrimination applicable to school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013.

#### 7. DUPLICATION:

The amendment does not duplicate any existing State or Federal requirements, and is necessary to implement the Chapter 90 of the Laws of 2013.

#### 8. ALTERNATIVES:

The proposed amendment is necessary to implement Chapter 90 of the Laws of 2013, which amended Education Law section 14(5) to require training on the social patterns of harassment, bullying and discrimination for school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013. The proposed amendment merely conforms the Commissioner's Regulations to the statute. There are no significant alternatives and none were considered.

#### 9. FEDERAL STANDARDS:

There are no related Federal standards governing the certification of teachers and administrators.

#### 10. COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with this amendment by its stated effective date.

#### **Regulatory Flexibility Analysis**

The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law section 14(5), as amended by Chapter 90 of the Laws of 2013, by making the training requirement on the social patterns of harassment, bullying and discrimination applicable to school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013. The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses or local governments. Because it is evident from the nature of the proposed amendment that it does not affect small businesses or local governments, no affirmative steps are 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.

#### **Rural Area Flexibility Analysis**

##### 1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment will affect school professionals in all parts of this State who are applying for a certificate or license on or after December 31, 2013, including those located in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

The proposed amendment does not impose any compliance requirements or professional services requirements. The proposed amendment merely conforms the Commissioner's Regulations to Education Law section 14(5), as amended by Chapter 90 of the Laws of 2013, by making the training requirement on the social patterns of harassment, bullying and discrimination applicable to school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013.

#### 3. COSTS:

The proposed amendment does not impose any costs. The proposed amendment merely conforms the Commissioner's Regulations to Education Law section 14(5), as amended by Chapter 90 of the Laws of 2013, by making the training requirement on the social patterns of harassment, bullying and discrimination applicable to school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013.

#### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any compliance requirements or costs. The proposed amendment merely conforms the Commissioner's Regulations to Education Law section 14(5), as amended by Chapter 90 of the Laws of 2013, by making the training requirement on the social patterns of harassment, bullying and discrimination applicable to school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013. The statute which the proposed amendment implements applies to affected school professionals throughout the State, including those in rural areas. Therefore, it was not possible to establish different requirements for school professionals in rural areas, or to exempt them from the amendment's provisions.

#### 5. RURAL AREA PARTICIPATION:

The Department consulted with a work group, which was comprised of representatives of teachers, administrators, school social workers, school counselors, school guidance counselors, school psychologists, superintendents, school boards, teacher education program faculty, GLSEN and Empire Pride Agenda. The work group included representatives from across the State, including members from 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 implements, and conforms the Commissioner's Regulations to, statutory requirements under Chapter 90 of the Laws of 2013 and therefore the substantive provisions of the proposed amendment cannot be repealed or modified unless there is a further statutory change. 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 is necessary to conform the Commissioner's Regulations to Education Law section 14(5), as amended by Chapter 90 of the Laws of 2013, by making the training requirement on the social patterns of harassment, bullying and discrimination applicable to school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013. 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.

#### **Assessment of Public Comment**

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

**EMERGENCY  
RULE MAKING**

**English Language Arts (ELA) and Mathematics Common Core Learning Standards (CCLS)**

**I.D. No.** EDU-33-13-00022-E

**Filing No.** 1008

**Filing Date:** 2013-10-22

**Effective Date:** 2013-10-28

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

**Action taken:** Amendment of section 100.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided), 209(not subdivided), 305(1), (2), 308(not subdivided), 309(not subdivided) and 3204(3)

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

**Specific reasons underlying the finding of necessity:** The proposed amendment establishes requirements to transition to the new Regents Examinations in English Language Arts (ELA) (Common Core) and in mathematics which measure the New York State Common Core Learning Standards (CCLS).

Pursuant to the proposed amendment, the transition plan for the new Regents Examination in ELA (Common Core) includes the following:

- Students who first enter grade 9 in September 2013 and thereafter shall meet the English requirement for graduation by passing the Regents Examination in English Language Arts (Common Core) or an approved alternative.

- Students who first entered Grade 9 prior to September 2013 shall meet the English requirement for graduation by passing the new Regents Examination in ELA (Common Core) or by passing the Regents Comprehensive Examination in English, while that exam is still being offered. For the June 2014 and August 2014 administrations only, students enrolled in Common Core English courses may, at local discretion, take the Regents Comprehensive Exam in English in addition to the Regents Examination in ELA (Common Core), and may meet the English requirement for graduation by passing either examination.

With respect to the transition plan for the new Regents Examinations in mathematics (Common Core), the proposed amendment would require that:

- Students who first begin instruction in a commencement level mathematics course aligned to the CCLS in September 2013 and thereafter shall meet the mathematics requirement for graduation by passing a commencement level Regents Examination in mathematics that measures the CCLS, or an approved alternative.

- Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 shall meet the mathematics requirements for graduation by passing the corresponding commencement level Regents, while those examinations are still being offered. For the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I (Common Core) instruction may, at local discretion, take the Regents Examination in Integrated Algebra in addition to the Regents Examination in Algebra I (Common Core), and may meet graduation requirements by passing either examination.

The proposed amendment was adopted as an emergency action at the July 22, 2013 Regents meeting, effective July 30, 2013, and has now been adopted as a permanent rule at the October 21-22, 2013 Regents meeting. Pursuant to SAPA § 203(1), the earliest effective date of the permanent rule is November 6, 2013, the date a Notice of Adoption will be published in the State Register. However, the July emergency rule will expire on October 27, 2013, 90 days after its filing with the Department of State on July 30, 2012. A lapse in the rule's effective date could disrupt preparations for transitioning to the new CCLS Regents Examinations in English Language Arts (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II). Emergency action is therefore necessary for the preservation of the general welfare to ensure that the proposed rule adopted by emergency action at the July Regents meeting, and adopted as a permanent rule at the October Regents meeting, remains continuously in effect until the effective date of its permanent adoption.

**Subject:** English Language Arts (ELA) and Mathematics Common Core Learning Standards (CCLS).

**Purpose:** Establish transition requirements for the Regents ELA and Mathematics examinations aligned to the CCLS.

**Text of emergency rule:** 1. Subdivision (a) of section 100.5 of the Regula-

tions of the Commissioner is amended, effective October 28, 2013, as follows:

(a) General requirements for a Regents or a local high school diploma. Except as provided in paragraph (d)(6) and subdivision (g) of this section, the following general requirements shall apply with respect to a Regents or local high school diploma. Requirements for a diploma apply to students depending upon the year in which they first enter grade nine. A student who takes more than four years to earn a diploma is subject to the requirements that apply to the year that student first entered grade nine. Students who take less than four years to complete their diploma requirements are subject to the provisions of subdivision (e) of this section relating to accelerated graduation.

- (1) . . .
- (2) . . .
- (3) . . .
- (4) . . .
- (5) . . .
- (6) . . .
- (7) . . .
- (8) . . .

2. Subdivision (b) of section 100.5 of the Regulations of the Commissioner is amended, effective October 28, 2013, as follows:

(b) Additional requirements for the Regents diploma. Except as provided in paragraph (d)(6) and subdivision (g) of this section, the following additional requirements shall apply for a Regents diploma.

- (1) . . .
- (2) . . .
- (3) . . .
- (4) . . .
- (5) . . .
- (6) . . .
- (7) . . .

3. Subdivision (c) of section 100.5 of the Regulations of the Commissioner is amended, effective October 28, 2013, as follows:

(c) Additional requirements for the local diploma. Except as provided in paragraph (d)(6) and subdivision (g) of this section, the following additional requirements shall apply for a local diploma.

- (1) . . .
- (2) . . .
- (3) . . .
- (4) . . .
- (5) . . .
- (6) . . .

4. Subdivision (g) of section 100.5 of the Regulations of the Commissioner is added, effective October 28, 2013, as follows:

(g) Notwithstanding the provisions of this section, the following provisions shall apply to the specified student cohorts for purposes of meeting the English and Mathematics requirements for a Regents or local diploma:

(1) English.  
(i) Students who first enter grade 9 in September 2013 and thereafter shall meet the English requirement for graduation in clause 100.5(a)(5)(i)(a) of this section by passing the Regents Examination in English Language Arts (Common Core) or an approved alternative pursuant to section 100.2(f) of this Part.

(ii) Students who first enter grade 9 prior to September 2013 shall meet the English requirement for graduation in clause 100.5(a)(5)(i)(a) of this section by (a) successfully completing a course in English Language Arts (Common Core) and passing the Regents Examination in English Language Arts (Common Core) or an approved alternative pursuant to section 100.2(f) of this Part; or (b) successfully completing a course in English aligned to the 2005 Learning Standards and passing the Regents Comprehensive Examination in English or an approved alternative pursuant to section 100.2(f) of this Part; provided that for the June 2014 and August 2014 administrations only, students enrolled in English Language Arts (Common Core) courses may, at the discretion of the applicable school district, take the Regents Comprehensive Examination in English in addition to the Regents Examination in English Language Arts (Common Core), and may meet such English requirement by passing either examination.

(2) Mathematics.

(i) Students who first begin instruction in a commencement level mathematics course aligned to the Common Core Learning Standards in September 2013 and thereafter shall meet the mathematics requirement for graduation in clause 100.5(a)(5)(i)(b) of this section by passing a commencement level Regents Examination in mathematics that measures the Common Core Learning Standards, or an approved alternative pursuant to section 100.2(f) of this Part; provided that for the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I (Common Core) instruction may, at the discretion of the applicable school district, take the Regents Examination in Integrated Algebra in addition to

the Regents Examination in Algebra I (Common Core), and may meet the mathematics requirement for graduation in clause 100.5(a)(5)(i)(b) of this section by passing either examination.

(ii) Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 shall meet the mathematics requirement for graduation in clause 100.5(a)(5)(i)(b) of this section by passing the corresponding commencement level Regents Examinations in mathematics or an approved alternative pursuant to section 100.2(f) of this Part.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-33-13-00022-EP, Issue of August 14, 2013. The emergency rule will expire December 20, 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 Ave., Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents at its head and the Commissioner of Education as the chief administrative officer, and charges the Department with the general management and supervision of public schools and the educational work of the State.

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

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

Education Law section 209 authorizes the Regents to establish secondary school examinations in studies furnishing a suitable standard of graduation and of admission to colleges; to confer certificates or diplomas on students who satisfactorily pass such examinations; and requires the admission to these examinations of any person who shall conform to the rules and pay the fees prescribed by the Regents.

Education Law section 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Board of Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education, and shall execute all educational policies determined by the Board of Regents.

Education Law section 308 authorizes the Commissioner to enforce and give effect to any provision in the Education Law or in any other general or special law pertaining to the school system of the State or any rule or direction of the Regents.

Education Law section 309 charges the Commissioner with the general supervision of boards of education and their management and conduct of all departments of instruction.

Education Law section 3204(3) provides for required courses of study in the public schools and authorizes the State education department to alter the subjects of required instruction.

##### 2. LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the authority conferred by the above statutes and is necessary to implement policy enacted by the Board of Regents relating to State learning standards, State assessments, graduation and diploma requirements, and higher levels of student achievement.

##### 3. NEEDS AND BENEFITS:

The Board of Regents adopted the Common Core State Standards (CCSS) for English Language Arts & Literacy (ELA) and Mathematics at its July 2010 meeting and incorporated New York-specific additions, creating the New York State Common Core Learning Standards (CCLS) at its January 2011 meeting.

The proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in ELA (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II) which measure the New York State CCLS.

##### 4. COSTS:

(a) Costs to State government: none.

(b) Costs to local government: none.

(c) Costs to private regulated parties: none.

(d) Costs to regulating agency for implementation and continued administration of this rule: none.

The proposed amendment does not impose any direct costs to the State, school districts, charter schools or the State Education Department. The proposed amendment establishes requirements to transition to the new

Regents Examinations in ELA (Common Core) and in mathematics which measure the CCLS. It is anticipated that any indirect costs associated with these requirements will be minimal and capable of being absorbed using existing school resources.

##### 5. LOCAL GOVERNMENT MANDATES:

Consistent with the Board of Regents' adoption of the New York State Common Core Learning Standards (CCLS) at its January 2011 meeting, the proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in ELA (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II) which measure the New York State Common Core Learning Standards (CCLS).

Pursuant to the proposed amendment, the transition plan for the new Regents Examination in ELA (Common Core) includes the following:

- Students who first enter grade 9 in September 2013 and thereafter shall meet the English requirement for graduation by passing the Regents Examination in English Language Arts (Common Core) or an approved alternative.

- Students who first entered Grade 9 prior to September 2013 shall meet the English requirement for graduation by: (a) successfully completing a course in English Language Arts (Common Core) and passing the new Regents Examination in ELA (Common Core) or an approved alternative or (b) successfully completing a course in English aligned to the 2005 Learning Standards and passing the Regents Comprehensive Examination in English, while that exam is still being offered; provided that for the June 2014 and August 2014 administrations only, students enrolled in ELA (Common Core) courses may, at local discretion, take the Regents Comprehensive Exam in English in addition to the Regents Examination in ELA (Common Core), and may meet the English requirement for graduation by passing either examination.

With respect to the transition plan for the new Regents Examinations in mathematics (Common Core), the proposed amendment would require that:

- Students who first begin instruction in a commencement level mathematics course aligned to the CCLS in September 2013 and thereafter shall meet the mathematics requirement for graduation by passing a commencement level Regents Examination in mathematics that measures the CCLS, or an approved alternative. For the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I (Common Core) instruction may, at local discretion, take the Regents Examination in Integrated Algebra in addition to the Regents Examination in Algebra I (Common Core), and may meet graduation requirements by passing either examination.

- Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 shall meet the mathematics requirements for graduation by passing the corresponding commencement level Regents Examination, while those examinations are still being offered.

##### 6. PAPERWORK:

The proposed amendment does not impose any specific recordkeeping, reporting or other paperwork requirements.

##### 7. DUPLICATION:

The proposed amendment does not duplicate existing State or federal requirements.

##### 8. ALTERNATIVES:

There are no significant alternatives to the proposed amendment and none were considered. The Board of Regents adopted the Common Core State Standards (CCSS) for English Language Arts & Literacy (ELA) and Mathematics at its July 2010 meeting and incorporated New York-specific additions, creating the New York State Common Core Learning Standards (CCLS) at its January 2011 meeting. The proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in ELA (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II).

##### 9. FEDERAL STANDARDS:

There are no related federal standards in this area.

##### 10. COMPLIANCE SCHEDULE:

It is anticipated regulated parties will be able to achieve compliance with the proposed amendment by its effective date. To ensure implementation of the CCLS in line with the Regents Reform Agenda and the State's winning Race to the Top (RTTT) application, the proposed amendment requires that all students entering grade nine in September 2013 and thereafter must pass the new Regents Examination in English Language Arts (Common Core); and that any student who in September 2013 or thereafter, regardless of grade of enrollment, begins their first commencement-level mathematics course culminating in a Regents Examination in June 2014 or later must take the CCLS Regents Examination in mathematics that corresponds to that course, as available, and be provided with Common Core instruction, provided that for the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I (Common Core) instruction may, at local discretion, take the Regents Examina-

tion in Integrated Algebra in addition to the Regents Examination in Algebra I (Common Core), and may meet graduation requirements by passing either examination.

Students who first entered Grade 9 prior to September 2013 must pass the new Regents Examination in ELA (Common Core) or the Regents Comprehensive Examination in English, while that exam is still being offered; provided that for the June 2014 and August 2014 administrations only, students enrolled in Common Core English courses may, at local discretion, take the Regents Comprehensive Exam in English in addition to the Regents Examination in ELA (Common Core), and may meet the English requirement for graduation by passing either examination. Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 must pass the corresponding commencement level Regents Examination, while those examinations are still being offered.

The new Regents Examination in ELA (Common Core) is designed to be administered at the end of Grade 11, similar to typical practice with the current Regents Comprehensive Examination in English. The last administration of the current Regents Comprehensive Examination in English will occur in June 2016. The last administrations of the current Regents Examinations in Integrated Algebra, Geometry and Algebra 2/Trigonometry will be in January 2015, January 2016, and January 2017, respectively. Based on feedback from the field and the recommendation to teach math courses in a sequential manner, the Department has decided to postpone the first administrations of the CCLS exams in Geometry and Algebra II until June 2015 and June 2016, respectively.

#### **Regulatory Flexibility Analysis**

##### **Small Businesses:**

The proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in English Language Arts (ELA) (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II) which measure the New York State Common Core Learning Standards (CCLS). The proposed amendment relates to State learning standards, State assessments, graduation and diploma requirements and higher levels of student achievement, and 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 Government:**

#### **1. EFFECT OF RULE:**

The proposed amendment applies to each of the 695 public school districts in the State, and to charter schools that are authorized to issue Regents diplomas with respect to State assessments and high school graduation and diploma requirements. At present, there are 34 charter schools authorized to issue Regents diplomas.

#### **2. COMPLIANCE REQUIREMENTS:**

Consistent with the Board of Regents' adoption of the New York State Common Core Learning Standards (CCLS) at its January 2011 meeting, the proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in ELA (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II) which measure the New York State Common Core Learning Standards (CCLS).

Pursuant to the proposed amendment, the transition plan for the new Regents Examination in ELA (Common Core) includes the following:

- Students who first enter grade 9 in September 2013 and thereafter shall meet the English requirement for graduation by passing the Regents Examination in English Language Arts (Common Core) or an approved alternative.

- Students who first entered Grade 9 prior to September 2013 shall meet the English requirement for graduation by: (a) successfully completing a course in English Language Arts (Common Core) and passing the new Regents Examination in ELA (Common Core) or an approved alternative or (b) successfully completing a course in English aligned to the 2005 Learning Standards and passing the Regents Comprehensive Examination in English, while that exam is still being offered; provided that for the June 2014 and August 2014 administrations only, students enrolled in ELA (Common Core) courses may, at local discretion, take the Regents Comprehensive Exam in English in addition to the Regents Examination in ELA (Common Core), and may meet the English requirement for graduation by passing either examination.

With respect to the transition plan for the new Regents Examinations in mathematics (Common Core), the proposed amendment would require that:

- Students who first begin instruction in a commencement level mathematics course aligned to the CCLS in September 2013 and thereafter shall meet the mathematics requirement for graduation by passing a commencement level Regents Examination in mathematics that measures

the CCLS, or an approved alternative. For the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I (Common Core) instruction may, at local discretion, take the Regents Examination in Integrated Algebra in addition to the Regents Examination in Algebra I (Common Core), and may meet graduation requirements by passing either examination.

- Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 shall meet the mathematics requirements for graduation by passing the corresponding commencement level Regents, while those examinations are still being offered.

#### **3. PROFESSIONAL SERVICES:**

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

#### **4. COMPLIANCE COSTS:**

The proposed amendment does not impose any direct costs to school districts or charter schools. The proposed amendment establishes requirements to transition to the new Regents Examinations in ELA (Common Core) and in mathematics which measure the CCLS. It is anticipated that any indirect costs associated with these requirements will be minimal and capable of being absorbed using existing school resources.

#### **5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

The proposed amendment does not impose any new technological requirements on school districts or charter schools. Economic feasibility is addressed in the Costs section above.

#### **6. MINIMIZING ADVERSE IMPACT:**

Consistent with the Board of Regents' adoption of the New York State Common Core Learning Standards (CCLS) at its January 2011 meeting, the proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in English Language Arts and Literacy (ELA - Common Core) and in Mathematics (Algebra I, Geometry and Algebra II). Because the Regents policy upon which the proposed amendment is based applies to all school districts in the State and to charter schools authorized to issue Regents diplomas, it is not possible to establish differing compliance or reporting requirements or timetables or to exempt school districts or charter schools from coverage by the proposed amendment. The proposed amendment does not directly impose any additional compliance requirements or costs on school districts. It is anticipated that any indirect costs associated with the proposed amendment will be minimal and capable of being absorbed using existing school resources.

#### **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 is necessary to implement long-range Regents policy providing for a transition to the New York State Common Core Learning Standards (CCLS) adopted at the January 2011 Regents meeting. To ensure implementation of the CCLS in line with the Regents Reform Agenda and the State's winning Race to the Top (RTTT) application, the proposed amendment requires that all students entering grade nine in September 2013 and thereafter must pass the Regents Examination in English Language Arts (Common Core); and that any student who in September 2013 or thereafter, regardless of grade of enrollment, begins their first commencement-level mathematics course culminating in a Regents Examination in June 2014 or later must take the CCLS Regents Examination in mathematics that corresponds to that course, as available, and be provided with Common Core instruction. The new Regents Examination in ELA (Common Core) is designed to be administered at the end of Grade 11, similar to typical practice with the current Regents Comprehensive Examination in English. The last administration of the current Regents Comprehensive Examination in English will occur in June 2016. The last administrations of the current Regents Examinations in Integrated Algebra, Geometry and Algebra 2/Trigonometry will be in January 2015, January 2016, and January 2017, respectively. Based on feedback from the field and the recommendation to teach math courses in a sequential manner, the Department has decided to postpone the first administrations of the CCLS exams in Geometry and Algebra II until June 2015 and June 2016, respectively. 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 16. of the Notice of Emergency Adoption and 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 each of the 695 public school districts 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. The proposed amendment also applies to charter schools in such areas, to the extent they offer instruction in the high school grades and issue Regents diplomas. At present, there is one charter school located in a rural area that is authorized to issue Regents diplomas.

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

Consistent with the Board of Regents' adoption of the New York State Common Core Learning Standards (CCLS) at its January 2011 meeting, the proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in ELA (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II) which measure the New York State Common Core Learning Standards (CCLS).

Pursuant to the proposed amendment, the transition plan for the new Regents Examination in ELA (Common Core) includes the following:

- Students who first enter grade 9 in September 2013 and thereafter shall meet the English requirement for graduation by passing the Regents Examination in English Language Arts (Common Core) or an approved alternative.

- Students who first entered Grade 9 prior to September 2013 shall meet the English requirement for graduation by: (a) successfully completing a course in English Language Arts (Common Core) and passing the new Regents Examination in ELA (Common Core) or an approved alternative or (b) successfully completing a course in English aligned to the 2005 Learning Standards and passing the Regents Comprehensive Examination in English, while that exam is still being offered; provided that for the June 2014 and August 2014 administrations only, students enrolled in ELA (Common Core) courses may, at local discretion, take the Regents Comprehensive Exam in English in addition to the Regents Examination in ELA (Common Core), and may meet the English requirement for graduation by passing either examination.

With respect to the transition plan for the new Regents Examinations in mathematics (Common Core), the proposed amendment would require that:

- Students who first begin instruction in a commencement level mathematics course aligned to the CCLS in September 2013 and thereafter shall meet the mathematics requirement for graduation by passing a commencement level Regents Examination in mathematics that measures the CCLS, or an approved alternative. For the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I (Common Core) instruction may, at local discretion, take the Regents Examination in Integrated Algebra in addition to the Regents Examination in Algebra I (Common Core), and may meet graduation requirements by passing either examination.

- Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 shall meet the mathematics requirements for graduation by passing the corresponding commencement level Regents, while those examinations are still being offered.

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

##### **3. COMPLIANCE COSTS:**

The proposed amendment does not impose any direct costs to school districts or charter schools. The proposed amendment establishes requirements to transition to the new Regents Examinations in ELA (Common Core) and in mathematics which measure the CCLS. It is anticipated that any indirect costs associated with these requirements will be minimal and capable of being absorbed using existing school resources.

##### **4. MINIMIZING ADVERSE IMPACT:**

Consistent with the Board of Regents' adoption of the New York State Common Core Learning Standards (CCLS) at its January 2011 meeting, the proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in English Language Arts and Literacy (ELA - Common Core) and in Mathematics (Algebra I, Geometry and Algebra II). Because the Regents policy upon which the proposed amendment is based applies to all school districts and BOCES in the State and to charter schools authorized to issue Regents diplomas, it is not possible to establish differing compliance or reporting requirements or timetables or to exempt schools in rural areas from coverage by the proposed amendment. The proposed amendment does not directly impose any additional compliance requirements or costs on school districts or charter schools in rural areas. It is anticipated that any indirect costs associated with the proposed amendment will be minimal and capable of being absorbed using existing school resources.

##### **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 is necessary to implement long-range Regents policy providing for a transition to the New York State Common Core Learning Standards (CCLS) adopted at the January 2011 Regents meeting. To ensure implementation of the CCLS in line with the Regents Reform Agenda and the State's winning Race to the Top (RTTT) application, the proposed amendment requires that all students entering grade nine in September 2013 and thereafter must pass the Regents Examination in English Language Arts (Common Core); and that any student who in September 2013 or thereafter, regardless of grade of enrollment, begins their first commencement-level mathematics course culminating in a Regents Examination in June 2014 or later must take the CCLS Regents Examination in mathematics that corresponds to that course, as available, and be provided with Common Core instruction. The new Regents Examination in ELA (Common Core) is designed to be administered at the end of Grade 11, similar to typical practice with the current Regents Comprehensive Examination in English. The last administration of the current Regents Comprehensive Examination in English will occur in June 2016. The last administrations of the current Regents Examinations in Integrated Algebra, Geometry and Algebra 2/Trigonometry will be in January 2015, January 2016, and January 2017, respectively. Based on feedback from the field and the recommendation to teach math courses in a sequential manner, the Department has decided to postpone the first administrations of the CCLS exams in Geometry and Algebra II until June 2015 and June 2016, respectively. 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 16. of the Notice of Emergency Adoption and 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 is necessary to implement requirements for transitioning to the new Regents examinations in English Language Arts (ELA) (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II) which measure the New York State Common Core Learning Standards (CCLS). The proposed amendment relates to State learning standards, State assessments, graduation and diploma requirements, and higher levels of student achievement, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the 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 ADOPTION**

#### **Coursework or Training in Harassment, Bullying and Discrimination Prevention and Intervention**

**I.D. No.** EDU-32-13-00006-A

**Filing No.** 1007

**Filing Date:** 2013-10-22

**Effective Date:** 2013-11-06

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

**Action taken:** Amendment of sections 80-1.13, 80-3.5, 80-5.14 and 80-5.22 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 14(5), 207(not subdivided), 305(1), (2), 3004(1) and 3007(not subdivided); and L. 2013, ch. 90

**Subject:** Coursework or training in harassment, bullying and discrimination prevention and intervention.

**Purpose:** To conform the Commissioner's Regulations to Education Law section 14(5), as amended by chapter 90 of the Laws of 2013.

**Text or summary was published** in the August 7, 2013 issue of the Register, I.D. No. EDU-32-13-00006-EP.

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

**Text of rule and any required statements and analyses may be obtained from:** 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:

An assessment of public comment on the 4 or 5-year initial review period is not attached because no comments were received on the issue.

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**English Language Arts (ELA) and Mathematics Common Core Learning Standards (CCLS)**

**I.D. No.** EDU-33-13-00022-A

**Filing No.** 1009

**Filing Date:** 2013-10-22

**Effective Date:** 2013-11-06

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

**Action taken:** Amendment of section 100.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided), 209(not subdivided), 305(1), (2), 308(not subdivided), 309(not subdivided) and 3204(3)

**Subject:** English Language Arts (ELA) and Mathematics Common Core Learning Standards (CCLS).

**Purpose:** Establish transition requirements for the Regents ELA and Mathematics examinations aligned to the CCLS.

**Text of final rule:** 1. Subdivision (a) of section 100.5 of the Regulations of the Commissioner is amended, effective November 6, 2013, as follows:

(a) General requirements for a Regents or a local high school diploma. Except as provided in paragraph (d)(6) and subdivision (g) of this section, the following general requirements shall apply with respect to a Regents or local high school diploma. Requirements for a diploma apply to students depending upon the year in which they first enter grade nine. A student who takes more than four years to earn a diploma is subject to the requirements that apply to the year that student first entered grade nine. Students who take less than four years to complete their diploma requirements are subject to the provisions of subdivision (e) of this section relating to accelerated graduation.

- (1) . . .
- (2) . . .
- (3) . . .
- (4) . . .
- (5) . . .
- (6) . . .
- (7) . . .
- (8) . . .

2. Subdivision (b) of section 100.5 of the Regulations of the Commissioner is amended, effective November 6, 2013, as follows:

(b) Additional requirements for the Regents diploma. Except as provided in paragraph (d)(6) and subdivision (g) of this section, the following additional requirements shall apply for a Regents diploma.

- (1) . . .
- (2) . . .
- (3) . . .
- (4) . . .
- (5) . . .
- (6) . . .
- (7) . . .

3. Subdivision (c) of section 100.5 of the Regulations of the Commissioner is amended, effective November 6, 2013, as follows:

(c) Additional requirements for the local diploma. Except as provided in paragraph (d)(6) and subdivision (g) of this section, the following additional requirements shall apply for a local diploma.

- (1) . . .
- (2) . . .
- (3) . . .
- (4) . . .
- (5) . . .

(6) . . .

4. Subdivision (g) of section 100.5 of the Regulations of the Commissioner is added, effective November 6, 2013, as follows:

(g) Notwithstanding the provisions of this section, the following provisions shall apply to the specified student cohorts for purposes of meeting the English and Mathematics requirements for a Regents or local diploma:

(1) English.

(i) Students who first enter grade 9 in September 2013 and thereafter shall meet the English requirement for graduation in clause 100.5(a)(5)(i)(a) of this section by passing the Regents Examination in English Language Arts (Common Core) or an approved alternative pursuant to section 100.2(f) of this Part.

(ii) Students who first enter grade 9 prior to September 2013 shall meet the English requirement for graduation in clause 100.5(a)(5)(i)(a) of this section by (a) successfully completing a course in English Language Arts (Common Core) and passing the Regents Examination in English Language Arts (Common Core) or an approved alternative pursuant to section 100.2(f) of this Part; or (b) successfully completing a course in English aligned to the 2005 Learning Standards and passing the Regents Comprehensive Examination in English or an approved alternative pursuant to section 100.2(f) of this Part; provided that for the June 2014 and August 2014 administrations only, students enrolled in English Language Arts (Common Core) courses may, at the discretion of the applicable school district, take the Regents Comprehensive Examination in English in addition to the Regents Examination in English Language Arts (Common Core), and may meet such English requirement by passing either examination.

(2) Mathematics.

(i) Students who first begin instruction in a commencement level mathematics course aligned to the Common Core Learning Standards in September 2013 and thereafter shall meet the mathematics requirement for graduation in clause 100.5(a)(5)(i)(b) of this section by passing a commencement level Regents Examination in mathematics that measures the Common Core Learning Standards, or an approved alternative pursuant to section 100.2(f) of this Part; provided that for the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I (Common Core) instruction may, at the discretion of the applicable school district, take the Regents Examination in Integrated Algebra in addition to the Regents Examination in Algebra I (Common Core), and may meet the mathematics requirement for graduation in clause 100.5(a)(5)(i)(b) of this section by passing either examination.

(ii) Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 shall meet the mathematics requirement for graduation in clause 100.5(a)(5)(i)(b) of this section by passing the corresponding commencement level Regents Examinations in mathematics or an approved alternative pursuant to section 100.2(f) of this Part.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 100.5(g)(1)(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 Emergency Adoption and Proposed Rule Making in the State Register on August 14, 2013, a nonsubstantial revision has been made to clarify the text of the proposed amendment, as described in the Assessment of Public Comment submitted herewith.

The aforesaid revision requires that the LOCAL GOVERNMENT MANDATES and COMPLIANCE SCHEDULE sections of the previously published Regulatory Impact Statement be revised as follows:

**5. LOCAL GOVERNMENT MANDATES:**

Consistent with the Board of Regents' adoption of the New York State Common Core Learning Standards (CCLS) at its January 2011 meeting, the proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in ELA (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II) which measure the New York State Common Core Learning Standards (CCLS).

Pursuant to the proposed amendment, the transition plan for the new Regents Examination in ELA (Common Core) includes the following:

- Students who first enter grade 9 in September 2013 and thereafter shall meet the English requirement for graduation by passing the Regents Examination in English Language Arts (Common Core) or an approved alternative.

- Students who first entered Grade 9 prior to September 2013 shall meet the English requirement for graduation by: (a) successfully completing a course in English Language Arts (Common Core) and passing the new Regents Examination in ELA (Common Core) or an approved alternative or (b) successfully completing a course in English aligned to the 2005

Learning Standards and passing the Regents Comprehensive Examination in English, while that exam is still being offered; provided that for the June 2014 and August 2014 administrations only, students enrolled in ELA (Common Core) courses may, at local discretion, take the Regents Comprehensive Exam in English in addition to the Regents Examination in ELA (Common Core), and may meet the English requirement for graduation by passing either examination.

With respect to the transition plan for the new Regents Examinations in mathematics (Common Core), the proposed amendment would require that:

- Students who first begin instruction in a commencement level mathematics course aligned to the CCLS in September 2013 and thereafter shall meet the mathematics requirement for graduation by passing a commencement level Regents Examination in mathematics that measures the CCLS, or an approved alternative. For the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I (Common Core) instruction may, at local discretion, take the Regents Examination in Integrated Algebra in addition to the Regents Examination in Algebra I (Common Core), and may meet graduation requirements by passing either examination.

- Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 shall meet the mathematics requirements for graduation by passing the corresponding commencement level Regents Examination, while those examinations are still being offered.

#### 10. COMPLIANCE SCHEDULE:

It is anticipated regulated parties will be able to achieve compliance with the proposed amendment by its effective date. To ensure implementation of the CCLS in line with the Regents Reform Agenda and the State's winning Race to the Top (RTTT) application, the proposed amendment requires that all students entering grade nine in September 2013 and thereafter must pass the new Regents Examination in English Language Arts (Common Core); and that any student who in September 2013 or thereafter, regardless of grade of enrollment, begins their first commencement-level mathematics course culminating in a Regents Examination in June 2014 or later must take the CCLS Regents Examination in mathematics that corresponds to that course, as available, and be provided with Common Core instruction, provided that for the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I (Common Core) instruction may, at local discretion, take the Regents Examination in Integrated Algebra in addition to the Regents Examination in Algebra I (Common Core), and may meet graduation requirements by passing either examination.

Students who first entered Grade 9 prior to September 2013 must pass the new Regents Examination in ELA (Common Core) or the Regents Comprehensive Examination in English, while that exam is still being offered; provided that for the June 2014 and August 2014 administrations only, students enrolled in Common Core English courses may, at local discretion, take the Regents Comprehensive Exam in English in addition to the Regents Examination in ELA (Common Core), and may meet the English requirement for graduation by passing either examination. Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 must pass the corresponding commencement level Regents Examination, while those examinations are still being offered.

The new Regents Examination in ELA (Common Core) is designed to be administered at the end of Grade 11, similar to typical practice with the current Regents Comprehensive Examination in English. The last administration of the current Regents Comprehensive Examination in English will occur in June 2016. The last administrations of the current Regents Examinations in Integrated Algebra, Geometry and Algebra 2/Trigonometry will be in January 2015, January 2016, and January 2017, respectively. Based on feedback from the field and the recommendation to teach math courses in a sequential manner, the Department has decided to postpone the first administrations of the CCLS exams in Geometry and Algebra II until June 2015 and June 2016, respectively.

#### *Revised Regulatory Flexibility Analysis*

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on August 14, 2013, a nonsubstantial revision has been made to clarify the text of the proposed amendment, as described in the Assessment of Public Comment submitted herewith.

The aforesaid revision requires that the COMPLIANCE REQUIREMENTS section of the previously published Regulatory Flexibility Analysis be revised as follows:

#### 2. COMPLIANCE REQUIREMENTS:

Consistent with the Board of Regents' adoption of the New York State Common Core Learning Standards (CCLS) at its January 2011 meeting, the proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in ELA (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II) which measure the New York State Common Core Learning Standards (CCLS).

Pursuant to the proposed amendment, the transition plan for the new Regents Examination in ELA (Common Core) includes the following:

- Students who first enter grade 9 in September 2013 and thereafter shall meet the English requirement for graduation by passing the Regents Examination in English Language Arts (Common Core) or an approved alternative.

- Students who first entered Grade 9 prior to September 2013 shall meet the English requirement for graduation by: (a) successfully completing a course in English Language Arts (Common Core) and passing the new Regents Examination in ELA (Common Core) or an approved alternative or (b) successfully completing a course in English aligned to the 2005 Learning Standards and passing the Regents Comprehensive Examination in English, while that exam is still being offered; provided that for the June 2014 and August 2014 administrations only, students enrolled in ELA (Common Core) courses may, at local discretion, take the Regents Comprehensive Exam in English in addition to the Regents Examination in ELA (Common Core), and may meet the English requirement for graduation by passing either examination.

With respect to the transition plan for the new Regents Examinations in mathematics (Common Core), the proposed amendment would require that:

- Students who first begin instruction in a commencement level mathematics course aligned to the CCLS in September 2013 and thereafter shall meet the mathematics requirement for graduation by passing a commencement level Regents Examination in mathematics that measures the CCLS, or an approved alternative. For the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I (Common Core) instruction may, at local discretion, take the Regents Examination in Integrated Algebra in addition to the Regents Examination in Algebra I (Common Core), and may meet graduation requirements by passing either examination.

- Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 shall meet the mathematics requirements for graduation by passing the corresponding commencement level Regents, while those examinations are still being offered.

#### *Revised Rural Area Flexibility Analysis*

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on August 14, 2013, a nonsubstantial revision has been made to clarify the text of the proposed amendment, as described in the Assessment of Public Comment submitted herewith.

The aforesaid revision requires that the PAPERWORK, RECORD-KEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES section of the previously published Rural Area Flexibility Analysis be revised as follows:

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

Consistent with the Board of Regents' adoption of the New York State Common Core Learning Standards (CCLS) at its January 2011 meeting, the proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in ELA (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II) which measure the New York State Common Core Learning Standards (CCLS).

Pursuant to the proposed amendment, the transition plan for the new Regents Examination in ELA (Common Core) includes the following:

- Students who first enter grade 9 in September 2013 and thereafter shall meet the English requirement for graduation by passing the Regents Examination in English Language Arts (Common Core) or an approved alternative.

- Students who first entered Grade 9 prior to September 2013 shall meet the English requirement for graduation by: (a) successfully completing a course in English Language Arts (Common Core) and passing the new Regents Examination in ELA (Common Core) or an approved alternative or (b) successfully completing a course in English aligned to the 2005 Learning Standards and passing the Regents Comprehensive Examination in English, while that exam is still being offered; provided that for the June 2014 and August 2014 administrations only, students enrolled in ELA (Common Core) courses may, at local discretion, take the Regents Comprehensive Exam in English in addition to the Regents Examination in ELA (Common Core), and may meet the English requirement for graduation by passing either examination.

With respect to the transition plan for the new Regents Examinations in mathematics (Common Core), the proposed amendment would require that:

- Students who first begin instruction in a commencement level mathematics course aligned to the CCLS in September 2013 and thereafter shall meet the mathematics requirement for graduation by passing a commencement level Regents Examination in mathematics that measures the CCLS, or an approved alternative. For the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra I

(Common Core) instruction may, at local discretion, take the Regents Examination in Integrated Algebra in addition to the Regents Examination in Algebra I (Common Core), and may meet graduation requirements by passing either examination.

- Students who first began or will complete an Integrated Algebra, Geometry, or Algebra 2/Trigonometry course prior to September 2013 shall meet the mathematics requirements for graduation by passing the corresponding commencement level Regents, while those examinations are still being offered.

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

#### Revised Job Impact Statement

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on August 14, 2013, a nonsubstantial revision has been made to clarify the text of the proposed amendment, as described in the Assessment of Public Comment submitted herewith. The proposed amendment, as revised, is necessary to implement requirements for transitioning to the new Regents examinations in English Language Arts (ELA) (Common Core) and in Mathematics (Algebra I, Geometry and Algebra II) which measure the New York State Common Core Learning Standards (CCLS). The proposed revised amendment relates to State learning standards, State assessments, graduation and diploma requirements, and higher levels of student achievement, and 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:

An assessment of public comment on the 4 or 5-year initial review period is not attached because no comments were received on the issue.

#### Assessment of Public Comment

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on August 14, 2013, the State Education Department received the following comment.

##### COMMENT:

The proposed amendment includes a provision that for the June 2014, August 2014 and January 2015 administrations only, students receiving Algebra 1 (Common Core) instruction may at the discretion of the school district take the Regents Examination in Integrated Algebra in addition to the Regents Examination in Algebra 1 (Common Core), and may meet the mathematics requirements for graduation by passing either examination. However, the placement of this provision in 100.5(g)(2)(ii) is confusing in that it appears to make this provision applicable to the student cohort described in that subparagraph, i.e. "Students who first began or will complete an Integrated Algebra, Geometry, Algebra 2/Trigonometry course prior to September 2013 shall meet the mathematics requirement for graduation. . . by passing the corresponding commencement level Regents Examinations in mathematics or an approved alternative. . ."

This appears to be contrary to the intent of the provision as recently explained in a September 2013 memo to the field from the Deputy Commissioner for P-12 Education (see <http://www.p12.nysed.gov/assessment/math/ccmath/transitioncc.pdf>), which is that the option of meeting the mathematics graduation requirement by passing either the Regents Examination in Integrated Algebra or the Algebra 1 (Common Core) examination applies to students as described in 100.5(g)(2)(i), i.e. "Students who first begin instruction in a commencement level mathematics course aligned to the Common Core Learning Standards in September 2013 and thereafter. . ."

##### DEPARTMENT RESPONSE:

The Department concurs and has made a nonsubstantial revision to clarify the text by including such provision in 100.5(g)(2)(i) instead of 100.5(g)(2)(ii).

### NOTICE OF ADOPTION

#### Occupational Therapy

**I.D. No.** EDU-33-13-00023-A

**Filing No.** 1006

**Filing Date:** 2013-10-22

**Effective Date:** 2013-11-06

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

**Action taken:** Amendment of section 76.10 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 212(3), 6504 (not subdivided), 6507(2)(a) and 7908(4), (5) and (6)

**Subject:** Occupational therapy.

**Purpose:** Permits continuing competency credits for independent study related to fieldwork education and mentoring from outside the field.

**Text or summary was published in:** the August 14, 2013 issue of the Register, I.D. No. EDU-33-13-00023-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](mailto: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:

An assessment of public comment on the 4 or 5-year initial review period is not attached because no comments were received on the issue.

#### Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the August 14, 2013 State Register, the State Education Department has not received any comments from the public. A copy of the proposed rule was provided to the New York State Occupational Therapy Association (NYSOTA) prior to publication. NYSOTA provided comments summarized as follows.

##### 1. COMMENT:

Fieldwork supervision should be created as a separate category of acceptable learning activities, removed from the category "Independent study" [clause (b) of subparagraph (iii) of paragraph (2) of subdivision (c)]. Allowing only 12 learning hours over a 3 year period for fieldwork supervision and independent learning combined is too restrictive.

##### DEPARTMENT RESPONSE:

The Department understands the significance of fieldwork supervision to the profession and the need to encourage occupational therapy professionals to take on this responsibility. However, once continuing competency became a requirement for New York State licensees, the Department had an obligation to ensure that credit is granted for learning activities that enhance the competency of such licensees, and that such activities are appropriately documented. Consistent with these goals, we do not believe it is appropriate to grant continuing education credit for fieldwork supervision alone. We do, however, believe it is appropriate to grant up to 12 hours of continuing competency credit for study undertaken in conjunction with fieldwork supervision. Accordingly, we have proposed a regulation that explicitly provides that the learning associated with fieldwork supervision could be recognized as part of independent study, and have expanded the number of hours that can be earned through independent study from 6 to 12. We believe that the primary method of earning continuing competency hours is through formal study; therefore, the Department does not believe that expanding the upper limit of independent study hours beyond 12 is appropriate.

##### 2. COMMENT:

Clarify the status of "in-service training" under the category "Coursework or training" [clause (a) of subparagraph (iii) of paragraph (2) of subdivision (c)]. In-service training that is offered by an employer that has been approved as a sponsor will be eligible for learning hours under this category. However, if the in-service training is not offered by an employer that has been approved, we understand that the OT or OTA may be able to apply that learning experience to the category of independent study, a category that is already very limited in the number of hours allowed. We would recommend that the regulation language regarding in-service training needs to be clearer.

##### DEPARTMENT RESPONSE:

The Department recognizes the value of in-service training provided by employers, and has worked with employers who are not already recognized as approved sponsors and who seek to apply to the Department for approval. The application for such approval is available on our website and the fee associated with this application, as proposed in this regulatory package, is a nominal \$300 per year. We may recognize credit for independent study for a professional whose employer provides some training but is not an approved sponsor, but view this as an exception to the preferred method and not appropriate in regulation.

##### 3. COMMENT:

Restricting mentoring to professions licensed under Title VIII of the Education Law may discourage valuable mentoring relationships in the field of education. This is true both for occupational therapists and as-

sistants who work in primary and secondary education settings, as well as for therapists who are teaching at occupational therapy and assistant programs in colleges and universities. It is quite possible that an occupational therapist or occupational therapy assistant may find their most beneficial mentoring from a well-seasoned educator or school psychologist. For occupational therapy educators in post-secondary settings, further mentoring in pedagogical methods is critical to their development in their role as an educator.

**DEPARTMENT RESPONSE:**

The Department is willing to expand mentoring to include mentors who are licensed professionals under Title VIII of the Education Law, as set forth in the amendments to the regulation, but is not willing to expand the available mentors to individuals who are not so licensed. We believe that the regulations provide individuals other options to gain knowledge on the related subjects that non-licensed mentors may be able to provide. We are also concerned over our lack of disciplinary authority over mentors who are not licensed.

**4. COMMENT:**

Section 76.10(a)(3) of the Regulations of the Commissioner of Education currently defines "licensee" as including an occupational therapy assistant. This is inaccurate because occupational therapy assistants are not granted a license, but are exempted from the license by the statute. It is recommended that alternate language should be used in the definition section and throughout section 76.10.

**DEPARTMENT RESPONSE:**

The continuing competency regulations apply to both occupational therapists and occupational therapy assistants in almost every respect and, therefore, the use of a common term was the most expedient way to refer to both. The regulations in their current form are lengthy, and the Department does not wish to complicate them further through the use of two separate identifiers that would need to be repeated throughout the regulation. The proposed regulation clearly limits the definition of "licensee" by indicating that the definition applies only to the continuing education section of the regulations.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Definition of Part-Time Experience for Permanent or Professional Certification

**I.D. No.** EDU-45-13-00032-P

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

**Proposed Action:** Amendment of section 80-1.1(b)(47) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 305(1), 3001(2), 3006(1)(a), (b) and 3009(1)

**Subject:** Definition of part-time experience for permanent or professional certification.

**Purpose:** To provide certification candidates serving as substitute teachers with an alternative to meet part-time continuous service experience requirements.

**Text of proposed rule:** 1. Paragraph (47) of subdivision (b) of section 80-1.1 of the Regulations of the Commissioner of Education is amended, effective January 29, 2014, to read as follows:

(47) Year of experience for permanent or professional certification means the following:

(i) . . .  
(ii) a minimum of 180 days of full-time, continuous school experience in the subject or area of certification completed in periods of no less than 90 days each within a 12-month period; [or]

(iii) a minimum of 360 days of part-time continuous school experience consisting of an average of 2.5 days per work in the subject or area of certification and completed in periods of no less than 90 days each within a 12-year period; or

(iv) a minimum of 360 days of part-time school experience, which shall include at least 45 days of part-time continuous school experience within a 12-year period in the subject area of the certificate sought, consisting of at least of one class period each day with a consistent group of students during such time period.

**Text of proposed 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:** Peg Rivers, State Education Department, Office of Higher Education, Room 979, 89 Washington Ave., Albany, NY 12234, (518) 486-3633, email: privers@mail.nysed.gov

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

**Regulatory Impact Statement**

**1. STATUTORY AUTHORITY:**

Education Law section 207 grants general rule-making authority to the Regents to carry into effect State educational laws and policies.

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

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

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.

**2. LEGISLATIVE OBJECTIVES:**

The amendment carries out the legislative objectives of the above-referenced statutes by amending the definition of year of experience for permanent or professional certification to provide candidates serving as substitute teachers with an alternative to meet the part-time continuous service experience requirements.

**3. NEEDS AND BENEFITS:**

Definition of a year of experience for permanent or professional certification

Section 80-1.1(b)(47) of the Commissioner's Regulations currently defines a year of experience for permanent or professional certification as:

(i) a minimum of 180 days of full-time continuous school experience in the subject or area of certification completed within a 12-month period; or

(ii) a minimum of 180 days of full-time continuous school experience in the subject or area of certification completed in periods of no less than 90 days each within a 12-month period; or

(iii) a minimum of 360 days of part-time continuous school experience consisting of an average of 2.5 days per week in the subject or area of certification and completed in periods of no less than 90 days each within a 12-year period.

Due to budget constraints and reductions in force, the number of teaching positions in many school districts has declined. As a result, it has become increasingly difficult for newly certified teachers to meet the experience requirements for permanent or professional certification.

Teachers are submitting substitute experience to meet the experience requirements for permanent or professional certification. However, many times the part-time substitute experience does not average 2.5 days per week in the subject or the area of certification. This is preventing some teachers from meeting the experience requirement for professional certification. We are proposing to add an option for teachers to obtain their required experience for the permanent certificate.

**An example**

A teacher holds a Math 7-12 certificate. This teacher cannot find full-time employment in the local school district. The teacher decides to become a substitute teacher, hoping to find a full-time position. This teacher cannot find any position that is 2.5 days per week in the years that he/she is substituting. The substitute teaching is a day here and there in multiple schools. The teacher does have the equivalent of 3 years of experience within the twelve year period, however has not been able to have periods of at least 90 days or 2.5 days per week.

**Proposed Amendment**

In consultation with the Professional Standards and Practices Board, the Department recommends that the definition of part-time experience be expanded to include the following experience:

A minimum of 360 days of part-time school experience, which shall include at least 45 days of part-time continuous school experience in the subject area of the certificate sought, consisting of at least one class period each day with a consistent group of students during such time period.

The experience must include the breadth of activities that a full-time teacher assigned to the class would have following the teaching standards appropriate to the part-time position. This change would allow candidates serving as substitute teachers who are applying for a permanent or professional certificate to have an alternative option to meet the part-time continuous service, while at the same time requiring candidates to have the skills and abilities required of new teachers.

**4. COSTS:**

(a) Costs to State government: The amendment will not impose any additional costs on State government including the State Education Department.

(b) Costs to local governments: The amendment will not impose any additional costs on local governments.

**5. LOCAL GOVERNMENT MANDATES:**

The proposed amendment does not impose any mandatory program, service, duty, or responsibility upon local government, including school districts or BOCES.

**6. PAPERWORK:**

There are no additional paperwork requirements beyond those currently imposed.

**7. DUPLICATION:**

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

**8. ALTERNATIVES:**

No alternatives were considered.

**9. FEDERAL STANDARDS:**

There are no Federal standards that establish requirements for the certification of teachers for service in the State's public schools.

**10. COMPLIANCE SCHEDULE:**

It is anticipated that the proposed amendment will be adopted at January Regents meeting and will become effective on January 29, 2014.

**Regulatory Flexibility Analysis**

The purpose of the proposed amendment is to amend the definition of year of experience for permanent or professional certification to provide candidates serving as substitute teachers with an alternative to meet the part-time continuous service experience requirements. The proposed rule does not impose any reporting, recordkeeping or other compliance requirements, and will not have an adverse economic impact, on small businesses or local governments. Because it is evident from the nature of the amendment that it does not affect small businesses or local governments, no further steps were needed to ascertain that fact and one 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 will affect candidates who seeking to the experience requirement for a permanent or professional certification, including those located in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

Currently, section 80-1.1(b)(47) of the Commissioner's Regulations defines a year of experience for permanent or professional certification as follows: (i) a minimum of 180 days of full-time continuous school experience in the subject or area of certification completed within a 12-month period; (ii) a minimum of 180 days of full-time continuous school experience in the subject or area of certification completed in periods of no less than 90 days each within a 12-month period; or (iii) a minimum of 360 days of part-time continuous school experience consisting of an average of 2.5 days per week in the subject or area of certification and completed in periods of no less than 90 days each within a 12-year period.

Due to budget constraints and reductions in force, the number of teaching positions in many school districts has declined. As a result, it has become increasingly difficult for newly certified teachers to meet the experience requirements for permanent or professional certification.

Teachers are submitting substitute experience to meet the experience requirements for permanent or professional certification. However, many times the part-time substitute experience does not average 2.5 days per week in the subject or the area of certification. This is preventing some teachers from meeting the experience requirement for professional certification. We are proposing to add an option for teachers to obtain their required experience for the permanent certificate.

**An example**

A teacher holds a Math 7-12 certificate. This teacher cannot find full-time employment in the local school district. The teacher decides to become a substitute teacher, hoping to find a full-time position. This teacher cannot find any position that is 2.5 days per week in the years that he/she is substituting. The substitute teaching is a day here and there in multiple schools. The teacher does have the equivalent of 3 years of experience within the twelve year period, however has not been able to have periods of at least 90 days or 2.5 days per week.

**Proposed Amendment**

The Department recommends that the definition of part-time experience be expanded to include the following experience:

A minimum of 360 days of part-time school experience, which shall include at least 45 days of part-time continuous school experience in the subject area of the certificate sought, consisting of at least one class period each day with a consistent group of students during such time period.

The experience must include the breadth of activities that a full-time

teacher assigned to the class would have following the teaching standards appropriate to the part-time position. This change would allow candidates serving as substitute teachers who are applying for a permanent or professional certificate to have an alternative option to meet the part-time continuous service, while at the same time requiring candidates to have the skills and abilities required of new teachers.

There are no reporting requirements in the proposed amendment and no professional services are needed to comply.

**3. COSTS:**

There are no additional costs imposed beyond those imposed by statute.

**4. MINIMIZING ADVERSE IMPACT:**

The State Education Department does not believe that making this change for candidates who live or work in rural areas is warranted because uniform standards for certification are necessary across the State.

**5. RURAL AREA PARTICIPATION:**

The State Education Department has sent the proposed amendment to the Rural Advisory Committee, which has members who live or work in rural areas across the State.

**Job Impact Statement**

The purpose of the proposed amendment is to amend the definition of year of experience for permanent or professional certification to provide candidates serving as substitute teachers with an alternative to meet the part-time continuous service experience requirements. Because it is evident from the nature of the proposed rule that it will have no impact on the number of jobs or employment opportunities in New York State, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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

**Mandatory Reporting Requirements and Testing Misconduct**

**I.D. No.** EDU-45-13-00033-P

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

**Proposed Action:** Amendment of section 102.4 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 225(1)-(11), 305(1) and (2); and Civil Service Law, section 75-b(2)(a)

**Subject:** Mandatory reporting requirements and testing misconduct.

**Purpose:** To formally implement the recommendations of Special Investigator Hank Greenberg to enhance the security of the State assessment program.

**Text of proposed rule:** 1. Section 102.4 of the Regulations of the Commissioner of Education is amended, effective January 29, 2014, to read as follows:

Section 102.4. Fraud in examinations.

(a) *Prohibited Student Fraud.* If, in the judgment of the principal responsible for administration of an examination under the authority of the Regents, upon the basis of evidence deemed by him to be sufficient, a student has been found guilty of having committed or attempted to commit fraud in the examination, the principal shall be authorized to cancel the examination and to exclude this student from any subsequent Regents examination until such time as the student has demonstrated by exemplary conduct and citizenship, to the satisfaction of the principal, that the student is entitled to restoration of this privilege. As used in this [section] *subdivision*, fraud shall include the use of unfair means to pass an examination, giving aid to, or obtaining aid from, another person in any examination, alteration of any Regents passcard or other credential, and intentional misrepresentation in connection with examinations or credentials. Before such penalty shall be applied, the student accused of fraud shall be given an opportunity to make satisfactory explanations, including the right to appear before the board of education or a person or persons designated by such board, together with his parent or parents and, if so desired by the parent or parents, an attorney, all of whom shall be given the opportunity to ask questions of the examiner or examiners and any other person having direct personal knowledge of the facts. The board of education or the person or persons designated by the board for the purpose of such inquiry may affirm, modify or reverse the findings or penalty, if any, imposed by the principal. The principal shall report promptly to the commissioner the name of each student penalized under this regulation, together with a brief description of circumstances.

(b) *Prohibited Testing Misconduct.* Testing misconduct, assisting in the engagement of, or soliciting another to engage in testing misconduct, and/or the knowing failure to report testing misconduct in accordance

with subdivision (d) of this section when committed by an employee of a school district or board of cooperative educational services in a position for which a teaching or school leader certificate is required, shall be deemed to raise a reasonable question of moral character under Part 83 of this Title and shall be subject to referral to the Office of School Personnel Review and Accountability at the State Education Department to the extent provided in Section 83.1 of this Title. Each school district and board of cooperative educational services employee in a position for which a teaching or school leader certificate is not required who commits an unlawful act in respect to examination and records that is prohibited by Education Law § 225 shall be subject to disciplinary action by the board of education or the board of cooperative educational services in accordance with subdivision 11 of Education Law § 225.

(c) For purposes of this section, testing misconduct shall include, but need not be limited to, the following acts or omissions:

(1) Accessing secure test booklets and/or answer sheets prior to the time allowed by New York State testing rules;

(2) Duplicating, reproducing, or keeping any part of any secure examination materials;

(3) Reviewing test booklets prior to test administration in order to:

- (i) determine and record correct responses for use during testing;
- (ii) create pre-test lessons or discussions with students about concepts being tested; and/or
- (iii) create a "cheat sheet" for students to use during any State assessment, including but not limited to, sharing formulas, concepts, or definitions, necessary for the test;

(4) Providing students clues or answers during test administration, including, but not limited to, one or more of the following actions:

- (i) coaching students about correct answers;
- (ii) defining terms and concepts contained in the test;
- (iii) pointing out wrong answers to a student and suggesting that the student reconsider or change the recorded response;
- (iv) reminding students during testing of concepts they learned in class; and/or
- (v) making facial or other non-verbal suggestions regarding answers.

(5) Allowing any student more time to take an examination than is allowed for that student;

(6) Leaving any materials displayed in the room containing topics being tested;

(7) Writing test specific formulas, concepts, or definitions on the board prior to and while a State assessment is administered;

(8) Reviewing a student answer sheet for wrong answers and returning it to a student with instructions to change or reconsider wrong responses;

(9) Altering, erasing, or in any other way changing a student's recorded responses after the student has handed in his/her test materials; or

(10) Rescoring portions of the test in order to add or find points so a student will pass; and/or

(11) Encouraging or assisting an individual to engage in the conduct described in paragraphs (1) through (10) of this subdivision.

(e) **Mandatory Reporting of Testing Misconduct.** Each school district employee shall be required to report to the Executive Director of the Test Security and Educator Integrity Unit of the department any known incident of testing misconduct by a certified educator or any known conduct by a non-certified individual involved in the handling, administration or scoring of State assessments that may reasonably be considered to be in violation of section 225 of the Education Law, in accordance with directions and procedures established by the Commissioner for the purpose of maintaining the security and confidential integrity of State assessments.

(f) **Prohibition Against Taking Adverse Action Against Certain Employees for Filing a Report.** In accordance with section 75-b of the Civil Service Law, a school district or board of cooperative educational services shall not dismiss or take other disciplinary or adverse action against an employee because he/she submitted a report pursuant to subdivision (e) of this section. Any such adverse action by an individual holding a teaching or school leader certificate shall be deemed to raise a reasonable question of moral character under Part 83 of this Title and may be referred to the Office of School Personnel Review and Accountability at the State Education Department.

**Text of proposed 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:** Peg Rivers, State Education Department, Office of Higher Education, Room 979, 89 Washington Ave., Albany, NY 12234, (518) 486-3633, email: privers@mail.nysed.gov

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

### **Regulatory Impact Statement**

#### **1. STATUTORY AUTHORITY:**

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

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

Education Law section 215 authorizes the Board of Regents and the Commissioner of Education to require school districts to prepare and submit reports containing such information as they may prescribe.

Education Law section 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Board of Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education, and shall execute all educational policies determined by the Board of Regents.

Education Law section 225(1) through (11) defines unlawful acts with respect to examinations and records and provides that any violation of this section shall constitute grounds for disciplinary action.

Civil Service Law section 75-b(2)(a) prohibits a public employer from dismissing or taking other disciplinary action or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information regarding a violation of a law, rule or regulations which creates a present or substantial danger to the public health or safety or which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action.

#### **2. LEGISLATIVE OBJECTIVES:**

The amendment carries out the legislative objectives of the above statutes by enhancing the security of the State assessment program by prohibiting certain testing misconduct and establishing a mandatory reporting requirement for school personnel, who learn of any security breach or other testing misconduct, and to sanction those who fail to comply.

#### **3. NEEDS AND BENEFITS:**

In November 2011, pursuant to Education Law § 104 and section 3.9 of the Rules of the Board of Regents, the Commissioner appointed Henry "Hank" Greenberg as a Special Investigator, and tasked him with performing a review of the Department's processes and procedures for handling and responding to reports of allegations of misconduct related to the administration and scoring of New York State assessments. In this capacity, Special Investigator Greenberg performed an exhaustive review of the Department's processes and procedures for the intake, review, referral, investigation, findings, response, follow-up, and records retention policy regarding allegations of educator misconduct during the administration and scoring of State assessments. The review included interviews of Department personnel and others involved in testing investigations, and the review of pending and closed investigative case files, guidance materials, manuals, statutes, and regulations, among other relevant items.

On March 19, 2012, Special Investigator Greenberg reported his findings and recommendations to the Board. See Greenberg, H., Review of the New York State Education Department's ('NYSED') Processes and Procedures for Handling and Responding to Reports of Alleged Irregularities in the Administration and Scoring of State Assessments. The Board accepted all of the Special Investigator's recommendations, which included the creation of a new Test Security Unit ("TSU") that would focus on the detection and deterrence of security breaches and other testing irregularities.

Another significant recommendation from Special Investigator Greenberg that the Board adopted was that the Department establish a mandatory reporting requirement for school personnel, who learn of any security breach or other testing misconduct, define specific context based examples of prohibited testing misconduct, and sanction those who fail to comply. (Greenberg Report, pgs. 10 and 14, emphasis in original). Pursuant to this recommendation, the TSU incorporated a mandatory reporting requirement in the Department's testing manuals for Regents and Grades 3 through 8 examinations. The TSU recommends that the Board formalize Special Investigator Greenberg's recommendations by amending Section 102.4 of the Commissioner's Regulations to prohibit certain testing misconduct and that the regulation be amended to include specific concrete examples of what constitutes "testing misconduct."

Additionally, Special Investigator Greenberg recommended that NYSED "[p]rotect from retribution persons who report security breaches and other testing irregularities." (Greenberg Report, p. 11). Therefore, the TSU recommends that the Board formalize this recommendation for protecting persons who report test security violations to the TSU by amending Section 102.4 of the Commissioner's Regulations to include

such protection. Under Civil Service Law § 75-b, protections exist for public employees who report violations of “a law, rule, or regulation” that the reporting person reasonably believes has occurred. The proposed amendment clarifies that certified individuals who take retaliatory action against a person who makes a test fraud report in compliance with the proposed amendment may be subject to Part 83 sanctions.

The proposed amendments enhance the security of the State Assessment program in several ways. First, the regulation defines specific types of testing misconduct, prohibits such misconduct and requires that incidents of suspected testing misconduct be reported to the Department so that they can be investigated and addressed. Second, the proposed amendment serves to protect district personnel, educators and others who file reports of suspected cheating from retaliation by prohibiting them from being disciplined and/or from any other adverse action as the result of the filing of a report while at the same time deterring misconduct and encouraging a culture of ethical testing by serving notice that any ethical testing breaches will be reported to the Department if they become known. The mandatory reporting requirements in the proposed amendment are consistent with the requirements of several other states, including but not limited to, Virginia, Illinois, Texas and Nevada.

#### 4. COSTS:

(a) Costs to State government: The amendment will not impose any additional costs on State government including the State Education Department.

(b) Costs to local governments: The amendment will not impose any additional costs on local governments.

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any mandatory program, service, duty, or responsibility upon local government, including school districts or BOCES, except that it requires school personnel to report testing misconduct as defined in the proposed amendment.

#### 6. PAPERWORK:

See section 4 above.

#### 7. DUPLICATION:

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

#### 8. ALTERNATIVES:

No alternatives were considered because the proposed amendment implements the recommendations of Special Investigator Hank Greenberg.

#### 9. FEDERAL STANDARDS:

There are no Federal standards that require school personnel to report testing misconduct in the public schools of this State.

#### 10. COMPLIANCE SCHEDULE:

It is anticipated that the proposed amendment will be adopted at January Regents meeting and will become effective on January 29, 2014.

### *Regulatory Flexibility Analysis*

#### (a) Small businesses:

The purpose of the proposed amendment is to formally implement the recommendations of Special Investigator Hank Greenberg to enhance the security of the State assessment program by prohibiting certain testing misconduct, establishing a mandatory reporting requirement for school personnel, who learn of any security breach or other testing misconduct, and to sanction those who fail to comply. The proposed amendment does not impose any reporting, recordkeeping or other compliance requirements, and will not have an adverse economic impact, on small businesses. Because it is evident from the nature of the amendment that it does not affect small businesses, no further steps were needed to ascertain that fact and one were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

#### (b) Local governments:

##### 1. EFFECT OF RULE:

The rule applies to school personnel in each of the 695 school districts and 37 boards of cooperative educational services (“BOCES”) in the State.

##### 2. COMPLIANCE REQUIREMENTS:

In November 2011, pursuant to Education Law § 104 and section 3.9 of the Rules of the Board of Regents, the Commissioner appointed Henry “Hank” Greenberg as a Special Investigator, and tasked him with performing a review of the Department’s processes and procedures for handling and responding to reports of allegations of misconduct related to the administration and scoring of New York State assessments. In this capacity, Special Investigator Greenberg performed an exhaustive review of the Department’s processes and procedures for the intake, review, referral, investigation, findings, response, follow-up, and records retention policy regarding allegations of educator misconduct during the administration and scoring of State assessments. The review included interviews of Department personnel and others involved in testing investigations, and the review of pending and closed investigative case files, guidance materials, manuals, statutes, and regulations, among other relevant items.

On March 19, 2012, Special Investigator Greenberg reported his findings and recommendations to the Board. See Greenberg, H., Review of the

New York State Education Department’s (“NYSED”) Processes and Procedures for Handling and Responding to Reports of Alleged Irregularities in the Administration and Scoring of State Assessments. The Board accepted all of the Special Investigator’s recommendations, which included the creation of a new Test Security Unit (“TSU”) that would focus on the detection and deterrence of security breaches and other testing irregularities.

Another significant recommendation from Special Investigator Greenberg that the Board adopted was that the Department establish a mandatory reporting requirement for school personnel, who learn of any security breach or other testing misconduct, define specific context based examples of prohibited testing misconduct, and sanction those who fail to comply. (Greenberg Report, pgs. 10 and 14, emphasis in original). Pursuant to this recommendation, the TSU incorporated a mandatory reporting requirement in the Department’s testing manuals for Regents and Grades 3 through 8 examinations. The TSU recommends that the Board formalize Special Investigator Greenberg’s recommendations by amending Section 102.4 of the Commissioner’s Regulations to prohibit certain testing misconduct and that the regulation be amended to include specific concrete examples of what constitutes “testing misconduct.”

Additionally, Special Investigator Greenberg recommended that NYSED “[p]rotect from retribution persons who report security breaches and other testing irregularities.” (Greenberg Report, p. 11). Therefore, the TSU recommends that the Board formalize this recommendation for protecting persons who report test security violations to the TSU by amending Section 102.4 of the Commissioner’s Regulations to include such protection. Under Civil Service Law § 75-b, protections exist for public employees who report violations of “a law, rule, or regulation” that the reporting person reasonably believes has occurred. The proposed amendment clarifies that certified individuals who take retaliatory action against a person who makes a test fraud report in compliance with the proposed amendment may be subject to Part 83 sanctions.

The proposed amendments enhance the security of the State Assessment program in several ways. First, the regulation defines specific types of testing misconduct, prohibits such misconduct and requires that incidents of suspected testing misconduct be reported to the Department so that they can be investigated and addressed. Second, the proposed amendment serves to protect district personnel, educators and others who file reports of suspected cheating from retaliation by prohibiting them from being disciplined and/or from any other adverse action as the result of the filing of a report while at the same time deterring misconduct and encouraging a culture of ethical testing by serving notice that any ethical testing breaches will be reported to the Department if they become known. The mandatory reporting requirements in the proposed amendment are consistent with the requirements of several other states, including but not limited to, Virginia, Illinois, Texas and Nevada.

#### 3. PROFESSIONAL SERVICES:

The proposed rule does not impose any additional professional services requirements on school districts or BOCES.

#### 4. COMPLIANCE COSTS:

The purpose of the proposed amendment is to formally implement the recommendations of Special Investigator Hank Greenberg to enhance the security of the State assessment program by prohibiting certain testing misconduct, establishing a mandatory reporting requirement for school personnel, who learn of any security breach or other testing misconduct, and to sanction those who fail to comply. The proposed amendment does not impose any additional costs on school districts and BOCES beyond those currently imposed.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The rule does not impose any additional costs or technological requirements on school districts or BOCES beyond those already imposed.

#### 6. MINIMIZING ADVERSE IMPACT:

The State Education Department believes uniform standards relating to testing misconduct are necessary across the State to ensure the security of the State assessment program.

#### 7. LOCAL GOVERNMENT PARTICIPATION:

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

### *Rural Area Flexibility Analysis*

#### 1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment will affect school personnel, including those located in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

In November 2011, pursuant to Education Law § 104 and section 3.9 of the Rules of the Board of Regents, the Commissioner appointed Henry

“Hank” Greenberg as a Special Investigator, and tasked him with performing a review of the Department’s processes and procedures for handling and responding to reports of allegations of misconduct related to the administration and scoring of New York State assessments. In this capacity, Special Investigator Greenberg performed an exhaustive review of the Department’s processes and procedures for the intake, review, referral, investigation, findings, response, follow-up, and records retention policy regarding allegations of educator misconduct during the administration and scoring of State assessments. The review included interviews of Department personnel and others involved in testing investigations, and the review of pending and closed investigative case files, guidance materials, manuals, statutes, and regulations, among other relevant items.

On March 19, 2012, Special Investigator Greenberg reported his findings and recommendations to the Board. See Greenberg, H., Review of the New York State Education Department’s (‘NYSED’) Processes and Procedures for Handling and Responding to Reports of Alleged Irregularities in the Administration and Scoring of State Assessments. The Board accepted all of the Special Investigator’s recommendations, which included the creation of a new Test Security Unit (“TSU”) that would focus on the detection and deterrence of security breaches and other testing irregularities.

Another significant recommendation from Special Investigator Greenberg that the Board adopted was that the Department establish a mandatory reporting requirement for school personnel, who learn of any security breach or other testing misconduct, define specific context based examples of prohibited testing misconduct, and sanction those who fail to comply. (Greenberg Report, pgs. 10 and 14, emphasis in original). Pursuant to this recommendation, the TSU incorporated a mandatory reporting requirement in the Department’s testing manuals for Regents and Grades 3 through 8 examinations. The TSU recommends that the Board formalize Special Investigator Greenberg’s recommendations by amending Section 102.4 of the Commissioner’s Regulations to prohibit certain testing misconduct and that the regulation be amended to include specific concrete examples of what constitutes “testing misconduct.”

Additionally, Special Investigator Greenberg recommended that NYSED “[p]rotect from retribution persons who report security breaches and other testing irregularities.” (Greenberg Report, p. 11). Therefore, the TSU recommends that the Board formalize this recommendation for protecting persons who report test security violations to the TSU by amending Section 102.4 of the Commissioner’s Regulations to include such protection. Under Civil Service Law § 75-b, protections exist for public employees who report violations of “a law, rule, or regulation” that the reporting person reasonably believes has occurred. The proposed amendment clarifies that certified individuals who take retaliatory action against a person who makes a test fraud report in compliance with the proposed amendment may be subject to Part 83 sanctions.

The proposed amendments enhance the security of the State Assessment program in several ways. First, the regulation defines specific types of testing misconduct, prohibits such misconduct and requires that incidents of suspected testing misconduct be reported to the Department so that they can be investigated and addressed. Second, the proposed amendment serves to protect district personnel, educators and others who file reports of suspected cheating from retaliation by prohibiting them from being disciplined and/or from any other adverse action as the result of the filing of a report while at the same time deterring misconduct and encouraging a culture of ethical testing by serving notice that any ethical testing breaches will be reported to the Department if they become known. The mandatory reporting requirements in the proposed amendment are consistent with the requirements of several other states, including but not limited to, Virginia, Illinois, Texas and Nevada.

3. COSTS:

There are no additional costs imposed beyond those imposed by statute.

4. MINIMIZING ADVERSE IMPACT:

The State Education Department does not believe that making a change for school personnel who live or work in rural areas is warranted because uniform standards are necessary across the State to ensure the security of the State assessment program.

5. RURAL AREA PARTICIPATION:

The State Education Department has sent the proposed amendment to the Rural Advisory Committee, which has members who live or work in rural areas across the State.

**Job Impact Statement**

The purpose of the proposed amendment is to formally implement the recommendations of Special Investigator Hank Greenberg to enhance the security of the State assessment program. Specifically, the proposed amendment prohibits certain testing misconduct and establishes a mandatory reporting requirement for school personnel who learn of any security breach or other testing misconduct, and to sanction those who fail to comply. Because it is evident from the nature of the proposed rule that it

will have no impact on the number of jobs or employment opportunities in New York State, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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

**Pupils with Limited English Proficiency (LEP)**

**I.D. No.** EDU-45-13-00034-P

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

**Proposed Action:** Amendment of sections 154.2 and 154.3 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207(not subdivided), 208(not subdivided), 215(not subdivided), 305(1), (2), 2117(1), 3204(2), (2-a), (3) and (6)

**Subject:** Pupils with limited English proficiency (LEP).

**Purpose:** To specify the NYS Identification Test for English Language Learners (NYSITELL) for purposes of identifying LEP pupils.

**Text of proposed rule:** 1. Section 154.2 of the Regulations of the Commissioner of Education is amended, effective February 1, 2014, as follows:  
154.2 Definitions.

(a) Pupils with limited English proficiency shall mean pupils who by reason of foreign birth or ancestry, speak a language other than English and:

(1) . . .

(2) score below a State designated level of proficiency, on the Language Assessment Battery-Revised (LAB-R) *prior to February 1, 2014, or on the New York State Identification Test for English Language Learners (NYSITELL) commencing February 1, 2014 and thereafter, or on the New York State English as a Second Language Achievement Test (NYSESLAT)?* provided, however, that no pupil shall be served in a bilingual or English as a second language education program pursuant to this Part for a period in excess of three years from the date of enrollment in school unless such period is extended by the commissioner with respect to an individual pupil in accordance with the provisions of subdivision 2 of section 3204 of the Education Law.

(b) Initial identification is the process followed to determine if the pupil is limited English proficient, at the time of a pupil’s enrollment in the New York State public school system for the first time or at the time of a pupil’s reentry into the New York State public school system with no available record of prior screening, based upon such pupil scoring below a State designated level of proficiency on the LAB-R *prior to February 1, 2014, or on the NYSITELL commencing February 1, 2014 and thereafter.*

(c) Annual English language assessment is the process followed to determine if a pupil with limited English proficiency continues to be limited English proficient, based upon such pupil scoring below a State designated level of proficiency on the NYSESLAT.

(d) . . .

(e) . . .

(f) . . .

2. Subdivision (l) of section 154.3 of the Regulations of the Commissioner of Education is amended, effective February 1, 2014, as follows:

(l) A pupil whose score on the LAB-R *prior to February 1, 2014, or on the NYSITELL commencing February 1, 2014 and thereafter, or on the NYSESLAT, as specified in section 154.2(a), (b) and (c) of this Part, is a result of a disability shall be provided special education programs and services in accordance with the individualized education program (IEP) developed for such pupil pursuant to Part 200 of this Title, and shall also be eligible for services pursuant to this Part when such services are recommended in the IEP. A pupil with a disability receiving services in accordance with the provisions of this section shall be counted as a pupil with limited English proficiency, as well as a student with a disability, for purposes of calculating State aid pursuant to section 3602 of the Education Law.*

3. Subdivision (l) of section 154.3 of the Regulations of the Commissioner of Education is amended, effective February 1, 2014, as follows:

(l) A pupil whose score on the LAB-R *prior to February 1, 2014, or on the NYSITELL commencing February 1, 2014 and thereafter, or on the NYSESLAT, as specified in section 154.2(a),(b) and (c) of this Part, is a result of a disability shall be provided special education programs and services in accordance with the individualized education program (IEP) developed for such pupil pursuant to Part 200 of this Title, and shall also be eligible for services pursuant to this Part when such services are recommended in the IEP. A pupil with a disability receiving services in accor-*

dance with the provisions of this section shall be counted as a pupil with limited English proficiency, as well as a student with a disability, for purposes of calculating State aid pursuant to section 3602 of the Education Law.

**Text of proposed 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:** Ken Wagner, Dep. Comm. Curriculum, Assessment & Ed. Tech., State Education Department, 875 EBA, 89 Washington Ave., Albany, NY 12234, (518) 474-5915, email: NYSEDP12@mail.nysed.gov

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

#### Regulatory Impact Statement

##### STATUTORY AUTHORITY:

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

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

Education Law section 215 authorizes the Board of Regents and the Commissioner of Education to require school districts to prepare and submit reports containing such information as they may prescribe.

Education Law section 305 (1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Board of Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education, and shall execute all educational policies determined by the Board of Regents.

Education Law section 2117(1) empowers the Board of Regents and the Commissioner of Education to require school districts to submit any information they deem appropriate.

Education Law section 3204(2) and (2-a) provide for instructional programs for pupils with limited English proficiency to be conducted in accordance with regulations of the Commissioner. Education Law section 3204(3) authorizes the Commissioner to establish standards for the instruction of children with limited English proficiency, and section 3204(6) requires the Commissioner to establish such standards by regulation.

##### LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to implement policy adopted by the Board of Regents relating to examination requirements for identifying pupils with limited English proficiency.

##### NEEDS AND BENEFITS:

The proposed amendment is necessary to implement policy adopted by the Board of Regents relating to examination requirements for identifying pupils with limited English proficiency. The State Education Department is in the process of implementing a two-phase alignment of the NYS English as a Second Language Achievement Test (NYSESLAT) to the Common Core. As a part of this new alignment, the Department is also building a new initial identification assessment, the New York State Identification Test for English Language Learners (NYSITELL). The NYSITELL will be based on, and similar to, the NYSESLAT. Additionally, the NYSITELL is being developed from the same pool of questions as the NYSESLAT and, thus, the two tests will include the same types of questions. These new alignments will better enable educators to determine a student's level of English proficiency and subsequently provide the appropriate instruction and will facilitate the field's transition to this new identification test.

The proposed amendment specifies the NYSITELL for purposes of identifying pupils with limited English proficiency. Specifically, the proposed amendment provides that "pupils with limited English proficiency" shall include pupils who by reason of foreign birth or ancestry, speak a language other than English and score below a State designated level of proficiency on the Language Assessment Battery-Revised (LAB-R) prior to February 1, 2014, or on the New York State Identification Test for English Language Learners (NYSITELL) commencing February 1, 2014 and thereafter, or on the New York State English as a Second Language Achievement Test (NYSESLAT).

##### COSTS:

- (a) Costs to State government: None.
- (b) Cost to local government: None.
- (c) Cost to private regulated parties: None.
- (d) Costs to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment merely specifies a new test, the New York State Identification Test for English Language Learners (NYSITELL), for purposes of identifying pupils with limited English proficiency and does not impose any costs on the State, local governments, private regulated parties or the State Education Department. Specifically, the proposed amendment provides that "pupils with limited English proficiency" shall include pupils who by reason of foreign birth or ancestry, speak a language other than English and score below a State designated level of proficiency on the Language Assessment Battery-Revised (LAB-R) prior to February 1, 2014, or on the New York State Identification Test for English Language Learners (NYSITELL) commencing February 1, 2014 and thereafter, or on the New York State English as a Second Language Achievement Test (NYSESLAT).

##### LOCAL GOVERNMENT MANDATES:

The proposed amendment merely specifies a new test, the New York State Identification Test for English Language Learners (NYSITELL), for purposes of identifying pupils with limited English proficiency and does not impose any additional program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district.

##### PAPERWORK:

The proposed amendment merely specifies a new test, the New York State Identification Test for English Language Learners (NYSITELL), for purposes of identifying pupils with limited English proficiency and does not impose any additional paperwork or recordkeeping requirements.

##### DUPLICATION:

The proposed amendment will not duplicate or exceed any other existing federal or State statute or regulation.

##### ALTERNATIVES:

The proposed amendment is necessary to implement policy enacted by the Board of Regents relating to examination requirements for identifying pupils with limited English proficiency. There are no significant alternatives and none were considered.

The proposed amendment merely specifies a new test, the New York State Identification Test for English Language Learners (NYSITELL), for purposes of identifying pupils with limited English proficiency and does not impose any costs on the State, local governments, private regulated parties or the State Education Department. Specifically, the proposed amendment provides that "pupils with limited English proficiency" shall include pupils who by reason of foreign birth or ancestry, speak a language other than English and score below a State designated level of proficiency on the Language Assessment Battery-Revised (LAB-R) prior to February 1, 2014, or on the New York State Identification Test for English Language Learners (NYSITELL) commencing February 1, 2014 and thereafter, or on the New York State English as a Second Language Achievement Test (NYSESLAT).

##### FEDERAL STANDARDS:

The proposed amendment does not exceed any federal rule in a similar area.

##### COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with the proposed amendment by its effective date. The proposed amendment provides that "pupils with limited English proficiency" shall include pupils who by reason of foreign birth or ancestry, speak a language other than English and score below a State designated level of proficiency on the Language Assessment Battery-Revised (LAB-R) prior to February 1, 2014, or on the New York State Identification Test for English Language Learners (NYSITELL) commencing February 1, 2014 and thereafter, or on the New York State English as a Second Language Achievement Test (NYSESLAT).

#### Regulatory Flexibility Analysis

##### Small Businesses:

The proposed amendment specifies a new test, the New York State Identification Test for English Language Learners (NYSITELL), for purposes of identifying pupils with limited English proficiency, and does not impose any adverse economic impact, reporting, record keeping or other compliance requirements on small businesses. No further steps 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:

##### EFFECT OF RULE:

The proposed amendment applies to each of the 695 public school districts in the State.

##### COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to implement policy adopted by the Board of Regents relating to examination requirements for identifying pupils with limited English proficiency. The proposed amendment merely specifies a new test, the New York State Identification Test for English Language Learners (NYSITELL), for purposes of identifying pupils with

limited English proficiency and does not impose any additional compliance requirements on school districts. Specifically, the proposed amendment provides that “pupils with limited English proficiency” shall include pupils who by reason of foreign birth or ancestry, speak a language other than English and score below a State designated level of proficiency on the Language Assessment Battery-Revised (LAB-R) prior to February 1, 2014, or on the New York State Identification Test for English Language Learners (NYSITELL) commencing February 1, 2014 and thereafter, or on the New York State English as a Second Language Achievement Test (NYSESLAT).

#### PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements on school districts.

#### COMPLIANCE COSTS:

The proposed amendment merely specifies a new test, the New York State Identification Test for English Language Learners (NYSITELL), for purposes of identifying pupils with limited English proficiency and does not impose any costs on school districts. Specifically, the proposed amendment provides that “pupils with limited English proficiency” shall include pupils who by reason of foreign birth or ancestry, speak a language other than English and score below a State designated level of proficiency on the Language Assessment Battery-Revised (LAB-R) prior to February 1, 2014, or on the New York State Identification Test for English Language Learners (NYSITELL) commencing February 1, 2014 and thereafter, or on the New York State English as a Second Language Achievement Test (NYSESLAT).

#### ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional technological requirements on school districts. Economic feasibility is addressed above under compliance costs.

#### MINIMIZE ADVERSE IMPACT:

The proposed amendment is necessary to implement policy adopted by the Board of Regents relating to examination requirements for identifying pupils with limited English proficiency. The proposed amendment merely specifies a new test, the New York State Identification Test for English Language Learners (NYSITELL), for purposes of identifying pupils with limited English proficiency and does not impose any additional compliance requirements or costs on school districts. Specifically, the proposed amendment provides that “pupils with limited English proficiency” shall include pupils who by reason of foreign birth or ancestry, speak a language other than English and score below a State designated level of proficiency on the Language Assessment Battery-Revised (LAB-R) prior to February 1, 2014, or on the New York State Identification Test for English Language Learners (NYSITELL) commencing February 1, 2014 and thereafter, or on the New York State English as a Second Language Achievement Test (NYSESLAT).

#### 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.

#### 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 necessary to implement long-range Regents policy providing for a transition to the New York State Identification Test for English Language Learners (NYSITELL) commencing February 1, 2014, for purposes of identifying pupils with limited proficiency. Accordingly, there is no need for a shorter review period.

The State Education Department is in the process of implementing a two-phase alignment of the NYS English as a Second Language Achievement Test (NYSESLAT) to the Common Core. As a part of this new alignment, the Department is also building a new initial identification assessment, the NYSITELL. The NYSITELL will be based on, and similar to, the NYSESLAT. Additionally, the NYSITELL is being developed from the same pool of questions as the NYSESLAT and, thus, the two tests will include the same types of questions. These new alignments will better enable educators to determine a student’s level of English proficiency and subsequently provide the appropriate instruction and will facilitate the field’s transition to this new identification test.

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 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.

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

The proposed amendment is necessary to implement policy adopted by the Board of Regents relating to examination requirements for identifying pupils with limited English proficiency. The proposed amendment merely specifies a new test, the New York State Identification Test for English Language Learners (NYSITELL), for purposes of identifying pupils with limited English proficiency and does not impose any additional reporting, recordkeeping or other compliance requirements on school districts. Specifically, the proposed amendment provides that “pupils with limited English proficiency” shall include pupils who by reason of foreign birth or ancestry, speak a language other than English and score below a State designated level of proficiency on the Language Assessment Battery-Revised (LAB-R) prior to February 1, 2014, or on the New York State Identification Test for English Language Learners (NYSITELL) commencing February 1, 2014 and thereafter, or on the New York State English as a Second Language Achievement Test (NYSESLAT).

The proposed amendment does not impose any additional professional services requirements on school districts.

##### 3. COMPLIANCE COSTS:

The proposed amendment merely specifies a new test, the New York State Identification Test for English Language Learners (NYSITELL), for purposes of identifying pupils with limited English proficiency and does not impose any costs on school districts. Specifically, the proposed amendment provides that “pupils with limited English proficiency” shall include pupils who by reason of foreign birth or ancestry, speak a language other than English and score below a State designated level of proficiency on the Language Assessment Battery-Revised (LAB-R) prior to February 1, 2014, or on the New York State Identification Test for English Language Learners (NYSITELL) commencing February 1, 2014 and thereafter, or on the New York State English as a Second Language Achievement Test (NYSESLAT).

##### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement policy adopted by the Board of Regents relating to examination requirements for identifying pupils with limited English proficiency. The proposed amendment merely specifies a new test, the New York State Identification Test for English Language Learners (NYSITELL), for purposes of identifying pupils with limited English proficiency and does not impose any additional compliance requirements or costs on school districts. Specifically, the proposed amendment provides that “pupils with limited English proficiency” shall include pupils who by reason of foreign birth or ancestry, speak a language other than English and score below a State designated level of proficiency on the Language Assessment Battery-Revised (LAB-R) prior to February 1, 2014, or on the New York State Identification Test for English Language Learners (NYSITELL) commencing February 1, 2014 and thereafter, or on the New York State English as a Second Language Achievement Test (NYSESLAT). Because this amendment implements Regents policy that is applicable to all school districts across the State, it was not possible to provide for a lesser standard or an exemption for school districts in 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 is necessary to implement long-range Regents policy providing for a transition to the New York State Identification Test for English Language Learners (NYSITELL) commencing February 1, 2014, for purposes of identifying pupils with limited proficiency. Accordingly, there is no need for a shorter review period.

The State Education Department is in the process of implementing a two-phase alignment of the NYS English as a Second Language Achievement Test (NYSESLAT) to the Common Core. As a part of this new alignment, the Department is also building a new initial identification assessment, the NYSITELL. The NYSITELL will be based on, and similar to, the NYSESLAT. Additionally, the NYSITELL is being developed from the same pool of questions as the NYSESLAT and, thus, the two tests will include the same types of questions. These new alignments will better enable educators to determine a student’s level of English proficiency and subsequently provide the appropriate instruction and will facilitate the field’s transition to this new identification test.

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 here-with, and must be received within 45 days of the State Register publication date of the Notice.

#### **Job Impact Statement**

The proposed amendment specifies a new test, the New York State Identification Test for English Language Learners (NYSITELL), for purposes of identifying pupils with limited English proficiency, and will not have an adverse impact on jobs or employment activities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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

### **Impartial Due Process Hearings for Special Education Matters**

**I.D. No.** EDU-45-13-00035-P

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

**Proposed Action:** Amendment of sections 200.1, 200.5 and 200.16 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 305(1), (2), (20), 3214(3)(g), 4402(1), (2), 4403(3), 4404(1), 4410(7)(b) and (13)

**Subject:** Impartial due process hearings for special education matters.

**Purpose:** Ensure that due process hearings are conducted in a more efficient and expeditious manner in order to meet statutory time lines.

**Substance of proposed rule (Full text is posted at the following State website: <http://www.p12.nysed.gov/specialed/timely.htm>):** The State Education Department (SED) proposes to amend sections 200.1, 200.5 and 200.16 of the Commissioner's Regulations, relating to Special Education impartial hearings. Overall, the proposed amendment will streamline the process for conducting hearings, which will in turn, facilitate a more efficient and expeditious hearing. This improved process will promote timely due process decisions and is likely to result in costs savings to districts. The following is a summary of the substantive provisions of the proposed rule.

Certification and appointment of IHOs [new sections 200.1(x)(4)(vi) and 200.5(j)(3)(i)(c)]:

The proposed rule would require an individual certified by the Commissioner as a hearing officer to be willing and available to accept appointment to conduct impartial hearings, and would provide for the rescinding of an impartial hearing officer (IHO)'s certification if he or she is unavailable or unwilling to accept an appointment within a two-year period of time, unless good cause is shown.

The proposed rule would also prohibit an IHO from accepting appointment as an IHO if he or she is an attorney involved in a pending due process complaint involving the same school district, or has, within a two-year period of time, served in the same district as an attorney in a due process complaint, or if he or she is an individual with special knowledge or training with respect to the problems of children with disabilities who has accompanied and advised a party from the same school district in a due process complaint.

Consolidation of multiple due process requests for the same student [new section 200.5(j)(3)(ii)(a)]:

In the interests of judicial economy and in furtherance of the student's educational interests, the proposed rule would establish procedures for the consolidation of multiple due process hearing requests filed for the same student, including the factors that must be considered in determining whether to consolidate separate requests for due process.

Decisions of the IHO [section 200.5(j)(4)(iii)]

The proposed amendment would preclude an IHO from issuing a so-ordered decision on the terms of a settlement agreement reached by the parties in other matters not before the IHO.

Timeline to render a decision [section 200.5(j)(5)]:

To further align the State's timeline requirements for issuing decisions with the federal requirements, the proposed amendment would clarify that:

- when a district files a due process complaint, the decision is due not later than 45 days from the day after the public agency's due process complaint is received by the other party and SED; and
- when a parent files a due process complaint notice, the decision must

be rendered 45 days after the date on which one of the following conditions occurs first: (1) the parties agree in writing to waive the resolution meeting, (2) the parties agree in writing that a mediation or resolution meeting was held but no agreement could be reached, or (3) the expiration of the 30-day resolution period (unless the parties agree in writing to continue mediation at the end of the 30-day resolution period).

Transmittal of the Hearing Decision [section 200.5(j)(5)]

The proposed amendment would provide IHOs with additional time to provide a redacted copy of the decision to NYSED.

Extensions to the due date for rendering the impartial hearing decision [section 200.5(j)(5)(i) through (iv)]:

The proposed amendment further reinforces the importance of granting extensions for only limited purposes, while addressing the practical concerns IHOs may face in conducting a hearing when the parties attempt to engage in settlement negotiations. The amendment would expressly prohibit an IHO from soliciting extensions for purposes of his or her own scheduling conflicts; prescribe additional considerations an IHO must consider in granting an extension; prohibit an IHO from granting an extension after the record close date; and require the IHO to set forth the facts relied upon for each extension granted. The amendment would also allow IHOs to grant extensions for the purposes of settlement discussions.

Impartial Hearing Record [section 200.5(j)(5)(vi)]

The proposed amendment further clarifies information that must be included in the record and provides that after the IHO issues the decision, he/she must promptly transmit the record to the school district with a certification.

Withdrawals of requests for due process hearings [new section 200.5(j)(6)]:

The proposed rule would address existing concerns regarding the withdrawal and subsequent resubmission of the same or substantially similar due process complaints by establishing procedures for the withdrawal of a due process complaint and requiring a withdrawal to be made on notice to the IHO if it is made after the commencement of the hearing. In particular, the rule would require that a request for a withdrawal made after the commencement of the hearing must be on notice to the IHO and the parties and would be presumed to be without prejudice, provided, however, that the impartial hearing officer may issue a written decision finding that the withdrawal is with prejudice upon review of the balancing of the equities.

**Text of proposed 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](mailto: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](mailto:spedpubliccomment@mail.nysed.gov)

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

#### **Regulatory Impact Statement**

##### **STATUTORY AUTHORITY:**

Education Law section 101 continues the existence of the State Education Department, with the Board of Regents at its head and the Commissioner of Education as the chief administrative officer, and charges the Department with the general management and supervision of public schools and educational work of the State.

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.

Education Law section 305(1) and (2) provide the Commissioner, as chief executive officer of the State education system, with general supervision over schools and institutions subject to the provisions of education law, and responsibility for executing Regents policies. Section 305(20) authorizes the Commissioner with such powers and duties as are charged by the Regents.

Education Law section 3214(3)(g) establishes the authority of an impartial hearing officer relating to a change in placement to interim alternative educational settings.

Education Law section 4402 establishes the duties of school districts for the education of students with disabilities.

Education Law section 4403 outlines the Department's responsibilities regarding special education programs/ and services to students with disabilities. Section 4403(3) authorizes the Department to adopt regulations as Commissioner deems in their best interests.

Education Law section 4404 establishes appeal procedures for students with disabilities. Subdivision (1) authorizes and requires the Commissioner to promulgate regulations relating to the qualifications, procedures and timelines for impartial hearings, as well as procedures for the suspension or revocation of impartial hearing officer certification for good cause.

Education Law section 4410(7)(b) establishes the timeline for an impartial hearing officer to render a decision for preschool students with disabilities. Section 4410(13) authorizes the Commissioner to adopt regulations to implement the statute.

#### LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes. The proposed rule amends the procedures for conducting a special education due process hearing so that the hearings will be conducted in a more efficient and expeditious manner and expressly provides impartial hearing officers (IHOs) with the tools necessary to properly manage and conduct these hearings in such manner, in order to further promote compliance with the federal timeline requirements. More specifically, the proposed rule primarily addresses seven procedural issues relating to impartial hearings, including: (1) certification and appointment of IHOs; (2) consolidation of multiple due process complaint notices for the same student; (3) decision of the IHO; (4) timeline to render a hearing decision; (5) extensions of the timelines for an impartial hearing decision; (6) contents and certification of the impartial hearing record; and (7) withdrawals of due process complaint notices.

In amending the procedures for conducting impartial hearings, the proposed amendment addresses processes which have been identified by the State Education Department over the past few years as being inconsistent and problematic, and addresses these issues in conformity with State Review Officer decisions, best practices, and findings made by the Department in investigating untimely decisions by hearing officers pursuant to its authority granted under section 200.21 of the Commissioner's Regulations.

Among other things, the proposed amendment would establish procedures for the consolidation of multiple due process hearing requests filed for the same student; prohibit an IHO from soliciting extension requests or issuing extensions to the timelines to conduct an impartial hearing and render a decision due to his or her own scheduling conflicts; clarify the factors an IHO must consider in granting an extension; prohibit an IHO from granting an extension after the record close date; require the IHO to set forth the facts relied upon for each extension granted; allow an IHO to grant not more than one 30-day extension for the purpose of settlement discussions between the parties; provide that upon a finding of good cause based on the likelihood that a settlement may be reached, an extension may be granted for settlement discussions between the parties; and establish procedures for the withdrawal of a due process complaint, which would provide that under certain limited circumstances a withdrawal after the commencement of the hearing may result in a dismissal with prejudice; and provides that a withdrawal shall be presumed to be without prejudice except that the IHO may, at the request of the other party and upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice. The proposed amendment further provides that the IHO's decision that the withdrawal is with prejudice is binding on the parties unless appealed to a State Review Officer.

#### NEEDS AND BENEFITS:

Federal law and regulations require all impartial hearings to be adjudicated within the 45-day timeline, or a timeline that is properly extended by the IHO at the request of either party, or in the case of an expedited or preschool hearing, within the required timelines. In 2011, only 83.26 percent of New York State impartial hearings were adjudicated within the timeline requirements. The proposed rule provides IHOs with more prescriptive authority to properly manage impartial hearing timelines. In addition, the proposed rule further ensures the impartiality and availability of IHOs.

#### COSTS:

- a. Costs to State government: None.
- b. Costs to local governments: The proposed amendment does not impose any additional costs beyond those already imposed by federal and State statutes and regulations. It is anticipated that school districts will experience costs savings as a result of these hearings being conducted in a more efficient and expeditious manner.
- c. Costs to regulated parties: None.
- d. Costs to the State Education Department of implementation and continuing compliance: The proposed amendment does not impose any additional costs on the State Education Department beyond those already imposed in accordance with law and regulations.

#### LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon local governments beyond those already imposed by federal and State statutes and regulations. Among other things, the proposed rule amends the procedures that must be followed by an IHO in accepting an appointment, conducting a hearing, and rendering a decision and providing the decision to the State Education Department. The proposed rule amends the procedures for conducting hearings to ensure they are held in an efficient and expeditious manner in compliance with the federal timeline requirements, and provides IHOs with the tools to

properly manage and conduct these hearings in such a manner. The rule also aligns the State's timeline requirements for issuing an impartial hearing decision with the federal requirements.

#### PAPERWORK:

The proposed rule does not impose any additional paperwork requirements on local governments.

#### DUPLICATION:

The proposed amendment does not duplicate, overlap, or conflict with any other State or federal statute or regulation. The rule aligns the State's timeline requirements for issuing an impartial hearing decision with the federal requirements.

#### ALTERNATIVES:

While the Department considered addressing identified matters through policy guidance, it chose to promulgate regulations because the State's special education impartial hearings are conducted by independent hearing officers. The proposed amendment was drafted in consideration of extensive public comment received on a similar proposed amendment published in the State Register in 2012, which has since expired. The proposed amendment is consistent with these standards and State and federal laws and regulations.

#### FEDERAL STANDARDS:

34 C.F.R. sections 300.511 – 515 establish the federal requirements for the impartial due process hearing, hearing rights, hearing decisions, finality of the decision, appeal and impartial review and the timelines and convenience of impartial hearings. The proposed amendment is consistent with federal standards and aligns New York State's timeline to render the hearing decision with the federal timeline. The proposed amendment also addresses actions required by the U.S. Department of Education to ensure the timely adjudication of impartial hearing decisions.

#### COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with the proposed amendment by its effective date.

#### *Regulatory Flexibility Analysis*

##### Small Businesses:

The proposed rule amends the procedures for conducting a special education due process hearing so that the hearings will be conducted in a more efficient and expeditious manner and expressly provides impartial hearing officers (IHOs) with the tools necessary to properly manage and conduct these hearings in such a manner, in order to further promote compliance with the federal timeline requirements.

The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping 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 affirmative steps are 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 primarily applies to independent IHOs certified by the State Education Department and does not impose any additional compliance requirements or costs on such governments.

##### 2. COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any additional compliance requirements on local governments beyond those already required pursuant to federal and State statutes and regulations. The proposed amendment relates to the procedures that must be followed by an IHO in accepting an appointment, conducting a hearing, rendering a decision, and providing the decision to the State Education Department. It is anticipated that school districts will experience cost-savings as a result of these impartial hearings being conducted in a more efficient and expeditious manner, in compliance with federal and State regulations.

##### 3. PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional service requirements on local governments.

##### 4. COMPLIANCE COSTS:

The proposed amendment does not impose any additional costs on local governments. It is anticipated that school districts will experience cost-savings as a result of these impartial hearings being conducted in a more efficient and expeditious manner, in compliance with federal and State regulations.

##### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements or costs on local governments.

##### 6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to enforce compliance with the timeline requirements prescribed in federal regulations governing the conduct of special education due process hearings. Sections 300.511 – 300.515 of the Code of Federal Regulations establish the federal requirements for the impartial due process hearing, hearing rights, hearing deci-

sions, finality of the decision, appeal and impartial review, and the timelines and convenience of impartial hearings. The proposed amendment is consistent with federal standards and aligns New York State's timeline requirements to issue a hearing decision with federal requirements.

The proposed amendment is necessary to provide for consistent procedures regarding the conduct of impartial hearings in New York State and to ensure compliance with federal law. The proposed amendment was developed upon review of State Review Officer decisions, investigations completed by the State Education Department of untimely hearing decisions pursuant to its authority granted under section 200.21 of the Commissioner's regulations, and best practices. The amendment is consistent with these standards.

#### 7. LOCAL GOVERNMENT PARTICIPATION:

Public comment on the proposed rule will be accepted for 45 days after the date it is published in the State Register. In addition, 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, and to the chief school officers of the Big 5 city school districts.

#### Rural Area Flexibility Analysis

##### 1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment applies to impartial hearing officers (IHOs) who conduct special education impartial hearings for all public schools located in New York State (NYS) where the district or a parent initiates a due process complaint, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with population density of 150 per square miles or less.

##### 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. Among other things, the proposed amendment would establish procedures for the consolidation of multiple due process hearing requests filed for the same student; prohibit an IHO from soliciting extension requests or issuing extensions to the timelines to conduct an impartial hearing and render a decision due to his or her own scheduling conflicts; clarify the factors an IHO must consider in granting an extension; prohibit an IHO from granting an extension after the record close date; require the IHO to set forth the facts relied upon for each extension granted; allow an IHO to grant not more than one 30-day extension for the purpose of settlement discussions between the parties; provide that upon a finding of good cause based on the likelihood that a settlement may be reached, an extension may be granted for settlement discussions between the parties; and establish procedures for the withdrawal of a due process complaint notice, which would provide that under certain limited circumstances a withdrawal after the commencement of the hearing may result in a dismissal with prejudice; and provide that a withdrawal shall be presumed to be without prejudice except that the IHO may, at the request of the other party and upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice. The proposed amendment further provides that the IHO's decision that the withdrawal is with prejudice is binding on the parties unless appealed to a State Review Officer.

##### 3. COSTS:

The proposed amendment does not impose any additional costs on entities in rural areas.

##### 4. MINIMIZING ADVERSE IMPACT:

The proposed regulations were developed in review of other states' impartial due process hearing regulations, State Review Officer decisions and complaints filed pursuant to section 200.21 of the Regulation of the Commissioner of Education. The amendments proposed are consistent with these standards. 34 C.F.R. sections 300.511 – 515 establish the federal requirements for the impartial due process hearing, hearing rights, hearing decisions, finality of the decision, appeal and impartial review and the timelines and convenience of impartial hearings. The proposed amendment is consistent with federal standards and aligns the NYS timeline to render the hearing decision, which is currently inconsistent with the federal timeline. The proposed amendment addresses actions required by the U.S. Department of Education to ensure the timely adjudication of impartial hearing decisions in NYS.

##### 5. RURAL AREA PARTICIPATION:

Public comment on the proposed rule will be accepted for 45 days after the date it is published in the State Register. In addition, the proposed amendment was submitted for comment to the Department's Rural Education Advisory Committee, which includes representatives of school districts in rural areas.

#### Job Impact Statement

The proposed rule amends the procedures for conducting a special education due process impartial hearing so that the hearings will be conducted

in a more efficient and expeditious manner and expressly provides impartial hearing officers with the tools necessary to properly manage and conduct these hearings in such manner, in order to further promote compliance with the federal timeline requirements. The proposed amendment will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the 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.

## Department of Financial Services

### EMERGENCY RULE MAKING

#### Public Retirement Systems

**I.D. No.** DFS-45-13-00005-E

**Filing No.** 999

**Filing Date:** 2013-10-21

**Effective Date:** 2013-10-21

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

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

**Statutory authority:** Financial Services Law, sections 202 and 302; Insurance Law, sections 301, 314, 7401(a) and 7402(n)

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

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

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

This regulation was previously promulgated on an emergency basis on June 18, 2009, September 16, 2009, January 5, 2010, April 2, 2010, May 28, 2010, July 29, 2010, September 23, 2010, November 19, 2010, January 18, 2011, March 21, 2011, May 19, 2011, August 16, 2011, November 10, 2011, February 7, 2012, May 7, 2012, August 3, 2012, October 31, 2012, January 28, 2013, April 26, 2013, and July 24, 2013. The Department is currently working with the Governor's Office to make additional revisions to the regulation.

**Subject:** Public Retirement Systems.

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

**Text of emergency rule:** Section 136-2.2 is amended to read as follows:  
§ 136-2.2 Definitions.

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

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

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

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

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

[(e)](b) Consultant or advisor shall mean any person (other than an

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(g) The Comptroller shall:

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

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

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

[(4)] disclose on the OSC public website, on at least an annual basis, instances where an investment manager has paid a fee to a placement agent or intermediary;]

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 18, 2014.

**Text of rule and any required statements and analyses may be obtained from:** Michael Maffei, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 480-5027, email: michael.maffei@dfs.ny.gov

#### **Regulatory Impact Statement**

1. Statutory authority: The Superintendent's authority for the adoption of the rule to 11 NYCRR 136 is derived from sections 202 and 302 of the Financial Services Law ("FSL") and sections 301, 314, 7401(a), and 7402(n) of the Insurance Law.

FSL section 202 establishes the office of the Superintendent and designates the Superintendent to be the head of the Department of Financial Services ("DFS").

FSL section 302 and Insurance Law section 301, in material part, authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, the Banking Law, the Financial Services Law, or any other law of this state and to prescribe regulations interpreting the Insurance Law.

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

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

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

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

2. Legislative objectives: Insurance Law section 314 authorizes the Superintendent to promulgate and amend, after consultation with the respec-

tive administrative heads of public retirement and pension systems and after a public hearing, standards with respect to the public retirement and pension systems of the State of New York.

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

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

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

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

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

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

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

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

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

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

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

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

- A ban on political contributions by any employee of any placement agent seeking to do business with the Fund;
- A requirement that any placement agent seeking to do business with the Fund be registered as a broker dealer with the SEC and ensure that its professionals have passed the appropriate Series qualifications administered by Financial Industry Regulatory Authority ("FINRA");

- A requirement that any placement agent seeking to do business in New York register with the Department; and

- A requirement that any placement agent representing an investment manager before the Fund fully disclose the contractual arrangement between it and the manager, including the fee arrangement and the scope of services to be provided.

The Securities Industry and Financial Markets Association ("SIFMA"), representing hundreds of securities firms, banks, and asset managers, commented that the proposed rule (1) inadvertently limits the access of smaller fund managers to the Fund; (2) restricts the number and types of advisers that could be utilized by the Fund; (3) creates an inherent conflict between federal and state law that would make it impossible to do business with the Fund while complying with both; and (4) adds duplicative regulation in an area already substantially regulated at the state level and that is primed for further federal regulation through the imminent imposition of a federal pay-to-play regime on all registered broker-dealers acting as placement agents. In addition, SIFMA provided language that it believes would be consistent with the existing federal requirements on the use of placement agents. SIFMA requested that the Department either exclude from the proposed rule those placement agents who are registered as broker-dealers under the Securities Exchange Act of 1934 or delay the enactment of the proposed rule until the federal and state placement agent initiatives are finalized.

The Superintendent did consider other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. The Department considered limiting the ban to include intent on the part of the party using placement agents, or defining "placement agent" in more general terms. At the time, the Superintendent concluded that only an immediate, total ban on the use of placement agents could provide sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments.

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

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

#### **Regulatory Flexibility Analysis**

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

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

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

These standards are intended to assure that the conduct of the business of the Retirement System and the Fund, and of the State Comptroller (as administrative head of the Retirement System and as sole trustee of the Fund), are consistent with the principles specified in the rule. Most among all affected parties, the State Comptroller, as a fiduciary whose responsibilities are clarified and broadened, is impacted by the rule. The State Comptroller is not a "small business" as defined in section 102(8) of the State Administrative Procedure Act.

This rule will affect investment managers and other intermediaries (other than OSC employees) who provide technical or professional services to the Fund related to Fund investments. The rule will prohibit investment managers from using the services of a placement agent unless such agent is a regular employee of the investment manager and is acting in a broader capacity than just providing specific investment advice to the Fund. In addition, the rule is also directed to placement agents, who as a

result of this rule, will no longer be engaged directly or indirectly by investment managers that do business with the Fund. Some investment managers and placement agents may come within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act, because they are independently owned and operated, and employ 100 or fewer individuals.

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

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

2. Compliance requirements: None.

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

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

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

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

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

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

#### **Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas: Investment managers, placement agents, consultants or advisors that do business in rural areas as defined under State Administrative Procedure Act Section 102(10) will be affected by this rule. The rule bans the use of placement agents in connection with investments by the New York State Common Retirement Fund ("the Fund"), which may adversely affect the business of placement agents and of other entities that utilize placement agents and are involved in Fund investments.

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

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

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

5. Rural area participation: A public hearing was held on April 28, 2010. Comments were received from two entities recommending that the total ban on the use of placement agents be modified. The Department will

continue to assess the comments that have been received and any others that may be submitted.

#### **Job Impact Statement**

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

## **EMERGENCY RULE MAKING**

### **Assessment of Entities Regulated by the Banking Division of the Department of Financial Services**

**I.D. No.** DFS-45-13-00020-E

**Filing No.** 1005

**Filing Date:** 2013-10-22

**Effective Date:** 2013-10-23

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

**Action taken:** Addition of Part 501 to Title 3 NYCRR.

**Statutory authority:** Banking Law, section 17; Financial Services Law, section 206

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

**Specific reasons underlying the finding of necessity:** Pursuant to the Financial Services Law ("FSL"), the New York State Banking Department ("Banking Department") and the New York State Insurance Department were consolidated, effective October 3, 2011, into the Department of Financial Services ("Department").

Prior to the consolidation, assessments of institutions subject to the Banking Law ("BL") were governed by Section 17 of the BL; effective on October 3, 2011, assessments are governed by Section 206 of the Financial Services Law, provided that Section 17 continues to apply to assessments for the fiscal year which commenced April 1, 2011.

Both Section 17 of the Banking Law and Section 206 of the Financial Services Law provide that all expenses (compensation, lease costs and other overhead) of the Department in connection with the regulation and supervision (including examination) of any person or entity licensed, registered, incorporated or otherwise formed pursuant to the BL are to be charged to, and paid by, the regulated institutions subject to the supervision of in the Banking Division of the Department (the "Banking Division"). Under both statutes, the Superintendent is authorized to assess regulated institutions in the Banking Division in such proportions as the Superintendent shall deem just and reasonable.

Litigation commenced in June, 2011 challenged the methodology used by the Banking Department to assess mortgage bankers. On May 3, 2012, the Appellate Division invalidated this methodology for the 2010 State Fiscal Year, finding that the former Banking Department had not followed the requirements of the State Administrative Procedures Act.

In response to this ruling, the Department has determined to adopt this new rule setting forth the assessment methodology applicable to all entities regulated by the Banking Division for fiscal years beginning with fiscal year 2011.

The emergency adoption of this regulation is necessary to implement the requirements of Section 17 of the Banking Law and Section 206 of the Financial Services Law in light of the determination of the Court and the ongoing need to fund the operations of the Department without interruption.

**Subject:** Assessment of entities regulated by the Banking Division of the Department of Financial Services.

**Purpose:** To set forth the basis for allocating all costs and expenses attributable to the operation of the Banking Division of the Department of Financial Services.

#### **Text of emergency rule: Part 501**

*Superintendent's Regulations*  
§ 501.1 Background.

*Pursuant to the Financial Services Law ("FSL"), the New York State Banking Department ("Banking Department") and the New York State In-*

insurance Department were consolidated on October 3, 2011 into the Department of Financial Services ("Department").

Prior to the consolidation, assessments of institutions subject to the Banking Law ("BL") were governed by Section 17 of the BL. Effective October 3, 2011, assessments are governed by Section 206 of the FSL, provided that Section 17 of the BL continues to apply to assessments for the fiscal year commencing on April 1, 2011.

Both Section 17 of the BL and Section 206 of the FSL provide that all expenses (including, but not limited to, compensation, lease costs and other overhead costs) of the Department attributable to institutions subject to the BL are to be charged to, and paid by, such regulated institutions. These institutions ("Regulated Entities") are now regulated by the Banking Division of the Department. Under both Section 17 of the BL and Section 206 of the FSL, the Superintendent is authorized to assess Regulated Entities for its total costs in such proportions as the Superintendent shall deem just and reasonable.

The Banking Department has historically funded itself entirely from industry assessments of Regulated Entities. These assessments have covered all direct and indirect expenses of the Banking Department, which are activities that relate to the conduct of banking business and the regulatory concerns of the Department, including all salary expenses, fringe benefits, rental and other office expenses and all miscellaneous and overhead costs such as human resource operations, legal and technology costs.

This regulation sets forth the basis for allocating such expenses among Regulated Entities and the process for making such assessments.

#### § 501.2 Definitions.

The following definitions apply in this Part:

(a) "Total Operating Cost" means for the fiscal year beginning on April 1, 2011, the total direct and indirect costs of operating the Banking Division. For fiscal years beginning on April 1, 2012, "Total Operating Cost" means (1) the sum of the total operating expenses of the Department that are solely attributable to regulated persons under the Banking Law and (2) the proportion deemed just and reasonable by the Superintendent of the other operating expenses of the Department which under Section 206(a) of the Financial Services Law may be assessed against persons regulated under the Banking Law and other persons regulated by the Department.

(b) "Industry Group" means the grouping to which a business entity regulated by the Banking Division is assigned. There are three Industry Groups in the Banking Division:

(1) The Depository Institutions Group, which consists of all banking organizations and foreign banking corporations licensed by the Department to maintain a branch, agency or representative office in this state;

(2) The Mortgage-Related Entities Group, which consists of all mortgage brokers, mortgage bankers and mortgage loan servicers; and

(3) The Licensed Financial Services Providers Group, which consists of all check cashers, budget planners, licensed lenders, sales finance companies, premium finance companies and money transmitters.

(c) "Industry Group Operating Cost" means the amount of the Total Operating Cost to be assessed to a particular Industry Group. The amount is derived from the percentage of the total expenses for salaries and fringe benefits for the examining, specialist and related personnel represented by such costs for the particular Industry Group.

(d) "Industry Group Supervisory Component" means the total of the Supervisory Components for all institutions in that Industry Group.

(e) "Supervisory Component" for an individual institution means the product of the average number of hours attributed to supervisory oversight by examiners and specialists of all institutions of a similar size and type, as determined by the Superintendent, in the applicable Industry Group, or the applicable sub-group, and the average hourly cost of the examiners and specialists assigned to the applicable Industry Group or sub-group.

(f) "Industry Group Regulatory Component" means the Industry Group Operating Cost for that group minus the Industry Group Supervisory Component and certain miscellaneous fees such as application fees.

(g) "Industry Financial Basis" means the measurement tool used to distribute the Industry Group Regulatory Component among individual institutions in an Industry Group.

The Industry Financial Basis used for each Industry Group is as follows:

(1) For the Depository Institutions Group: total assets of all institutions in the group;

(2) For the Mortgage-Related Entities Group: total gross revenues from New York State operations, including servicing and secondary market revenues, for all institutions in the group; and

(3) For the Licensed Financial Services Providers Group: (i.) for budget planners, the number of New York customers; (ii.) for licensed lenders, the dollar amount of New York assets; (iii.) for check cashers, the dollar amount of checks cashed in New York; (iv.) for money transmitters, the dollar value of all New York transactions; (v.) for premium finance companies, the dollar value of loans originated in New York; and (vi.) for sales finance companies, the dollar value of credit extensions in New York.

(h) "Financial Basis" for an individual institution is that institution's portion of the measurement tool used in Section 501.2(g) to develop the Industry Financial Basis. (For example, in the case of the Depository Institutions Group, an entity's Financial Basis would be its total assets.)

(i) "Industry Group Regulatory Rate" means the result of dividing the Industry Group Regulatory Component by the Industry Financial Basis.

(j) "Regulatory Component" for an individual institution is the product of the Financial Basis for the individual institution multiplied by the Industry Group Regulatory Rate for that institution.

#### § 501.3 Billing and Assessment Process.

The New York State fiscal year begins April 1 and ends March 31 of the following calendar year. Each institution subject to assessment pursuant to this Part is billed five times for a fiscal year: four quarterly assessments (each approximately 25% of the anticipated annual amount) based on the Banking Division's estimated annual budget at the time of the billing, and a final assessment (or "true-up"), based on the Banking Division's actual expenses for the fiscal year. Any institution that is a Regulated Entity for any part of a quarter shall be assessed for the full quarter.

#### § 501.4 Computation of Assessment.

The total annual assessment for an institution shall be the sum of its Supervisory Component and its Regulatory Component.

#### § 501.5 Penalties/Enforcement Actions.

All Regulated Entities shall be subject to all applicable penalties, including late fees and interest, provided for by the BL, the FSL, the State Finance law or other applicable laws. Enforcement actions for nonpayment could include suspension, revocation, termination or other actions.

#### § 501.6 Effective Date.

This Part shall be effective immediately. It shall apply to all State Fiscal Years beginning with the Fiscal Year starting on April 1, 2011.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 19, 2014.

**Text of rule and any required statements and analyses may be obtained from:** Gene C. Brooks, First Assistant Counsel, Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1641, email: gene.brooks@dfs.ny.gov

#### Regulatory Impact Statement

##### 1. Statutory Authority.

Pursuant to the Financial Services Law ("FSL"), the New York State Banking Department (the "Banking Department") and the New York State Insurance Department were consolidated, effective October 3, 2011, into the Department of Financial Services (the "Department").

Prior to the consolidation, assessments of institutions subject to the Banking Law ("BL") were governed by Section 17 of the BL; effective on October 3, 2011, assessments are governed by Section 206 of the Financial Services Law, provided that Section 17 continues to apply to assessments for the fiscal year which commenced April 1, 2011.

Both Section 17 of the BL and Section 206 of the FSL provide that all expenses (compensation, lease costs and other overhead) of the Department in connection with the regulation and supervision of any person or entity licensed, registered, incorporated or otherwise formed pursuant to the BL are to be charged to, and paid by, the regulated institutions subject to the supervision of the Banking Division of the Department (the "Banking Division"). Under both statutes, the Superintendent is authorized to assess regulated institutions in the Banking Division in such proportions as the Superintendent shall deem just and reasonable.

In response to a court ruling, *In the Matter of Homestead Funding Corporation v. State of New York Banking Department et al.*, 944 N.Y.S.2d 649 (2012) ("Homestead"), that held that the Department should adopt changes to its assessment methodology for mortgage bankers through a formal assessment rule pursuant to the requirements of the State Administrative Procedures Act ("SAPA"), the Department has determined to adopt this new regulation setting forth the assessment methodology applicable to all entities regulated by the Banking Division for fiscal years beginning with fiscal year 2011.

##### 2. Legislative Objectives.

The BL and the FSL make the industries regulated by the former Banking Department (and now by the Banking Division of the new Department) responsible for all the costs and expenses of their regulation by the State. The assessments have covered all direct and indirect expenses of the Banking Department, which are activities that relate to the conduct of banking business and the regulatory concerns of the Department, including all salary expenses, fringe benefits, rental and other office expenses and all miscellaneous and overhead costs such as human resource operations, legal and technology costs.

This reflects a long-standing State policy that the regulated industries are the appropriate parties to pay for their supervision in light of the financial benefits it provides to them to engage in banking and other

regulated businesses in New York. The statute specifically provides that these costs are to be allocated among such institutions in the proportions deemed just and reasonable by the Superintendent.

While this type of allocation had been the practice of the former Banking Department for many decades, Homestead found that a change to the methodology for mortgage bankers to include secondary market and servicing income should be accomplished through formal regulations subject to the SAPA process. Given the nature of the Banking Division's assessment methodology - - the calculation and payment of the assessment is ongoing throughout the year and any period of uncertainty as to the applicable rule would be extremely disruptive - - the Department has determined that it is necessary to adopt the rule on an emergency basis so as to avoid any possibility of disrupting the funding of its operations.

### 3. Needs and Benefits.

The Banking Division regulates more than 250 state chartered banks and licensed foreign bank branches and agencies in New York with total assets of over \$2 trillion. In addition, it regulates a variety of other entities engaged in delivering financial services to the residents of New York State. These entities include: licensed check cashers; licensed money transmitters; sales finance companies; licensed lenders; premium finance companies; budget planners; mortgage bankers and brokers; mortgage loan servicers; and mortgage loan originators.

Collectively, the regulated entities represent a spectrum, from some of the largest financial institutions in the country to the smallest, neighborhood-based financial services providers. Their services are vital to the economic health of New York, and their supervision is critical to ensuring that these services are provided in a fair, economical and safe manner.

This supervision requires that the Banking Division maintain a core of trained examiners, plus facilities and systems. As noted above, these costs are by statute to be paid by all regulated entities in the proportions deemed just and reasonable by the Superintendent. The new regulation is intended to formally set forth the methodology utilized by the Banking Division for allocating these costs.

### 4. Costs.

The new regulation does not increase the total costs assessed to the regulated industries or alter the allocation of regulatory costs between the various industries regulated by the Banking Division. Indeed, the only change from the allocation methodology used by the Banking Department in the previous state fiscal years is that the regulatory costs assessed to the mortgage banking industry will be divided among the entities in that group on a basis which includes income derived from secondary market and servicing activities. The Department believes that this is a more appropriate basis for allocating the costs associated with supervising mortgage banking entities.

### 5. Local Government Mandates.

None.

### 6. Paperwork.

The regulation does not change the process utilized by the Banking Division to determine and collect assessments.

### 7. Duplication.

The regulation does not duplicate, overlap or conflict with any other regulations.

### 8. Alternatives.

The purpose of the regulation is to formally set forth the process employed by the Department to carry out the statutory mandate to assess and collect the operating costs of the Banking Division from regulated entities. In light of Homestead, the Department believes that promulgating this formal regulation is necessary in order to allow it to continue to assess all of its regulated institutions in the manner deemed most appropriate by the Superintendent. Failing to formalize the Banking Division's allocation methodology would potentially leave the assessment process open to further judicial challenges.

### 9. Federal Standards.

Not applicable.

### 10. Compliance Schedule.

The emergency regulations are effective immediately. Regulated institutions will be expected to comply with the regulation for the fiscal year beginning on April 1, 2011 and thereafter.

## **Regulatory Flexibility Analysis**

### 1. Effect of the Rule:

The regulation does not have any impact on local governments.

The regulation simply codifies the methodology used by the Banking Division of the Department of Financial Services (the "Department") to assess all entities regulated by it, including those which are small businesses. The regulation does not increase the total costs assessed to the regulated industries or alter the allocation of regulatory costs between the various industries regulated by the Banking Division.

Indeed, the only change from the allocation methodology used by the Banking Department in the previous state fiscal years is that the regulatory

costs assessed to the mortgage banking industry will be divided among the entities in that group on a basis which includes income derived from secondary market and servicing activities. The Department believes that this is a more appropriate basis for allocating the costs associated with supervising mortgage banking entities. It is expected that the effect of this change will be that larger members of the mortgage banking industry will pay an increased proportion of the total cost of regulating that industry, while the relative assessments paid by smaller industry members will be reduced.

### 2. Compliance Requirements:

The regulation does not change existing compliance requirements. Both Section 17 of the Banking Law and Section 206 of the Financial Services Law provide that all expenses (compensation, lease costs and other overhead) of the Department in connection with the regulation and supervision of any person or entity licensed, registered, incorporated or otherwise formed pursuant to the Banking Law are to be charged to, and paid by, the regulated institutions subject to the supervision of the Banking Division. Under both statutes, the Superintendent is authorized to assess regulated institutions in the Banking Division in such proportions as the Superintendent shall deem just and reasonable.

### 3. Professional Services:

None.

### 4. Compliance Costs:

All regulated institutions are currently subject to assessment by the Banking Division. The regulation simply formalizes the Banking Division's assessment methodology. It makes only one change from the allocation methodology used by the Banking Department in the previous state fiscal years. That change affects only one of the industry groups regulated by the Banking Division. Regulatory costs assessed to the mortgage banking industry are now divided among the entities in that group on a basis which includes income derived from secondary market and servicing activities. Even within the one industry group affected by the change, additional compliance costs, if any, are expected to be minimal.

### 5. Economic and Technological Feasibility:

All regulated institutions are currently subject to the Banking Division's assessment requirements. The formalization of the Banking Division's assessment methodology in a regulation will not impose any additional economic or technological burden on regulated entities which are small businesses.

### 6. Minimizing Adverse Impacts:

Even within the mortgage banking industry, which is the one industry group affected by the change in assessment methodology, the change will not affect the total amount of the assessment. Indeed, it is anticipated that this change may slightly reduce the proportion of mortgage banking industry assessments that is paid by entities that are small businesses.

### 7. Small Business and Local Government Participation:

This regulation does not impact local governments.

This regulation simply codifies the methodology which the Banking Division uses for determining the just and reasonable proportion of the Banking Division's costs to be charged to and paid by each regulated institution, including regulated institutions which are small businesses. The overall methodology was adopted in 2005 after extensive discussion with regulated entities and industry associations representing groups of regulated institutions, including those that are small businesses.

Thereafter, the Banking Department applied assessments against all entities subject to its regulation. In addition, for fiscal 2010, the Banking Department changed its overall methodology slightly with respect to assessments against the mortgage banking industry to include income derived from secondary market and servicing activities. Litigation was commenced challenging this latter change, and in a recent decision, *In the Matter of Homestead Funding Corporation v. State of New York Banking Department et al.*, 944 N.Y.S. 2d 649 (2012), the court determined that the Department should adopt a change to its assessment methodology for mortgage bankers through a formal assessment rule promulgated pursuant to the requirements of the State Administrative Procedures Act. The challenged change in methodology had the effect of increasing the proportion of assessments against the mortgage banking industry paid by its larger members, while reducing the assessments paid by smaller participants, including those which are small businesses.

## **Rural Area Flexibility Analysis**

Types and Estimated Numbers. There are entities regulated by the New York State Department of Financial Services (formerly the Banking Department) located in all areas of the State, including rural areas. However, this rule simply codifies the methodology currently used by the Department to assess all entities regulated by it. The regulation does not alter that methodology, and thus it does not change the cost of assessments on regulated entities, including regulated entities located in rural areas.

Compliance Requirements. The regulation would not change the current compliance requirements associated with the assessment process.

Costs. While the regulation formalizes the assessment process, it does not change the amounts assessed to regulated entities, including those located in rural areas.

**Minimizing Adverse Impacts.** The regulation does not increase the total amount assessed to regulated entities by the Department. It simply codifies the methodology which the Superintendent has chosen for determining the just and reasonable proportion of the Department's costs to be charged to and paid by each regulated institution.

**Rural Area Participation.** This rule simply codifies the methodology which the Department currently uses for determining the just and reasonable proportion of the Department's costs to be charged to and paid by each regulated institution, including regulated institutions located in rural areas. The overall methodology was adopted in 2005 after extensive discussion with regulated entities and industry associations representing groups of regulated institutions, including those located in rural areas. It followed the loss of several major banking institutions that had paid significant portions of the former Banking Department's assessments.

Thereafter, the Department applied assessments against all entities subject to its regulation. In addition, for fiscal 2010, the Department changed this overall methodology slightly with respect to assessments against the mortgage banking industry to include income derived from secondary market income and servicing income. This latter change was challenged by a mortgage banker, and in early May, the Appellate Division determined that the latter change should have been made in conformity with the State Administrative Procedures Act. The challenged part of the methodology had the effect of increasing the proportion of assessments against the mortgage banking industry paid by its larger members, while reducing the assessments paid by smaller participants.

#### **Job Impact Statement**

The regulation is not expected to have an adverse effect on employment.

All institutions regulated by the Banking Division (the "Banking Division") of the Department of Financial Services are currently subject to assessment by the Department. The regulation simply formalizes the assessment methodology used by the Banking Division. It makes only one change from the allocation methodology used by the former Banking Department in the previous state fiscal years.

That change affects only one of the industry groups regulated by the Banking Division. It somewhat alters the way in which the Banking Division's costs of regulating mortgage banking industry are allocated among entities within that industry. In any case, the total amount assessed against regulated entities within that industry will remain the same.

## **EMERGENCY RULE MAKING**

### **Provider Requirements for Insurance Reimbursement of Applied Behavior Analysis**

**I.D. No.** DFS-45-13-00036-E

**Filing No.** 1011

**Filing Date:** 2013-10-22

**Effective Date:** 2013-10-22

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

**Action taken:** Addition of Part 440 (Regulation 201) to Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202 and 302; Insurance Law, sections 301, 1109, 1124, 3216, 3221, 4303 and 4709; Public Health Law, section 4406

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

**Specific reasons underlying the finding of necessity:** Chapters 595 and 596 of the Laws of 2011 require all policies and contracts subject to sections 3216(i)(25), 3221(l)(17) and 4303(ee) of the Insurance Law that are issued, renewed, modified, altered or amended on or after November 1, 2012, to provide coverage for autism spectrum disorder ("ASD"), including behavioral health treatment in the form of applied behavior analysis ("ABA").

Chapters 595 and 596 of the Laws of 2011 also require that the Superintendent of Financial Services (the "Superintendent"), in consultation with the Commissioners of Health and Education, promulgate regulations that establish standards of professionalism, supervision and relevant experience for individuals who provide or supervise behavioral health treatment in the form of ABA.

In response to the statutory directive, the Superintendent seeks to promulgate new 11 NYCRR 440 (Insurance Regulation 201). The Superintendent, in consultation with the Commissioners of Health and Educa-

tion, has determined that 11 NYCRR 440 will require that behavior analysts and assistant behavior analysts who work under the supervision of behavior analysts, meet the necessary minimum standards of education, training and relevant experience to ensure that individuals with ASD receive ABA services from qualified providers.

This rule also is necessary to ensure that insurers and health maintenance organizations ("HMOs") establish adequate provider networks and provider credentialing requirements that comply with this rule so that those entities may effectively provide insurance coverage for critical ABA therapy to those individuals diagnosed with ASDs, and for whom out-of-pocket costs for those services are prohibitively expensive.

In light of the foregoing, it is critical that this new 11 NYCRR 440 be adopted as promptly as possible, and that the rule be promulgated on an emergency basis for the furtherance of the public health and general welfare.

**Subject:** Provider Requirements for Insurance Reimbursement of Applied Behavior Analysis.

**Purpose:** Establish standards of professionalism, supervision, and relevant experience for providers of Applied Behavior Analysis.

**Text of emergency rule:** Section 440.0 Purpose.

*The purpose of this Part is to establish standards of professionalism, supervision, and relevant experience for individuals who provide or supervise the provision of behavioral health treatment in the form of applied behavior analysis, for insurance coverage pursuant to Insurance Law sections 3216(i)(25), 3221(l)(17) and 4303(ee).*

**Section 440.1 Definitions.**

*For purposes of this Part:*

(a) *Applied behavior analysis or ABA means the design, implementation, and evaluation of environmental modifications, using behavioral stimuli and consequences, to produce socially significant improvement in human behavior, including the use of direct observation, measurement, and functional analysis of the relationship between environment and behavior.*

(b) *ABA aide means an individual who meets at least one of the following requirements:*

(1) *a high school diploma or its equivalent; and*

(i) *two years of full-time direct, supervised work experience providing services to children with disabilities; or*

(ii) *current matriculation in a degree program that is an approved professional preparation program for licensure in psychology, early childhood development, early childhood education, speech language pathology, special or elementary education, or in a degree program necessary for a license, registration, or certification in a profession designated as qualified personnel in 10 NYCRR 69-4.1(ak);*

(2) *an associate's degree or higher level degree in a profession listed in Education Law Title VIII or in teaching;*

(3) *certification as a teaching assistant; or*

(4) *the minimum qualifications set forth in 10 NYCRR 69-4.25(e).*

(c) *Assistant behavior analyst means:*

(1) *an individual who is certified as an assistant behavior analyst pursuant to a behavior analyst certification board to provide behavioral health treatment under the supervision of a behavior analyst; or*

(2) *an ABA aide who meets the education, experience and supervision requirements for assistant behavior analysts as set forth in this Part.*

(d) *Applied behavior analysis provider or ABA provider means:*

(1) *an assistant behavior analyst who directly provides ABA pursuant to an ABA treatment plan to an individual diagnosed with autism spectrum disorder;*

(2) *a behavior analyst who directly provides or supervises an assistant behavior analyst in the provision of ABA; or*

(3) *a licensed provider.*

(e) *Autism spectrum disorder or ASD shall have the meaning ascribed by Insurance Law section 3216(i)(25)(C)(i).*

(f) *Behavior analyst means an individual who is certified as a behavior analyst pursuant to a behavior analyst certification board.*

(g) *Behavior analyst certification board means:*

(1) *the Behavior Analyst Certification Board, Inc., a nonprofit corporation established to meet professional credentialing needs identified by behavior analysts, governments, and consumers of behavior analysis services; or*

(2) *any other entity, acceptable to the superintendent, in consultation with the Commissioners of Health and Education, that has a certification or approval process for behavior analysts.*

(h) *Behavioral health treatment means, when prescribed or ordered for an individual diagnosed with ASD by a licensed physician or licensed psychologist, counseling and treatment programs when provided by a licensed provider, and ABA when provided or supervised by a behavior analyst, that are necessary to develop, maintain, or restore, to the maximum extent practicable, the functioning of an individual. A treatment*

program includes an ABA treatment plan developed by a licensed provider and delivered by an ABA provider.

(i) Licensed provider means an individual licensed or certified to practice psychiatry, psychology, clinical social work, or another related profession pursuant to Education Law Title VIII.

Section 440.2 Supervision of assistant behavior analysts.

(a) An assistant behavior analyst must be supervised by a behavior analyst.

(b) A behavior analyst who supervises and oversees the provision of ABA by assistant behavior analysts shall meet the following minimum education, training and experience requirements:

(1) documented completion of a minimum of 20 hours of continuing education or 12 credits of matriculated or non-matriculated relevant coursework in behavioral interventions, including at a minimum the following content areas:

- (i) basic principles, processes, and concepts of behavior analysis;
- (ii) clinical application of ABA, including behavior assessment, selecting intervention outcomes and strategies, behavior change procedures and systems support, data collection and analyses to measure and monitor progress, including measurement of behavior and displaying and interpreting data; and
- (iii) ethical issues related to the delivery of behavior interventions using ABA techniques; and

(2) a minimum of two years of documented full-time professional supervised work experience providing behavior interventions using ABA to individuals with ASD for whom such services have been proven effective in peer-reviewed, scientific research. The experience must include at a minimum:

- (i) performing behavior assessments;
- (ii) developing and evaluating individualized ABA services;
- (iii) employing an array of scientifically validated, behavior analytic procedures, including discrete trial intervention, modeling, incidental teaching, and other naturalistic teaching methods, activity-embedded instruction, task analysis, and chaining;
- (iv) using ABA methods in one-to-one intervention, small and large group intervention, and in transitions across those situations;
- (v) using behavior change procedures and systems supports;
- (vi) measuring behavior and displaying and interpreting behavior data;

(vii) conducting functional assessments (including functional analyses) of challenging behavior and selecting the specific assessment methods that are best suited to the behavior and the context; and

(viii) assessing, monitoring, documenting, evaluating, and modifying ABA techniques as necessary to promote the progress of the individual receiving ABA.

(c) A behavior analyst who supervises and oversees the provision of ABA by assistant behavior analysts shall be responsible for:

(1) developing individual ABA plans in collaboration with, as appropriate, the parents or caregivers of the individual receiving ABA, as well as assistant behavior analysts or licensed providers;

(2) directing the implementation of the individual ABA plans and the ongoing monitoring, systematic measurement, data collection, and documentation of the progress of the individual receiving ABA;

(3) modifying the individual ABA plans as necessary to promote progress toward goals, generalization of learning, and where applicable, transitioning of the individual receiving ABA across service delivery environments and settings;

(4) providing assistance, training, and support as needed by the parents or caregivers of the individual receiving ABA, as applicable, to assist them in follow-through specified in the individual's ABA plan and to enhance development, behavior, and functioning;

(5) supervising assistant behavior analysts, including:

(i) a minimum of six hours per month in the first three months of employment of an assistant behavior analyst, and a minimum of four hours per month thereafter, of direct on-site observation of each assistant behavior analyst assigned to the individual receiving ABA; and

(ii) a minimum of two hours per month of indirect supervision of an assistant behavior analyst assigned to an individual receiving ABA, in a group or individual format, including:

(a) weekly review and signed approval of the record of the individual receiving ABA, progress notes and data, correspondence, and evaluation of written reports;

(b) participation in telephone conferences with the assistant behavior analyst and, as appropriate, the parent or caregiver of the individual receiving ABA;

(c) ensuring proper documentation of the intervention provided and the response of the individual receiving ABA;

(d) ensuring that the assistant behavior analyst follows the modifications in the plan of the individual receiving ABA; and

(e) other supervision and support that the assistant behavior

analyst needs to successfully implement the ABA plan of the individual receiving ABA; and

(6) convening a minimum of two team meetings per month with the assistant behavior analyst, as well as other providers, as appropriate, who are delivering services to the individual receiving ABA to review the progress, identify problems or concerns, and modify intervention strategies as necessary to enhance the development, behavior, and functioning of the individual receiving ABA.

Section 440.3 Qualifications for assistant behavior analysts.

An assistant behavior analyst, in addition to the other requirements set forth in this Part, shall meet the following minimum qualifications:

(a) Prior to the provision of any services to any individual without direct, on-site supervision, completion of a child abuse and neglect identification and reporting workshop and a minimum of 20 hours of training or in-service in behavior interventions using ABA techniques within the past five years, including at a minimum:

- (1) basic principles of behavior analysis;
  - (2) the application of these principles in behavior intervention, including collection of data as needed for monitoring progress;
  - (3) ethical issues related to the delivery of applied behavior interventions; and
  - (4) overview of autism and pervasive developmental disorder; and
- (b) Completion of a minimum of ten hours of additional training or in-service annually in topics pertaining to ABA and ASD.

Section 440.4 Duties of assistant behavior analysts.

Under the supervision and direction of a behavior analyst in accordance with this Part, an assistant behavior analyst shall:

(a) assist in the recording and collection of data needed to monitor progress;

(b) participate in required team meetings; and

(c) complete any other activities as directed by his or her supervisor and as necessary to assist in the implementation of an individual ABA plan.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 19, 2014.

**Text of rule and any required statements and analyses may be obtained from:** Camielle Barclay, NYS Department of Financial Services, One State Street, New York, NY 10004, (212) 480-5299, email: camielle.barclay@dfs.ny.gov

#### Regulatory Impact Statement

1. Statutory authority: Financial Services Law sections 202 and 302, Insurance Law sections 301, 1109, 1124, 3216, 3221, 4303, and 4709, and Public Health Law section 4406.

Section 301 of the Insurance Law and sections 202 and 302 of the Financial Services Law authorize the Superintendent of Financial Services (the "Superintendent") to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insurance Law.

Insurance Law section 1109 authorizes the Superintendent to promulgate regulations to effectuate the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law with respect to contracts between a health maintenance organization ("HMO") and its subscribers.

Insurance Law section 1124, which applies to student health plans offered by institutions of higher learning, requires that such plans be subject to all consumer protection laws applicable to Article 43 corporations, including minimum requirements of Insurance Law Article 43 and regulations thereunder regarding benefits, contracts, and rates.

Insurance Law section 3216 establishes requirements for individual accident and health insurance policies and sets forth the benefits that must be covered under such policies. Specifically, subsection (i)(25) requires the Superintendent to promulgate regulations setting forth the standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of applied behavior analysis ("ABA"), under the supervision of a certified behavior analyst for insurance coverage under such policies.

Insurance Law section 3221 establishes requirements and standard provisions for group or blanket accident and health insurance policies and sets forth the benefits that must be covered under such policies. Specifically, subsection (l)(17) requires the Superintendent to promulgate regulations setting forth the standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of ABA under the supervision of a certified behavior analyst for insurance coverage under such policies.

Insurance Law section 4303 governs health insurance subscriber contracts written by not-for-profit corporations and sets forth the benefits that must be covered under such contracts. Specifically, subsection (ee) requires the Superintendent to promulgate regulations setting forth the

standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of ABA under the supervision of a certified behavior analyst for insurance coverage under such contracts.

Insurance Law section 4709(b), which applies to municipal cooperative health benefit plans, subjects such plans to the same scope and type of coverage as article 43 corporations.

Public Health Law section 4406 provides that the contract between an HMO and an enrollee is subject to regulation by the Superintendent as if it were a health insurance subscriber contract, and that it shall include all mandated benefits required by Article 43 of the Insurance Law.

2. Legislative objectives: In November 2011, Chapters 595 and 596 of the Laws of 2011 amended Insurance Law sections 3216, 3221 and 4303 to expand health insurance coverage for the screening, diagnosis and treatment of autism spectrum disorder (“ASD”). The amendments also directed the Superintendent, in consultation with the Commissioners of Health and Education, to promulgate regulations that set forth the standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of ABA, under the supervision of a certified behavior analyst for insurance coverage pursuant to Insurance Law sections 3216(i)(25), 3221(l)(17), and 4303(ee). Chapters 595 and 596 took effect on November 1, 2012.

3. Needs and benefits: Prior to the enactment of Chapters 595 and 596, state law did not provide health insurers and HMOs sufficient clarity or an affirmative obligation to cover costs related to treatments for ASD. As a result, individuals diagnosed with an ASD who required treatment in addition to an individualized family services plan, individualized education program, or individualized service plan, had to pay out-of-pocket for expensive services. The law, as amended, ensures that insurance coverage is extended to individuals diagnosed with ASD for treatment such as ABA, thus alleviating the financial burdens placed on the parents and caregivers of those individuals. This rule is being promulgated pursuant to the new statutory amendments to establish the education, training and supervision requirements of ABA providers in order for them to be eligible for health insurance reimbursement under the statute, and also to ensure that qualified ABA providers will be rendering services to individuals with ASD.

4. Costs: This rule imposes no compliance costs upon state or local governments, except that, to the extent that local governments participate in municipal cooperative health benefit plans, the rule will impact them, but the costs of providing the coverage are mandated by the statute.

Some private ABA providers may incur additional costs to fulfill the educational and training requirements of the rule in order to become eligible for reimbursement from health insurance coverage for providing ABA. However, many individuals currently providing ABA are not expected to incur such costs and will be able to continue providing ABA as they always have. In addition, any such costs are likely to be offset by the additional revenue obtained from being newly eligible for health insurance reimbursement. Nonetheless, the Department of Financial Services (“Department”) is unable to estimate the specific cost of such compliance because the cost depends on the number of ABA providers who intend to provide treatment to individuals with ASD for reimbursement through health insurance, and ABA providers are not regulated by the Department.

Insurers and HMOs also may incur compliance costs from having to develop an ABA provider eligibility database, and will have to expand their networks if they do not include an adequate number of ABA providers. Those costs may be passed on to consumers in the form of higher premiums, but the long-term benefits of having properly credentialed ABA providers to treat individuals with ASD greatly outweigh the costs. Furthermore, the costs for insurers and HMOs are a consequence of the legislation, not this regulation.

5. Local government mandates: This rule imposes no new mandates on any county, city, town, village, school district, fire district or other special district. The rule merely establishes the criteria by which insurers may reimburse ABA providers.

6. Paperwork: Insurers and HMOs submitted to the Department new health insurance policy forms and rates to add the new coverage for the screening, diagnosis and treatment of ASD. The requirement to make such submissions was imposed by the statutory mandate, not this rule.

7. Duplication: There are no federal or other New York State requirements that duplicate, or conflict with this regulation.

8. Alternatives: The Department, in consultation with the Department of Health and the State Education Department, considered various ways to establish the necessary standards of this regulation. The Department previously promulgated on an emergency basis two different versions of this rule. The first emergency regulation, promulgated on October 31, 2012, required an ABA provider both to be certified by a behavior analysis certification board (“board”) and to hold a certain type of license issued pursuant to New York Education Law Title VIII, or to be supervised by a person with both such a license and board certification. A number of stakeholders, however, expressed concern that the prior rule would permit very few

providers to be eligible for health insurance reimbursement for providing ABA – perhaps less than 100 statewide.

In response to those concerns, the Department made significant changes to the rule when it was again promulgated on an emergency basis on January 28, 2013. That emergency rule eliminated the dual license/board certification requirement and also permitted health insurance reimbursement for ABA provided by licensed providers whose scope of practice includes ABA, certified providers, and ABA aides under the supervision of certified behavior analysts. However, stakeholders expressed concerns that the rule would continue to limit the number of providers eligible to directly provide or supervise ABA, to the detriment of individuals diagnosed with ASD. In addition, because the rule specified that the provider had to be licensed under the New York Education Law, some insurers apparently denied claims for out-of-state providers where services were provided in other states.

To address the concerns of interested parties, the Department made significant changes to the rule. Those changes are reflected in the rule that was promulgated on July 25, 2013. The rule now permits health insurance reimbursement for ABA provided by licensed providers, behavior analysts, and assistant behavior analysts under the supervision of behavior analysts. Behavior analysts must be board certified but are not required to be New York licensed providers. As a result, the rule should significantly expand the pool of providers eligible to provide and supervise ABA while still ensuring that only properly credentialed ABA providers treat individuals with ASD and that those who require supervision obtain it from highly qualified ABA providers. Also, the rule permits health insurance reimbursement to out-of-state providers who are board certified.

The Department subsequently received comments from stakeholders that the definition of “behavioral health treatment” – as set forth in the rule promulgated on July 25, 2013 – should be clarified because, as written, the definition could be read to suggest that only a licensed provider may develop an ABA treatment plan, which is contrary to current practice. This was not the Department’s intent. That provision serves only to clarify that a licensed provider also may provide ABA services as part of a treatment program for individuals with ASD; it does not prohibit a behavior analyst from developing an ABA treatment plan for an individual with ASD.

9. Federal standards: There are no federal minimum standards or regulations regarding professionalism, supervision and relevant experience for individuals who provide ABA under the supervision of a certified behavior analyst as defined under Insurance Law sections 3216(i)(25), 3221(l)(17) and 4303(ee).

10. Compliance schedule: Because the law took effect on November 1, 2012, this rule takes effect upon filing with the Secretary of State.

#### **Regulatory Flexibility Analysis**

1. Effect of the rule: This rule will impact insurers and health maintenance organizations (“HMOs”) in New York State, but none fall within the definition of “small business” set forth in section 102(8) of the State Administrative Procedure Act, because none are either independently owned or have less than one hundred employees.

However, this rule may affect providers of applied behavior analysis (“ABA”) who treat autism spectrum disorder (“ASD”), many of which are small businesses, because some of those ABA providers may be required under the rule to obtain additional education, training and experience in order to become eligible for health insurance reimbursement for rendering ABA. However, the rule should have a positive impact on small business because of the additional revenue to be generated from health insurance reimbursement for ABA services. The Department of Financial Services (the “Department”) is unable to quantify the precise number of small businesses affected by this rule because ABA providers are not regulated by the Department. The Department has established no reporting requirements with respect to these small businesses, nor does the Department maintain records of ABA providers in this state.

2. Compliance requirements: This rule does not impose any reporting, recordkeeping, or other compliance requirements on small businesses, sole proprietors or local governments. The rule only establishes standards of professionalism, training and experience for ABA providers so that they can be eligible for insurance reimbursement for providing ABA.

3. Professional services: This rule does not require the use of professional services.

4. Compliance costs: This rule will not impose any compliance costs on local governments but may impose additional costs on small businesses that provide ABA services and want to obtain health insurance reimbursement for those services. In order to do so, some small business ABA providers who do not have the requisite education, training, or experience would have to incur costs of education, training and experience for their employees to become eligible for health insurance reimbursement for providing ABA. However, any such costs that may be incurred are likely to be more than offset by increased revenue as a result of health insurance reimbursement for these services. Nonetheless, the Department is unable

to estimate the cost of such compliance because the cost depends on whether the providers already meet such requisites. Moreover, ABA providers are not regulated by the Department.

5. Economic and technological feasibility: Compliance with the rule is economically and technologically feasible for providers.

6. Minimizing adverse impact: Although some ABA providers that are small businesses may incur additional costs to fulfill the requirements of this rule, many will not, and those costs likely will be offset by the additional revenue that will be generated from health insurance reimbursement for providing ABA services.

7. Small business and local government participation: On October 31, 2012, the Department first promulgated this rule on an emergency basis pursuant to a mandate in Chapters 595 and 596 of the Laws of 2011 amending Insurance Law sections 3216, 3221 and 4303, and again on January 28, 2013 and April 26, 2013. The Department received a number of comments from interested parties regarding the rule, particularly with respect to the regulation's requirement that ABA providers and supervisors of ABA providers had to be licensed under the New York Education Law, which would significantly limit the number of eligible ABA providers and supervisors of ABA providers.

In response to those concerns, the Department made significant changes to the rule. Those changes are reflected in the rule that was promulgated on July 25, 2013. The rule now permits health insurance reimbursement for ABA services provided by licensed providers, behavior analysts, and assistant behavior analysts under the supervision of behavior analysts. Behavior analysts will only be required to be certified by a behavior analysis certification board. As a result, the rule should significantly expand the pool of providers eligible to provide ABA services and to supervise ABA providers while still ensuring that only properly credentialed ABA providers treat individuals with ASD and that those who require supervision obtain it from highly qualified ABA providers.

The Department subsequently received comments from stakeholders that the definition of "behavioral health treatment" – as set forth in the rule promulgated on July 25, 2013 – should be clarified because, as written, the definition could be read to suggest that only a licensed provider may develop an ABA treatment plan, which is contrary to current practice. That was not the Department's intent. The rule serves only to clarify that a licensed provider also may provide ABA services as part of a treatment program for individuals with ASD; it does not prohibit a behavior analyst from developing an ABA treatment plan for an individual with ASD.

All interested parties will have a formal opportunity to comment on the rule when the Department files a notice of proposed rulemaking.

#### **Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas: Applied behavior analysis ("ABA") providers, health insurers, and health maintenance organizations ("HMOs") affected by this rule operate throughout this state, including rural areas as defined under State Administrative Procedure Act section 102(10).

2. Reporting, recordkeeping and other compliance requirements, and professional services: This rule will not impose any reporting, recordkeeping, or other compliance requirements on ABA providers located in rural areas. The rule only establishes standards of professionalism, training and experience required to be eligible for insurance reimbursement for providing ABA.

3. Costs: This rule may impose additional costs on some ABA providers located in rural areas who may need additional education, training and experience and certification pursuant to the rule in order to become eligible for health insurance reimbursement for providing ABA services. However, any such costs are likely to be more than offset by increased revenue generated from health insurance reimbursement for the services of ABA providers. Moreover, the education, training and experience requirements need to be uniform within the state, and providing ABA services within rural areas does not negate the need for the providers to satisfy these minimum consumer protection requirements.

Insurers and HMOs submitted to the Department of Financial Services (the "Department") new health insurance policy forms and rates to add the new coverage for the screening, diagnosis and treatment of ASD. The requirement to add such coverage was imposed by the enactment of Chapters 595 and 596 of the Laws of 2011 amending Insurance Law sections 3216, 3221 and 4303. As a result, insurers and HMOs may incur compliance costs from having to develop an ABA provider eligibility database, and may have to expand their networks if they do not include an adequate number of ABA providers. Those costs may be passed on to consumers in the form of higher premiums, but these additional costs are consequences of the statute, not the regulation, and the long-term benefits of having properly credentialed ABA providers to treat individuals with ASD, as well as the prohibitively expensive out-of-pocket costs for ABA services, greatly outweigh any increase in premiums.

4. Minimizing adverse impact: Although some ABA providers in rural areas may incur additional costs to fulfill the requirements of this rule,

those costs likely will be offset from the additional revenue that will be generated from health insurance reimbursement for their services. This rule also will enable many behavior analysts and assistant behavior analysts to immediately start providing ABA services covered by health insurance.

5. Rural area participation: On October 31, 2012, the Department first promulgated this rule pursuant to a mandate in Chapters 595 and 596 of the Laws of 2011 amending Insurance Law sections 3216, 3221 and 4303 on an emergency basis, and again on January 28, 2013 and April 26, 2013. The Department received a number of comments from interested parties regarding the rule, particularly with respect to the licensing requirement for ABA providers and supervisors of ABA providers, which would significantly limit the number of eligible ABA providers and supervisors of ABA providers.

In response to those concerns, the Department made significant changes to the rule. Those changes are reflected in the rule that was promulgated on July 25, 2013. The rule now permits health insurance reimbursement for ABA services provided by licensed providers, behavior analysts, and assistant behavior analysts under the supervision of behavior analysts. Behavior analysts will only be required to be certified by a behavior analysis certification board. As a result, the rule should significantly expand the pool of providers eligible to provide ABA services and to supervise ABA providers while still ensuring that only properly credentialed ABA providers treat individuals with ASD and that those who require supervision obtain it from highly qualified ABA providers.

The Department subsequently received comments from stakeholders that the definition of "behavioral health treatment" – as set forth in the rule promulgated on July 25, 2013 – should be clarified because, as written, the definition could be read to suggest that only a licensed provider may develop an ABA treatment plan, which is contrary to current practice. This was not the Department's intent. That provision serves only to clarify that a licensed provider also may provide ABA services as part of a treatment program for individuals with ASD; it does not prohibit a behavior analyst from developing an ABA treatment plan for an individual with ASD.

All interested parties will have a formal opportunity to comment on the rule when the Department files a notice of proposed rulemaking.

#### **Job Impact Statement**

1. Nature of impact: In November 2011, Chapters 595 and 596 of the Laws of 2011 amended Insurance Law sections 3216, 3221 and 4303 to expand health insurance coverage for the screening, diagnosis and treatment of autism spectrum disorder ("ASD"). The amendments also directed the Superintendent of Financial Services, in consultation with the Commissioners of Health and Education, to promulgate regulations that set forth the standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of applied behavior analysis ("ABA"). Chapters 595 and 596 took effect on November 1, 2012.

This rule should have no adverse impact on jobs and employment opportunities because it merely implements the statutory charge to establish standards of professionalism, supervision and relevant experience of individuals who provide behavioral health treatment in the form of ABA. These standards are designed to ensure that individuals with ASD receive treatment from qualified ABA providers. In fact, this rule will provide more job and employment opportunities because it does not require ABA providers to be licensed pursuant to the New York Education Law in order to receive insurance reimbursement for ABA services.

### **NOTICE OF WITHDRAWAL**

#### **Rules Governing Valuation of Life Insurance Reserves**

**I.D. No.** DFS-10-13-00008-W

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

**Action taken:** Notice of proposed rule making, I.D. No. DFS-10-13-00008-EP, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on March 6, 2013.

**Subject:** Rules Governing Valuation of Life Insurance Reserves.

**Reason(s) for withdrawal of the proposed rule:** Amendment does not accomplish intended changes to the reserve requirements on universal life with secondary guarantee policies.

## Department of Health

### EMERGENCY RULE MAKING

#### Episodic Pricing for Certified Home Health Agencies (CHHAs)

**I.D. No.** HLT-45-13-00016-E

**Filing No.** 1003

**Filing Date:** 2013-10-22

**Effective Date:** 2013-10-22

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

**Action taken:** Amendment of section 86-1.44 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 3614(13)

**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 ensure an appropriate level of reimbursement to those Certified Home Health Agencies (CHHAs) that provide services to a special needs population of medically complex children, adolescents and young disabled adults and to those CHHAs that serve primarily patients who are eligible for OPWDD services.

Section 111 of Part H of Chapter 59 of the Laws of 2011 provides the Commissioner of Health with authority to issue regulations such as these 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:** Episodic Pricing for Certified Home Health Agencies (CHHAs).

**Purpose:** To exempt services to a special needs population from the episodic payment system for CHHAs.

**Text of emergency rule:** Subdivisions (a) and (c) and the opening paragraph of subdivision (b) of section 86-1.44 of title 10 of NYCRR are amended to read as follows:

(a) Effective for services provided on and after [April 1] May 2, 2012, Medicaid payments for certified home health care agencies (“CHHA”), except for such services provided to children under eighteen years of age and except for services provided to a special needs population of medically complex and fragile children, adolescents and young disabled adults by a CHHA operating under a pilot program approved by the Department, shall be based on payment amounts calculated for 60-day episodes of care.

(b) An initial statewide episodic base price, to be effective [April 1] May 2, 2012, will be calculated based on paid Medicaid claims, as determined by the Department, for services provided by all certified home health agencies in New York State during the base period of January 1, 2009 through December 31, 2009.

(c) The base price paid for 60-day episodes of care shall be adjusted by an individual patient case mix index as determined pursuant to subdivision (f) of this section; and also by a regional wage index factor as determined pursuant to subdivision (h) of this section. *Such case mix adjustments shall include an adjustment factor for CHHAs providing care primarily to a special needs patient population coming under the jurisdiction of the Office of People With Developmental Disabilities (OPWDD) and consisting of no fewer than two hundred such patients.*

Section 86-1.44 of title 10 of NYCRR is amended by adding a new subdivision (k) to read as follows:

(k) *Closures, mergers, acquisitions, consolidations, and restructurings.*

(1) *The commissioner may grant approval of a temporary adjustment to rates calculated pursuant to this section for eligible certified home health agencies.*

(2) *Eligible certified home health agency providers shall include:*

(i) *providers undergoing closure;*

(ii) *providers impacted by the closure of other health care providers;*

(iii) *providers subject to mergers, acquisitions, consolidations or restructurings; or*

(iv) *providers impacted by the merger, acquisition, consolidation or restructuring of other health care facilities.*

(3) *Providers seeking rate adjustments under this subdivision shall demonstrate through submission of a written proposal to the commis-*

*sioner that the additional resources provided by a temporary rate adjustment will achieve one or more of the following:*

(i) *protect or enhance access to care;*

(ii) *protect or enhance quality of care;*

(iii) *improve the cost effectiveness of the delivery of health care services; or*

(iv) *otherwise protect or enhance the health care delivery system, as determined by the commissioner.*

(4)(i) *Such written proposal shall be submitted to the commissioner at least sixty days prior to the requested effective date of the temporary rate adjustment and shall include a proposed budget to achieve the goals of the proposal. Any temporary rate adjustment issued pursuant to this subdivision shall be in effect for a specified period of time as determined by the commissioner, of up to three years. At the end of the specified timeframe, the provider shall be reimbursed in accordance with the otherwise applicable rate-setting methodology as set forth in applicable statutes and applicable provisions of this Subpart. The commissioner may establish, as a condition of receiving such a temporary rate adjustment, benchmarks and goals to be achieved in conformity with the provider’s written proposal as approved by the commissioner and may also require that the provider submit such periodic reports concerning the achievement of such benchmarks and goals as the commissioner deems necessary. Failure to achieve satisfactory progress, as determined by the commissioner, in accomplishing such benchmarks and goals shall be a basis for ending the provider’s temporary rate adjustment prior to the end of the specified timeframe.*

(ii) *The commissioner may require that applications submitted pursuant to this section be submitted in response to and in accordance with a Request For Applications or a Request For Proposals issued by the commissioner.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 19, 2014.

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

#### Regulatory Impact Statement

Statutory Authority:

The authority for implementation of an episodic payment system for Certified Home Health Agency services pursuant to regulations is set forth in section 3614(13) of the Public Health Law and in section 111(t) of part H of chapter 59 of the laws of 2011, which authorizes the Commissioner to promulgate regulations, including emergency regulations, with regard to Medicaid reimbursement rates for certified home health agencies. Section 3614(13) also exempts the application of the episodic payment system to Medicaid reimbursement for “children under eighteen years of age and other discrete groups as may be determined by the commissioner pursuant to regulations”.

Legislative Objectives:

The Legislature chose to address the issue of over-utilization of Certified Home Health Agency services as a result of the recommendations submitted by the Medicaid Redesign Team and accepted by the Governor. Pursuant to statute, an episodic payment system based on 60-day episodes of care, with payments tied to patient acuity, was chosen as one of the vehicles to address this issue. The legislation also exempted Medicaid payments for children from the new payment system and, further, gave the Commissioner of Health authority to exempt other discrete groups through regulation.

In addition, Section 86-1.44 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulation of the State of New York, will be amended to add subdivision (k), which provides the Commissioner authority to grant temporary rate adjustments to eligible Article 36 certified home health agency providers subject to or affected by the closure, merger, acquisition, consolidation, or restructuring of a health care provider in their service delivery area. In addition, the proposed regulation sets forth the conditions under which a provider will be considered eligible, the requirements for requesting a temporary rate adjustment, and the conditions that must be met in order to receive a temporary rate adjustment. The temporary rate adjustment shall be in effect for a specified period of time, as approved by the Commissioner, of up to three years. This regulation is necessary in order to maintain beneficiaries’ access to services by providing needed relief to providers that meet the criteria.

Proposed subdivision (k) requires providers seeking a temporary rate adjustment to submit a written proposal demonstrating that the additional resources provided by a temporary rate adjustment will achieve one or more of the following: (i) protect or enhance access to care; (ii) protect or enhance quality of care; (iii) improve the cost effectiveness of the delivery

of health care services; or (iv) otherwise protect or enhance the health care delivery system, as determined by the Commissioner. The proposed amendment permits the Commissioner to establish benchmarks and goals, in conformity with a provider's written proposal as approved by the Commissioner, and to require the provider to submit periodic reports concerning its progress toward achievement of such. Failure to achieve satisfactory progress in accomplishing such benchmarks and goals, as determined by the Commissioner, shall be a basis for ending the provider's temporary rate adjustment prior to the end of the specified timeframe.

#### Needs and Benefits:

The proposed amendments to subdivisions (a), (b), and (c) will exempt services provided to a special needs population of medically complex children, adolescents and young disabled adults by a CHHA operating under a pilot program approved by the Department from the episodic payment system and will also provide for an adjustment of the case mix index for CHHAs serving primarily patients who are eligible for OPWDD services when such CHHAs have over 200 such patients. These amendments reflect a Health Department determination that the more stringent cost containment mechanism of episodic pricing, already deemed by the legislature to be an inappropriate reimbursement mechanism for CHHA services for children, is also not appropriate for special needs populations consisting of young adults as well as children and adolescents being cared for pursuant to an approved pilot program. These amendments will thus help assure that agencies primarily serving certain special needs populations will receive a level of reimbursement from the Medicaid system to maintain both adequate access and quality of care for members of these populations.

With regard to the new subdivision (k), in the center of a changing health care delivery system, the closure, merger, acquisition, consolidation or restructuring of a health care provider within a community often happens without adequate planning of resources for the impact on health care providers in the service delivery area. In addition, maintaining access to needed services while also maintaining or improving quality becomes challenging for the impacted providers. The additional reimbursement provided by this adjustment will support the impacted Article 36 certified home health agency providers in achieving these goals, thus improving quality while reducing health care costs.

#### Costs:

The regulated parties (providers) are not expected to incur any additional costs as a result of the proposed rule change. There are no additional costs to local governments for the implementation of and continuing compliance with this amendment. It is anticipated there will be a slight decrease to the total state fiscal savings which were budgeted for the Episodic Payment System.

#### Local Government Mandates:

The proposed amendment does 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 this amendment.

#### Duplication:

These regulations do not duplicate existing state or federal regulations.

#### Alternatives:

No significant alternatives are available that will protect the special needs populations identified in this amendment. With regard to the new subdivision (k), no significant alternatives are available. Any potential certified home health agency provider project that would otherwise qualify for funding pursuant to the revised regulation would, in the absence of this amendment, either not proceed or would require the use of existing provider resources.

#### Federal Standards:

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

#### Compliance Schedule:

There are no significant actions which are required by the affected providers to comply with the amendments to subdivisions (a), (b) and (c). With regard to the new subdivision (k), the proposed regulation provides the Commissioner of Health the authority to grant approval of temporary adjustments to rates calculated for Article 36 certified home health care providers that are subject to or affected by the closure, merger, acquisition, consolidation, or restructuring of a health care provider, for a specified period of time, as determined by the Commissioner, of up to three years.

#### Regulatory Flexibility Analysis

No regulatory flexibility analysis is required pursuant to section 202-(b)(3)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose reporting, record keeping or other compliance requirements on small businesses or local governments.

#### Rural Area Flexibility Analysis

No rural area flexibility analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse impact on facilities in rural areas, and it does not impose reporting, record keeping or other compliance requirements on facilities in rural areas.

#### Job Impact Statement

No Job Impact Statement is required pursuant to section 201 a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have an adverse impact on jobs and employment opportunities.

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

### Reduction to Statewide Base Price

**I.D. No.** HLT-45-13-00004-EP

**Filing No.** 997

**Filing Date:** 2013-10-18

**Effective Date:** 2013-10-18

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

**Proposed Action:** Amendment of section 86-1.16 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 Price.

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

**Text of emergency/proposed 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 as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire January 15, 2014.

**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

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

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

#### Regulatory Impact Statement

Statutory Authority:

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, recordkeeping or other compliance requirements are being imposed as a result of these rules. Affected health care providers

will bill Medicaid using procedure codes and ICD-9 codes approved by the American Medical Association, as is currently required. 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, recordkeeping, or other compliance requirements are being imposed as a result of this proposal.

**Professional Services:**

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

**Compliance Costs:**

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

**Minimizing Adverse Impact:**

The proposed amendments reflect statutory intent and requirements.

**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.

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

#### **Statewide Pricing Methodology for Nursing Homes**

**I.D. No.** HLT-45-13-00006-EP

**Filing No.** 1001

**Filing Date:** 2013-10-21

**Effective Date:** 2013-10-21

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

**Proposed Action:** Addition of section 86-2.40 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2808(2-c)

**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 implement the new Medicaid reimbursement methodology for nursing homes. The new methodology will replace an overly complex and burdensome methodology with a transparent pricing methodology that will stabilize the nursing home industry by timely providing predictable rate setting information that can be effectively used by providers to plan and manage their operations. In addition, implementing the pricing methodology will also mitigate the retroactive cash flow impact of reconciling rates that are paid today to the new pricing rates.

Proceeding with the proposed regulations on an emergency basis is in accordance with the provisions of Public Health Law section 2808 (2-c) which provides the Commissioner of Health the explicit authority to issue these emergency regulations.

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

**Subject:** Statewide Pricing Methodology for Nursing Homes.

**Purpose:** To establish a new Medicaid reimbursement methodology for Nursing Homes.

**Substance of emergency/proposed rule (Full text is posted at the following State website: [www.health.ny.gov](http://www.health.ny.gov)):** This regulation establishes a new reimbursement methodology for the operating component of non-specialty residential health care facilities (nursing homes). The operating component of the price is based upon allowable costs and is the sum of the direct price, indirect price and a facility-specific non-comparable price. The direct and indirect prices are a blend of a statewide price and a peer group price. There are two peer groups: 1) all non-specialty hospital-based facilities and non-specialty freestanding facilities with certified beds capacities of 300 or more, and 2) non-specialty freestanding facilities with certified bed capacities of less than 300 beds. The direct price is subject to a case mix adjustment and a wage index adjustment. The new case mix adjustment methodology also contains mechanisms to safeguard the integrity of case mix data reporting. If reported case mix data indicates a change in the facility's case mix of more than five percent, the payment adjustment associated with the change over five percent may be held, pending an audit to verify the accuracy of the reported data. Also, facilities are required to formally certify to the accuracy of their case mix data reporting on an annual basis. The indirect price is subject to a wage index adjustment. Per diem adjustments to the operating component of the rate include add-ons for bariatric, traumatic brain-injured (TBI) extended care, and dementia residents; adjustments for the reporting of quality data; and transition payments. Non-specialty facilities will transition to the price over a five-year period (2012-2016), with prices fully implemented beginning in 2017. The non-capital component of the rate for specialty facilities, which are not subject to the new reimbursement methodology, will be the rates in effect for such facilities on January 1, 2009.

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire January 18, 2014.

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

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

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

#### **Regulatory Impact Statement**

**Statutory Authority:**

The statutory authority for this regulation is contained in Section 2808(2-c) of the Public Health Law (PHL) as enacted by Section 95 of Part H of Chapter 59 of the Laws of 2011, which authorizes the Commissioner to promulgate regulations, with regard to Medicaid reimbursement rates for residential health care facilities. Such rate regulations are set forth in Subpart 86-2 of Title 10 (Health) of the Official Compilation of Codes, Rules, and Regulation of the State of New York.

**Legislative Objectives:**

Subpart 86-2 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulation of the State of New York, will be amended by adding a new section 2.40 to establish a new Medicaid reimbursement methodology for nursing homes. The reimbursement methodology is based on a blend of statewide prices and peer group prices, with adjustments for case mix, regional wage differences, add-ons for certain patients, and quality incentives and payments. To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year. The new and streamlined methodology will significantly reduce administrative burdens on both nursing homes and the Department and, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

**Needs and Benefits:**

The new pricing reimbursement methodology reforms and replaces an outdated, complex, and administratively burdensome (to both providers and the Department) rate-setting system with a stable, predictable and transparent methodology that rewards efficiencies and incentivizes quality outcomes. The new pricing system will also provide a good foundation for the transition of nursing home residents to managed care that will occur over the next several years. The new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation. The new methodology also contains mechanisms to safeguard the integrity of case mix data reporting. If reported case mix data indicates a change in the facility's case mix of more than five percent, the payment adjustment associated with the change over five percent may be held, pending an audit to verify the accuracy of the reported data. Also, facilities are required to formally certify to the accuracy of their case mix data reporting on an annual basis.

**Costs:**

**Costs to Private Regulated Parties:**

There will be no additional costs to private regulated parties. The only additional data requested from providers would be reporting quality measures in their annual cost report.

**Costs to State Government:**

There is no additional aggregate increase in Medicaid expenditures anticipated as a result of these regulations.

**Costs to Local Government:**

Local districts' share of Medicaid costs is statutorily capped; therefore, there will be no additional costs to local governments as a result of this proposed regulation.

**Costs to the Department of Health:**

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

**Local Government Mandates:**

The proposed regulation does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

**Paperwork:**

The proposed regulation does not create new or additional paperwork responsibility of any kind.

**Duplication:**

These regulations do not duplicate existing state or federal regulations.

**Alternatives:**

The Department is required by the Public Health Law section 2808 2-c to implement the new pricing methodology. The department worked closely with the Nursing Home Industry Associations to develop the details of the pricing methodology to be implemented by the regulation.

Federal Standards:  
The proposed regulation does not exceed any minimum standards of the federal government for the same or similar subject area.

Compliance Schedule:  
The new prices will be published by the department and transmitted to the EMedNY system. There are no new compliance efforts required by the nursing homes.

**Regulatory Flexibility Analysis**

Effect of Rule:  
For the purpose of this regulatory flexibility analysis, small businesses were considered to be residential health care facilities with 100 or fewer employees. Based on recent financial and statistical data extracted from Residential Health Care Facility Cost Reports, approximately 60 residential health care facilities were identified as employing fewer than 100 employees.

To ensure a smooth transition and mitigate significant swings in Medicaid revenues, the new Medicaid reimbursement methodology for nursing homes implemented by this regulation will be phased-in over a five year period (full implementation in the sixth year). Of the 60 nursing homes, 36 nursing homes that are subject to this regulation will experience a decrease in Medicaid revenues. The losses in Medicaid revenues will occur gradually – and will increase from 47.3% of total operating revenue in year one to 5.4% of total operating revenue in year six. Twenty-four nursing homes that are subject to this regulation will experience an increase in Medicaid revenues. The gains in Medicaid revenues will occur gradually – and will increase from 1.2% of total operating revenue in year one to 2% of total operating revenue in year six. In addition, the new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

This rule will have no direct effect on local governments.

Compliance Requirements:  
There are no new compliance requirements.

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

Compliance Costs:  
No additional compliance costs are anticipated as a result of this rule.

Economic and Technological Feasibility:  
The proposed rule doesn't require additional technological or economic requirements.

Minimizing Adverse Impact:  
To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year. The new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

Small Business and Local Government Participation:  
The State filed a Federal Public Notice, published in the State Register, prior to the effective date of the change. The Notice provided a summary of the action to be taken and instructions as to where the public, including small businesses and local governments, could locate copies of the corresponding proposed State Plan Amendment. The Notice further invited the public to review and comment on the related proposed State Plan Amendment. The Department worked closely with the major nursing home industry associations to develop the details of the pricing methodology to be implemented by the regulation. In addition, contact information for the Department was provided for anyone interested in further information.

**Rural Area Flexibility Analysis**

Effect on Rural Areas:  
Rural areas are defined as counties with populations less than 200,000 and, for counties with populations greater than 200,000, include towns with population densities of 150 persons or less per square mile. The following 43 counties have populations of less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan

Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene		

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:  
There are no new compliance requirements as a result of the proposed rule.

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 additional compliance costs are anticipated as a result of this rule.

Minimizing Adverse Impact:  
To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year. The new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

Rural Area Participation:  
The Department, in collaboration with the major nursing home industry associations (which include representation of rural nursing homes), worked collaboratively to develop the key components of the statewide pricing methodology. In addition, a Federal Public Notice, published in the New York State Register invited comments and questions from the general public.

**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 not expected that the proposed rule to establish a new Medicaid reimbursement methodology for nursing homes will have a material impact on jobs or employment opportunities across the nursing home industry. To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included in the proposed regulations to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year.

**NOTICE OF ADOPTION**

**Tanning Facilities**

**I.D. No.** HLT-33-13-00024-A

**Filing No.** 1010

**Filing Date:** 2013-10-22

**Effective Date:** 2013-11-06

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

**Action taken:** Amendment of Subpart 72-1 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 3551 and 3554

**Subject:** Tanning Facilities.

**Purpose:** To further clarify the authority of local jurisdictions to enact and enforce local regulations governing tanning facilities.

**Text or summary was published** in the August 14, 2013 issue of the Register, I.D. No. HLT-33-13-00024-P.

**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment.

## Office of Mental Health

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

**Repeal of 14 NYCRR Parts 10, 51, 71 and 103**

**I.D. No.** OMH-45-13-00003-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 repeal Parts 10, 51, 71 and 103 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, section 7.09

**Subject:** Repeal of 14 NYCRR Parts 10, 51, 71 and 103.

**Purpose:** To repeal several outdated regulations.

**Text of proposed rule:** Pursuant to the authority granted to the Commissioner of the Office of Mental Health in accordance with Section 7.09 of the Mental Hygiene Law, Title 14 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended as follows:

14 NYCRR Parts 10, 51, 71 and 103 are repealed.

**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 regulations that are obsolete; therefore, no person is likely to object.

14 NYCRR Parts 10, 51, 71 and 103 were promulgated in the 1970's by the Department of Mental Hygiene. When these regulations were promulgated, the Office of Mental Health, the Office of Mental Retardation and Developmental Disabilities (now known as the Office for People With Developmental Disabilities, or "OPWDD"), and the Office of Alcoholism and Substance Abuse (now known as the Office of Alcoholism and Substance Abuse Services, or "OASAS"), were all a part of the Department of Mental Hygiene, and none had its own rule making authority. In 1977, the New York State Mental Hygiene Law was recodified, and the Department of Mental Hygiene was divided into three autonomous agencies, all of which have independent rule making authority.

OMH, OPWDD and OASAS have reviewed the following regulations and determined that they are outdated and are no longer applicable to the agencies. All three autonomous offices are proposing a repeal of the following obsolete rules:

Part 10 – Insurance Coverage for Diagnosis and Treatment of Mental, Nervous and Emotional Disorders. This Part consists of definitions that are no longer current. Relevant definitions that pertain to Title 14 NYCRR have been added to the applicable Part. In addition, Part 10 includes references to the DSM-II, which has been revised several times since the 1970's. The most current edition, the DSM-V, was published in early 2013. The agencies believe this Part is unnecessary and appropriate for repeal.

Part 51 – Prior Approval of the Commissioner. This Part is out of date, and all three agencies have incorporated updated provisions into existing regulations. OMH superseded this Part with 14 NYCRR Part 551, Prior Approval Review for Quality and Appropriateness. OPWDD superseded Part 51 with 14 NYCRR Part 620, Certification of Need for Administrative Review Projects, Substantial Review Projects and Terms of Approval for Acquisition of Property or Construction. OASAS regulations are found at 14 NYCRR Part 810, Establishment, Incorporation and Certification of Providers of Chemical Dependence Services and 14 NYCRR Part 814, General Facility Requirements.

Part 71 – Visitation and Inspection of Facilities. OMH superseded this Part by 14 NYCRR Part 553, Visitation and Inspection of Facilities. OPWDD notes that requirements applicable to visitation and inspection of facilities are found in Article 16 of the NYS Mental Hygiene Law and considers that the provisions of Article 16 are sufficient to address this topic. OPWDD considers the provisions of Part 71 which are not duplicative of the Article 16 provisions to be out of date and unnecessary. OASAS provisions are found in 14 NYCRR Part 810, Establishment, Incorporation and Certification of Providers of Chemical Dependence Services.

Part 103 – Unified Services Plans. References to the Unified Services Plan were deleted from Mental Hygiene Law by Chapter 111 of the Laws of 2010; therefore, this Part is no longer applicable to any of the three agencies and is appropriate for repeal.

**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 is not being submitted with this notice because it is evident from the subject matter of the rule making that there will be no impact on jobs and employment opportunities. The consensus rule merely repeals outdated regulations.

## Office for People with Developmental Disabilities

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

**Repeal of 14 NYCRR Parts 10, 51, 71 and 103**

**I.D. No.** PDD-45-13-00019-P

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

**Proposed Action:** This is a consensus rule making to repeal Parts 10, 51, 71 and 103; and amend Part 620 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, section 13.09(b)

**Subject:** Repeal of 14 NYCRR Parts 10, 51, 71 and 103.

**Purpose:** To repeal several outdated regulations.

**Text of proposed rule:** • Part 10 of Title 14 NYCRR is repealed.

- Part 51 of Title 14 NYCRR is repealed.
- Part 71 of Title 14 NYCRR is repealed.
- Part 103 of Title 14 NYCRR is repealed.

Subdivision 620.1(a) of Title 14 NYCRR Part 620 is amended as follows:

(a) This Part supersedes 14 NYCRR Part[s 51 and] 53 ...

NOTE: Rest of the subdivision is unchanged.

**Text of proposed rule and any required statements and analyses may be obtained from:** Barbara Brundage, Director, Regulatory Affairs Unit, OPWDD, 44 Holland Avenue, Albany, NY 12229, (518) 474-1830, email: RAU.Unit@opwdd.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.

**Additional matter required by statute:** Pursuant to the requirements of the State Environmental Quality Review Act, OPWDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

**Consensus Rule Making Determination**

This rule making is filed as a Consensus rule on the grounds that its purpose is to repeal regulations that are obsolete; therefore, no party is likely to object.

14 NYCRR Parts 10, 51, 71 and 103 were promulgated in the 1970's by the Department of Mental Hygiene. When these regulations were promulgated the Office of Mental Retardation and Developmental Disabilities (now known as the Office for People With Developmental Disabilities, or "OPWDD"), the Office of Mental Health (OMH), and the Office of Alcoholism and Substance Abuse (now known as the Office of Alcoholism and Substance Abuse Services, or "OASAS"), were all a part of the Department of Mental Hygiene, and none had its own rule making authority. In 1977, the New York State Mental Hygiene Law was recodi-

fied, and the Department of Mental Hygiene was divided into three autonomous agencies, all of which have independent rule making authority.

OPWDD, OMH and OASAS have reviewed the following regulations and determined that they are outdated and are no longer applicable to the agencies. All three autonomous offices are proposing a repeal of the following obsolete rules:

Part 10 – Insurance Coverage for Diagnosis and Treatment of Mental, Nervous and Emotional Disorders. This Part consists of definitions that are no longer current. Relevant definitions that pertain to Title 14 NYCRR have been added to the applicable Part. In addition, Part 10 includes references to the DSM-II, which has been revised several times since the 1970's. The most current edition, the DSM-V, was published in early 2013. The agencies believe this Part is unnecessary and appropriate for repeal.

Part 51 – Prior Approval of the Commissioner. This Part is out of date, and all three agencies have incorporated updated provisions into existing regulations. OPWDD superseded Part 51 with 14 NYCRR Part 620, Certification of Need for Administrative Review Projects, Substantial Review Projects and Terms of Approval for Acquisition of Property or Construction. OMH superseded this Part with 14 NYCRR Part 551, Prior Approval Review for Quality and Appropriateness. OASAS regulations are found at 14 NYCRR Part 810, Establishment, Incorporation and Certification of Providers of Chemical Dependence Services and 14 NYCRR Part 814, General Facility Requirements.

Part 71 – Visitation and Inspection of Facilities. OPWDD notes that requirements applicable to visitation and inspection of facilities are found in Article 16 of the NYS Mental Hygiene Law and considers that the provisions of Article 16 are sufficient to address this topic. OPWDD considers the provisions of Part 71 which are not duplicative of the Article 16 provisions to be out of date and unnecessary. OMH superseded this Part by 14 NYCRR Part 553, Visitation and Inspection of Facilities. OASAS provisions are found in 14 NYCRR Part 810, Establishment, Incorporation and Certification of Providers of Chemical Dependence Services.

Part 103 – Unified Services Plans. References to the Unified Services Plan were deleted from Mental Hygiene Law by Chapter 111 of the Laws of 2010; therefore, this Part is no longer applicable to any of the three agencies and is appropriate for repeal.

Statutory Authority: Section 13.09(b) of the Mental Hygiene Law grants the Commissioner of the Office for People With Developmental Disabilities the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

#### Job Impact Statement

A job impact statement is not being submitted because it is evident from the subject matter of the rule making that there will be no impact on jobs and employment opportunities. The consensus rule merely repeals several outdated regulations.

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## Public Service Commission

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### NOTICE OF ADOPTION

#### Approval, with Modifications, National Grid's Economic Development Programs

**I.D. No.** PSC-04-13-00009-A

**Filing Date:** 2013-10-18

**Effective Date:** 2013-10-18

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

**Action taken:** On 10/17/13, the PSC adopted an order approving, with modifications, a filing made by subsidiaries of National Grid, requesting Emergency Economic and Community Redevelopment Program to provide financial assistance to customers affected by 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:** Approval, with modifications, National Grid's Economic Development Programs.

**Purpose:** To approve, with modifications, National Grid's Economic Development Programs.

**Substance of final rule:** The Commission, on October 17, 2013, adopted an order approving, with modifications, a filing made by subsidiaries of National Grid requesting approval of an Emergency Economic and Community Redevelopment Program to provide financial assistance to custom-

ers affected by 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](mailto: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-0001SA1)

### NOTICE OF ADOPTION

#### Approval of Penn Yan's Request to Increase Annual Revenues

**I.D. No.** PSC-13-13-00007-A

**Filing Date:** 2013-10-21

**Effective Date:** 2013-10-21

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

**Action taken:** On 10/17/13, the PSC adopted an order authorizing Penn Yan Municipal Utilities Board (Penn Yan) to increase its annual revenues by approximately \$89,217 or 2.3%.

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

**Subject:** Approval of Penn Yan's request to increase annual revenues.

**Purpose:** To allow Penn Yan to increase annual revenues.

**Substance of final rule:** The Commission, on October 17, 2013, adopted an order authorizing Penn Yan Municipal Utilities Board to increase its total annual revenues by about \$89,217 or 2.3%, 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](mailto: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-0097SA1)

### NOTICE OF ADOPTION

#### Water Service Termination Hours

**I.D. No.** PSC-19-13-00008-A

**Filing Date:** 2013-10-22

**Effective Date:** 2013-10-22

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

**Action taken:** On 10/17/13, the PSC adopted an order approving a petition of Floridan Estates, Inc. to revise its hours for disconnection of service.

**Statutory authority:** Public Service Law, sections (4)1, 5(1)(f), 89-c(1) and (10)

**Subject:** Water service termination hours.

**Purpose:** To approve a revision to water service termination hours.

**Substance of final rule:** The Commission, on October 17, 2013, adopted an order approving Floridan Estates, Inc.'s request to revise its hours for disconnection of service, 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](mailto: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-W-0167SA1)

**NOTICE OF ADOPTION**

**Approving, in Part, of TWCIS' Request for Waivers of Rules**

**I.D. No.** PSC-25-13-00013-A

**Filing Date:** 2013-10-21

**Effective Date:** 2013-10-21

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

**Action taken:** On 10/17/13, the PSC adopted an order approving, in part and denying in part, Time Warner Cable Information Systems (New York), LLC's (TWCIS) petition requesting waivers of certain Commission regulations under 16 NYCRR.

**Statutory authority:** Public Service Law, sections 94(2), 91(1) and 98

**Subject:** Approving, in part, of TWCIS' request for waivers of rules.

**Purpose:** To approve, in part, TWCIS' request for waivers of rules.

**Substance of final rule:** The Commission, on October 17, 2013, adopted an order approving, in part and denying in part, a petition filed by Time Warner Cable Information Services (New York), LLC, requesting waivers of certain Commission rules under 16 NYCRR, sections 602, 603, 606 and 609, 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](mailto: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-C-0193SA1)

**NOTICE OF ADOPTION**

**Approval of Transfer from RG&E to AENY of Ownership Interests in Two Gas-Fired Generation Facilities**

**I.D. No.** PSC-27-13-00012-A

**Filing Date:** 2013-10-18

**Effective Date:** 2013-10-18

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

**Action taken:** On 10/17/13, the PSC adopted an order approving the transfer from Rochester Gas and Electric Corporation (RG&E) and affiliates to Alliance Energy, New York LLC (AENY) and affiliates of ownership interests in two gas-fired facilities.

**Statutory authority:** Public Service Law, sections 2(2-a), (13), 5(1)(b), 64-69, 69-a, 70, 71, 72, 72-a, 105-114, 114-a, 115, 117, 118, 119-b and 119-c

**Subject:** Approval of transfer from RG&E to AENY of ownership interests in two gas-fired generation facilities.

**Purpose:** To approve the transfer from RG&E to AENY of ownership interests in two gas-fired generation facilities.

**Substance of final rule:** The Commission, on October 17, 2013, adopted an order approving a petition filed by Rochester Gas and Electric Corporation (RG&E) and its affiliates and Alliance Energy, New York LLC (AENY) and its affiliates, requesting approval of the transfer from RG&E to AENY, of ownership interests in two gas-fired generation facilities, 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](mailto: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.  
(07-M-0906SA9)

**NOTICE OF ADOPTION**

**Approval of Lightened and Incidental Regulation of a Steam Service**

**I.D. No.** PSC-28-13-00022-A

**Filing Date:** 2013-10-18

**Effective Date:** 2013-10-18

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

**Action taken:** On 10/17/13, the PSC adopted an order approving a petition filed by Monroe Community College requesting that a steam service it will provide in the City of Rochester be subject to lightened and incidental ratemaking regulation.

**Statutory authority:** Public Service Law, sections 2(22), 5(1)(c), 78, 79, 80, 81, 82, 82-a, 83, 84, 85, 88, 89, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 117, 118, 119-b and 119-c

**Subject:** Approval of lightened and incidental regulation of a steam service.

**Purpose:** To approve lightened and incidental regulation of a steam service.

**Substance of final rule:** The Commission, on October 17, 2013, adopted an order approving Monroe Community College's petition that a steam service it will provide in the City of Rochester be subject to lightened and incidental regulation, 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](mailto: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-S-0248SA1)

**NOTICE OF ADOPTION**

**Approval of Sithe's Participation with Affiliates in Consolidated Debt Obligations of No More Than \$2.175 Billion**

**I.D. No.** PSC-32-13-00013-A

**Filing Date:** 2013-10-21

**Effective Date:** 2013-10-21

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

**Action taken:** On 10/17/13, the PSC adopted an order approving the petition of Sithe/Independence Power Partners, L.P. (Sithe) for participation with affiliates in consolidated obligations up to the maximum of \$2.175 billion.

**Statutory authority:** Public Service Law, sections 25(1)(b), (c), 69 and 82  
**Subject:** Approval of Sithe's participation with affiliates in consolidated debt obligations of no more than \$2.175 billion.

**Purpose:** To approve Sithe's participation with affiliates in consolidated debt obligations of no more than \$2.175 billion.

**Substance of final rule:** The Commission, on October 17, 2013, adopted an order approving a petition filed by Sithe/Independence Power Partners, L. P. for participation with affiliates in consolidated debt obligations of up to the maximum of \$2.175 billion, 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](mailto: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-M-0305SA1)

**NOTICE OF ADOPTION**

**Approval of Tariff Modifications Contained in PSC No. 119 – Electricity**

**I.D. No.** PSC-33-13-00025-A

**Filing Date:** 2013-10-17

**Effective Date:** 2013-10-17

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

**Action taken:** On 10/17/13, the PSC adopted an order approving a tariff filing by New York State Electric and Gas Corporation, to make various revisions to the rates, charges, rules and regulations contained in PSC No. 119–Electricity.

**Statutory authority:** Public Service Law, sections 65 and 66(12)

**Subject:** Approval of tariff modifications contained in PSC No. 119–Electricity.

**Purpose:** To approve the tariff modifications contained in PSC No. 119–Electricity.

**Substance of final rule:** The Commission, on October 17, 2013, adopted an order approving New York State Electric and Gas Corporation’s tariff filing approving various modifications to PSC No. 119–Electricity to reflect new pole attachment 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](mailto: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-0321SA1)

**NOTICE OF ADOPTION**

**Approval of Tariff Modifications Contained in PSC No. 220–Electricity**

**I.D. No.** PSC-33-13-00028-A

**Filing Date:** 2013-10-17

**Effective Date:** 2013-10-17

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

**Action taken:** On 10/17/13, the PSC adopted an order approving a tariff filing by Niagara Mohawk Power Corporation d/b/a National Grid, to make various revisions to the rates, charges, rules and regulations contained in PSC No. 220–Electricity.

**Statutory authority:** Public Service Law, sections 65 and 66(12)

**Subject:** Approval of tariff modifications contained in PSC No. 220–Electricity.

**Purpose:** To approve the tariff modifications contained in PSC No. 220–Electricity.

**Substance of final rule:** The Commission, on October 17, 2013, adopted an order approving Niagara Mohawk Power Corporation d/b/a National Grid’s tariff filing approving various modifications to PSC No. 220–

Electricity, to allow customers served under the Company’s Service Classification No. 4 (SC4-Untransformed Service to Certain Customers Taking Power from Projects of the New York Power Authority) to participate in the Empire Zone and the Excelsior Jobs economic development 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](mailto: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-0337SA1)

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

**Investigation into Effect of Bifurcation of Gas and Electric Utility Service on Long Island**

**I.D. No.** PSC-45-13-00021-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 by International Brotherhood of Electrical Workers Local Union 1014 for an investigation into the effect of bifurcation of gas and electric utility service on Long Island.

**Statutory authority:** Public Service Law, sections 5, 65 and 66

**Subject:** Investigation into effect of bifurcation of gas and electric utility service on Long Island.

**Purpose:** To consider a Petition for an investigation into effect of bifurcation of gas and electric utility service on Long Island.

**Substance of proposed rule:** The Public Service Commission is considering a Petition by International Brotherhood of Electrical Workers Local Union 1014 (the Union) for an investigation into the effect of bifurcation of gas and electric utility service on Long Island. As a result of the selection of PSEG Long Island, LLC by the Long Island Power Authority (LIPA) as its electric service provider, a service currently provided by National Grid, electric and gas utility service on Long Island will be bifurcated. The Union asserts that this may impact LIPA operations and utility service on Long Island. The Commission may approve, modify, or reject, in whole or in part, the relief requested.

**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](mailto:Deborah.Swatling@dps.ny.gov)

**Data, views or arguments may be submitted to:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: [secretary@dps.ny.gov](mailto: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-M-0482SP1)

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

**Waiver of PSC Regulations, 16 NYCRR Section 88.4(a)(4)**

**I.D. No.** PSC-45-13-00022-P

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

**Proposed Action:** The PSC is considering a waiver of certain provisions

of 16 NYCRR regarding requirements for applications under PSC Article VII requested in a motion by applicants, North America Transmission, LLC and North America Transmission Corporation.

**Statutory authority:** Public Service Law, sections 4 and 122

**Subject:** Waiver of PSC regulations, 16 NYCRR section 88.4(a)(4).

**Purpose:** To consider a waiver of certain regulations relating to the content of an application for transmission line siting.

**Substance of proposed rule:** The Public Service Commission is considering a motion by North America Transmission, LLC and North America Transmission Corporation (collectively, "NAT") for waiver of certain requirements for the content of an application to construct and operate electric transmission lines pursuant to a Certificate of Environmental Compatibility and Public Need under Public Service Law Article VII. NAT proposes to construct 345 kV transmission lines from the Edic substation in the Town of Marcy, New York, to the Fraser substation in the Town of Delhi, New York, and from the New Scotland substation in the Town of New Scotland, New York, to the Leeds substation in the Town of Athens, New York, and then to the Pleasant Valley substation in the Town of Pleasant Valley, New York. For purposes of the proceeding in which this application was submitted, the Commission established a two-part application process with initial, abbreviated applications (Part A) due October 1, 2013, and full applications (Part B) due at a later date to be determined. The Commission also defined the Part A filing requirements. NAT made a Part A filing on October 1, 2013, and seeks waiver of the requirement to file a map overlay showing zoning for all municipalities that its proposed project routes traverse. NAT also requests a waiver of the filing of System Reliability Impact Study (SRIS) information called for by 16 NYCRR § 88.4(a)(4), if the Commission intended to require that information for Part A, or if the Commission required only notice that the SRIS was underway, a waiver of that requirement with respect to the New Scotland-Leeds-Pleasant Valley line only. The Commission may grant, deny, or modify the relief requested or provide an alternate resolution proposed in responses to the motion or otherwise related to the motion.

**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:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

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

(13-T-0454SP1)

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

#### Waiver of PSC Regulations, 16 NYCRR Section 88.4(a)(4)

I.D. No. PSC-45-13-00023-P

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

**Proposed Action:** The PSC is considering a waiver of certain provisions of 16 NYCRR regarding requirements for applications under PSC Article VII requested in a motion by applicant, NextEra Energy Transmission New York, Inc.

**Statutory authority:** Public Service Law, sections 4 and 122

**Subject:** Waiver of PSC regulations, 16 NYCRR section 88.4(a)(4).

**Purpose:** To consider a waiver of certain regulations relating to the content of an application for transmission line siting.

**Substance of proposed rule:** The Public Service Commission is considering a motion by NextEra Energy Transmission New York, Inc. (NextEra) for waiver of certain requirements for the content of an application to construct and operate an electric transmission line pursuant to a Certificate of Environmental Compatibility and Public Need under Public Service Law Article VII. NextEra proposes to construct 345 kV transmission line from the Marcy substation in the Town of Marcy, New York, to the Pleasant Valley substation in the Town of Pleasant Valley, New York. For

purposes of the proceeding in which this application was submitted, the Commission established a two-part application process with initial, abbreviated applications (Part A) due October 1, 2013, and full applications (Part B) due at a later date to be determined. The Commission also defined the Part A filing requirements. NextEra made a Part A filing on October 1, 2013, and seeks waiver of the requirement that the filing include a notice that a System Impact Study/System Reliability Impact Study by the New York Independent System Operator is in progress. The Commission may grant, deny, or modify the relief requested or provide an alternate resolution proposed in responses to the motion or otherwise related to the motion.

**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:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

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

(13-T-0455SP1)

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

#### Waiver of PSC Regulations, 16 NYCRR Section 88.4(a)(4); Waiver of Filing Deadlines

I.D. No. PSC-45-13-00024-P

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

**Proposed Action:** The PSC is considering a waiver of certain provisions of 16 NYCRR regarding requirements for applications under PSC Article VII requested in a motion by applicant, Boundless Energy NE, LLC.

**Statutory authority:** Public Service Law, sections 4 and 122

**Subject:** Waiver of PSC regulations, 16 NYCRR section 88.4(a)(4); waiver of filing deadlines.

**Purpose:** To consider a waiver of certain regulations relating to the content of an application for transmission line siting.

**Substance of proposed rule:** The Public Service Commission is considering a petition by Boundless Energy NE, LLC (Boundless) in which the company requests a waiver of certain filing requirements related to its application to construct and operate electric transmission lines pursuant to a Certificate of Environmental Compatibility and Public Need under Public Service Law Article VII. Boundless proposes to construct a 345 kV transmission line from a connection with an existing line in the Town of East Greenbush, New York, to the New Scotland substation in the Town of New Scotland, New York; to construct a new substation in the Town of Schodack and a 345 kV transmission line from that substation to the Leeds substation in the Town of Athens, New York; to add a new 345 kV circuit to an existing line between Leeds and the Rock Tavern substation in the Town of New Windsor, New York; and to construct a new 345 kV line from the Roseton substation in Orange County, New York, to the East Fishkill substation in Dutchess County, New York. For purposes of the proceeding in which this application was submitted, the Commission established a two-part application process with initial, abbreviated applications (Part A) due October 1, 2013, and full applications (Part B) due at a later date to be determined. The Commission also defined the Part A filing requirements. Boundless made a Part A filing on October 2, 2013. Its petition seeks a determination that its filing was timely or that the October 1, 2013, filing deadline be waived. It also seeks waiver of the requirement that the filing include a notice that a System Impact Study/System Reliability Impact Study by the New York Independent System Operator is in progress; and a waiver of the requirement that seven hard copies of the application be submitted by October 7, 2013. The Commission may grant, deny, or modify the relief requested or provide an alternate resolution proposed in responses to the motion or otherwise related to the motion.

**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:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

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

(13-T-0461SP1)

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

**Waiver of PSC Regulations, 16 NYCRR Section 88.4(a)(4)**

**I.D. No.** PSC-45-13-00025-P

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

**Proposed Action:** The PSC is considering a waiver of certain provisions of 16 NYCRR regarding requirements for applications under PSC Article VII requested in a motion by applicant, NextEra Energy Transmission New York, Inc.

**Statutory authority:** Public Service Law, sections 4 and 122

**Subject:** Waiver of PSC regulations, 16 NYCRR section 88.4(a)(4).

**Purpose:** To consider a waiver of certain regulations relating to the content of an application for transmission line siting.

**Substance of proposed rule:** The Public Service Commission is considering a motion by NextEra Energy Transmission New York, Inc. (NextEra) for waiver of certain requirements for the content of an application to construct and operate an electric transmission line pursuant to a Certificate of Environmental Compatibility and Public Need under Public Service Law Article VII. NextEra proposes to construct a 345 kV transmission line from the Oakdale substation in Broome County, New York, to the Fraser substation in Delaware County, New York. For purposes of the proceeding in which this application was submitted, the Commission established a two-part application process with initial, abbreviated applications (Part A) due October 1, 2013, and full applications (Part B) due at a later date to be determined. The Commission also defined the Part A filing requirements. NextEra made a Part A filing on October 1, 2013, and seeks waiver of the requirement that the filing include a notice that a System Impact Study/System Reliability Impact Study by the New York Independent System Operator is in progress. The Commission may grant, deny, or modify the relief requested or provide an alternate resolution proposed in responses to the motion or otherwise related to the motion.

**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:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

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

(13-T-0456SP1)

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

**Net Metering of Residential Farm Photovoltaic and Farm and Non-Residential Fuel Cell Electric Generating Systems**

**I.D. No.** PSC-45-13-00026-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 Central Hudson Gas and Electric Corporation to make various revisions to the rates, charges, rules and regulations contained in Schedule for P.S.C. No. 15 — Electricity.

**Statutory authority:** Public Service Law, section 66-j

**Subject:** Net metering of residential farm photovoltaic and farm and non-residential fuel cell electric generating systems.

**Purpose:** To provide net metering of residential farm photovoltaic and farm and non-residential fuel cell electric generating systems.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Central Hudson Gas and Electric Corporation to effectuate amendments to Public Service Law (PSL) Section 66-j resulting from Chapters 200 and 253 of the Laws of 2013, signed into law by Governor Cuomo on July 31, 2013. Pursuant to Chapter 200, the amendments provide for the remote net metering of fuel cell electric generating equipment on property owned or leased by non-residential customers and customers that own or operate a farm operation. Pursuant to Chapter 253, the amendments provide for the rated capacity eligible for net metering of photovoltaic electric generating systems owned or operated by customers utilizing residential meters that own or operate a farm operation. The New York State Standard Interconnection Requirements (SIR) document will also be modified. The filing has an effective date of February 1, 2014. The Commission may apply aspects of its decision here to the requirements for tariffs of other utilities.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.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:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-4535, 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-E-0421SP1)

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

**Net Metering of Residential Farm Photovoltaic and Farm and Non-Residential Fuel Cell Electric Generating Systems**

**I.D. No.** PSC-45-13-00027-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 Consolidated Edison Company of New York, Inc. to make various revisions to the rates, charges, rules and regulations contained in Schedule for P.S.C. No. 10 — Electricity.

**Statutory authority:** Public Service Law, section 66-j

**Subject:** Net metering of residential farm photovoltaic and farm and non-residential fuel cell electric generating systems.

**Purpose:** To provide net metering of residential farm photovoltaic and farm and non-residential fuel cell electric generating systems.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Consolidated Edison Company of New York, Inc. to effectuate amendments to Public Service Law (PSL) Section 66-j resulting from Chapters 200 and 253 of the Laws of 2013, signed into law by Governor Cuomo on July 31, 2013. Pursuant to Chapter 200, the amendments provide for the remote net metering of fuel cell electric generating equipment on property owned or leased by non-residential customers and customers that own or operate a farm operation. Pursuant to Chapter 253, the amendments provide for the rated capacity eligible for net metering of photovoltaic electric generating systems owned or operated by customers utilizing residential meters that own or operate a farm operation. The New York State Standard Interconnection Requirements (SIR) document will also be modified. The filing has an effective date of February 1, 2014. The Commission may apply aspects of its decision here to the requirements for tariffs of other utilities.

*Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.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:* Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-4535, 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-E-0422SP1)

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

**Net Metering of Residential Farm Photovoltaic and Farm and Non-Residential Fuel Cell Electric Generating Systems**

**I.D. No.** PSC-45-13-00028-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 New York State Electric & Gas Corporation to make various revisions to the rates, charges, rules and regulations contained in Schedule for P.S.C. No. 120 — Electricity.

**Statutory authority:** Public Service Law, section 66-j

**Subject:** Net metering of residential farm photovoltaic and farm and non-residential fuel cell electric generating systems.

**Purpose:** To provide net metering of residential farm photovoltaic and farm and non-residential fuel cell electric generating systems.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by New York State Electric & Gas Corporation to effectuate amendments to Public Service Law (PSL) Section 66-j resulting from Chapters 200 and 253 of the Laws of 2013, signed into law by Governor Cuomo on July 31, 2013. Pursuant to Chapter 200, the amendments provide for the remote net metering of fuel cell electric generating equipment on property owned or leased by non-residential customers and customers that own or operate a farm operation. Pursuant to Chapter 253, the amendments provide for the rated capacity eligible for net metering of photovoltaic electric generating systems owned or operated by customers utilizing residential meters that own or operate a farm operation. The New York State Standard Interconnection Requirements (SIR) document will also be modified. The filing has an effective date of February 1, 2014. The Commission may apply aspects of its decision here to the requirements for tariffs of other utilities.

*Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.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:* Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-4535, 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-E-0423SP1)

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

**Net Metering of Residential Farm Photovoltaic and Farm and Non-Residential Fuel Cell Electric Generating Systems**

**I.D. No.** PSC-45-13-00029-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 filing by Niagara Mohawk Power Corporation d/b/a National Grid to make various revisions to the rates, charges, rules and regulations contained in Schedule for P.S.C. No. 220 — Electricity.

**Statutory authority:** Public Service Law, section 66-j

**Subject:** Net metering of residential farm photovoltaic and farm and non-residential fuel cell electric generating systems.

**Purpose:** To provide net metering of residential farm photovoltaic and farm and non-residential fuel cell electric generating systems.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Niagara Mohawk Power Corporation d/b/a National Grid to effectuate amendments to Public Service Law (PSL) Section 66-j resulting from Chapters 200 and 253 of the Laws of 2013, signed into law by Governor Cuomo on July 31, 2013. Pursuant to Chapter 200, the amendments provide for the remote net metering of fuel cell electric generating equipment on property owned or leased by non-residential customers and customers that own or operate a farm operation. Pursuant to Chapter 253, the amendments provide for the rated capacity eligible for net metering of photovoltaic electric generating systems owned or operated by customers utilizing residential meters that own or operate a farm operation. The New York State Standard Interconnection Requirements (SIR) document will also be modified. The filing has an effective date of February 1, 2014. The Commission may apply aspects of its decision here to the requirements for tariffs of other utilities.

*Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.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:* Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-4535, 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-E-0424SP1)

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

**Net Metering of Residential Farm Photovoltaic and Farm and Non-Residential Fuel Cell Electric Generating Systems**

**I.D. No.** PSC-45-13-00030-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 Orange and Rockland Utilities, Inc. to make various revisions to the rates, charges, rules and regulations contained in Schedule for P.S.C. No. 3 — Electricity.

**Statutory authority:** Public Service Law, section 66-j

**Subject:** Net metering of residential farm photovoltaic and farm and non-residential fuel cell electric generating systems.

**Purpose:** To provide net metering of residential farm photovoltaic and farm and non-residential fuel cell electric generating systems.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Orange and

Rockland Utilities, Inc. to effectuate amendments to Public Service Law (PSL) Section 66-j resulting from Chapters 200 and 253 of the Laws of 2013, signed into law by Governor Cuomo on July 31, 2013. Pursuant to Chapter 200, the amendments provide for the remote net metering of fuel cell electric generating equipment on property owned or leased by non-residential customers and customers that own or operate a farm operation. Pursuant to Chapter 253, the amendments provide for the rated capacity eligible for net metering of photovoltaic electric generating systems owned or operated by customers utilizing residential meters that own or operate a farm operation. The New York State Standard Interconnection Requirements (SIR) document will also be modified. The filing has an effective date of February 1, 2014. The Commission may apply aspects of its decision here to the requirements for tariffs of other utilities.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.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:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-4535, 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-E-0426SP1)

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

**Net Metering of Residential Farm Photovoltaic and Farm and Non-Residential Fuel Cell Electric Generating Systems**

**I.D. No.** PSC-45-13-00031-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 Rochester Gas and Electric Corporation to make various revisions to the rates, charges, rules and regulations contained in Schedule for P.S.C. No. 19 — Electricity.

**Statutory authority:** Public Service Law, section 66-j

**Subject:** Net metering of residential farm photovoltaic and farm and non-residential fuel cell electric generating systems.

**Purpose:** To provide net metering of residential farm photovoltaic and farm and non-residential fuel cell electric generating systems.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Rochester Gas and Electric Corporation to effectuate amendments to Public Service Law (PSL) Section 66-j resulting from Chapters 200 and 253 of the Laws of 2013, signed into law by Governor Cuomo on July 31, 2013. Pursuant to Chapter 200, the amendments provide for the remote net metering of fuel cell electric generating equipment on property owned or leased by non-residential customers and customers that own or operate a farm operation. Pursuant to Chapter 253, the amendments provide for the rated capacity eligible for net metering of photovoltaic electric generating systems owned or operated by customers utilizing residential meters that own or operate a farm operation. The New York State Standard Interconnection Requirements (SIR) document will also be modified. The filing has an effective date of February 1, 2014. The Commission may apply aspects of its decision here to the requirements for tariffs of other utilities.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.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:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-4535, 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-E-0425SP1)

**State University of New York**

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

**State University of New York Appointment of Employees**

**I.D. No.** SUN-45-13-00001-P

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

**Proposed Action:** This is a consensus rule making to amend sections 335.8(a)(1), (2) and 335.11(b) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 353, 355 and 355-a

**Subject:** State University of New York Appointment of Employees.

**Purpose:** To amend the eligibility for initial permanent appointment and eligibility for term appointment for professional class employees.

**Text of proposed rule:** 335.8 Eligibility for initial permanent appointment.

(a) Except as provided in paragraphs (a)(1)-(2) and subdivision (b) of this section and in paragraph (b)(2) of section 335.9 of this Part, at any college further employment, in a professional title in which permanent appointment may be granted, of a professional employee who has completed seven consecutive years of full-time service as a professional employee at that college, the last two years of which have been in that professional title, must be on the basis of permanent appointment; provided, however, that such appointment shall not be effective until made so by the chancellor.

(1) Upon completion of three consecutive years of full-time service as a professional employee at that college, the last year of which has been in that professional title, a professional employee in a title eligible for permanent appointment [in any of the first four salary ranks] may initiate early consideration for permanent appointment through notification to the chief administrative officer of the college. To be effective, such notification must be in writing and received by the chief administrative officer of the college no later than nine months prior to the date upon which such employee would otherwise receive written notice that a term appointment is not to be renewed upon expiration. In the event the chief administrative officer of the college grants the employee's request for such early consideration, any further employment of that employee after completion of five consecutive years of full-time service as a professional employee at that college, the last two years of which have been in that professional title, must be on the basis of permanent appointment; provided, however, that such appointment shall not be effective until made so by the chancellor.

(2) Upon completion of four consecutive years of full-time service as a professional employee at that college, the last year of which has been in that professional title, a professional employee in a title eligible for permanent appointment [in any of the first four salary ranks] may initiate early consideration for permanent appointment through notification to the chief administrative officer of the college. To be effective, such notification must be in writing and received by the chief administrative officer of the college no later than nine months prior to the date upon which such employee would otherwise receive written notice that a term appointment is not to be renewed upon expiration. In the event the chief administrative officer of the college grants the employee's request for such early consideration, any further employment of that employee after completion of six consecutive years of full-time service as a professional employee at that college, the last two years of which have been in that professional title, must be on the basis of permanent appointment; provided, however, that such appointment shall not be effective until made so by the chancellor.

\* \* \* \* \*

335.11 Eligibility.

\* \* \* \* \*

(b) Part-time service. (1) Further employment at any college of an individual who has been employed at that college on a part-time basis for

[six] four consecutive semesters in a position designated as being in the Professional Services Negotiating Unit shall be on the basis of a term appointment. In computing consecutive semesters of part-time service for the purposes of appointment or reappointment under this subdivision, periods of leave of absence at partial salary or without salary shall not be included, but shall not be deemed an interruption of otherwise consecutive service. An individual who has been granted term appointment but for whom classroom enrollment is inadequate shall have no entitlement to salary, benefits, or any other rights or privileges.

(2) In the event the service of such an individual is interrupted for a period of four consecutive semesters or more, the chief administrative officer of the college may grant the employee any type of appointment as in the chief administrative officer's judgment is appropriate.

**Text of proposed rule and any required statements and analyses may be obtained from:** Lisa S. Campo, State University of New York, State University Plaza, 353 Broadway, Albany, NY 12246, (518) 320-1400, email: Lisa.Campo@SUNY.edu

**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**

No person is likely to object to the adoption of the rule as written because the proposed amendment conforms rules that constitute the Policies of the Board of Trustees of the State University of New York to agreements reached as the result of collective bargaining between the State of New York and the collective bargaining agent for professional staff of the State University, the United University Professions.

**Job Impact Statement**

No job impact statement is submitted with this notice because the proposed rule does not impose any adverse economic impact on existing jobs, employment opportunities, or self-employment. This regulation governs eligibility for initial permanent appointment and eligibility for part-time term appointment for professional employees for State University of New York and will not have any adverse impact on the number of jobs or employment.

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## Workers' Compensation Board

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### EMERGENCY RULE MAKING

**Methodology for Determining Annual Assessments**

**I.D. No.** WCB-45-13-00017-E

**Filing No.** 1004

**Filing Date:** 2013-10-22

**Effective Date:** 2013-10-22

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

**Action taken:** Addition of Part 500 to Title 12 NYCRR.

**Statutory authority:** Workers' Compensation Law, sections 117 and 151

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

**Specific reasons underlying the finding of necessity:** This amendment is adopted as an emergency measure because time is of the essence. The Board is required, as specified in the statute cited below to establish an assessment rate by November 1, 2013 and assess that rate by January 1, 2014. Specifically, Section 151 (2) WCL states:

“on the first day of November two thousand thirteen, and annually thereafter, the chair shall establish an assessment rate for all affected employers in the state of New York in an amount expected to be sufficient to produce assessment receipts at least sufficient to fund all estimated annual expense pursuant to subdivision one of this section except those expenses for which an assessment is authorized for self- insurance pursuant to subdivision five of section fifty of this chapter. Such rate shall be assessed effective the first of January of the succeeding year and shall be based on a single methodology determined by the chair.”

The assessment rate funds statutorily required programs such as the Board's administrative expenses (151 WCL), the liabilities of the Special Disability Fund (15-8 WCL), the Fund for Reopened Cases (25-a WCL) and the Special Fund for Disability Benefits (214 WCL).

Accordingly, emergency adoption of this rule is necessary.

**Subject:** Methodology for determining annual Assessments.

**Purpose:** Annual assessments to fund administrative costs and special fund payments provided for in the Workers' Compensation Law (WCL).

**Substance of emergency rule:** The proposed regulation adds new Sections 500.00-500.12 to comply with Chapter 57 of the Laws of 2013 which requires the Board to streamline the manner in which it collects its administrative and special fund assessments to one that will be consistent among the various categories of payers and will be based upon active coverage.

Section 500-2 states that the assessment rate will be established by November 1st annually and apply to policies effective on or before January 1st of the next calendar year.

Section 500-3 establishes that the rate will apply to standard premium and defines the expenses to be covered by the assessment rate.

Section 500-4 states that the rate established by November 1st of each year for the succeeding calendar year shall be applied to a base of standard premium as defined below.

Standard premium is defined as follows:

(a) Carriers and State Insurance Fund – For employers securing workers' compensation coverage via a policy issued either by an authorized carrier or the State Insurance Fund, standard premium shall mean the full annual value of premiums booked for each policy written or renewed during a specific reporting period as determined on forms prescribed by the Chair.

(b) Private and Public Self-Insured Employers – Standard written premium for self-insured employers shall be determined by applying payroll by classification codes to applicable loss cost rates. Loss cost rates for self-insured employers shall be furnished by the Chair based, in whole or in part at the discretion of the Chair, upon comparable rates applicable to carrier policies which may be adjusted for administrative expenses. To the extent there are no corresponding class codes for one or more classifications of payroll, the Chair shall establish an equivalent rate.

Estimated statewide premiums shall be determined by combining the standard premium for all employers.

Section 500-5 establishes that the assessment rate shall be a percentage of standard premiums and calculated as follows:

Total estimated annual expenses as defined in 500.3, Divided By, Total estimated statewide premiums as defined in 500.4

The estimated statewide premiums may, where appropriate, reflect projected changes in overall premium levels that may result from loss cost rate changes approved by the Department of Financial Services.

Section 500-6 establishes that rate adjustments will be addressed as follows:

(a) If the rate established for any given year results in the collection of assessments which exceed the amounts described herein, the assessment rate for the next calendar year shall be reduced accordingly. However, the assessment rate for each calendar year shall ensure that the clearing account described in section 500.7 maintains a balance of at least ten percent of the annual projected assessments.

(b) If it appears that the rate established for any given year will not produce assessment revenue sufficient to meet all estimated annual expenses as described herein, the Board may make adjustments to the existing published rate prior to the beginning of the next calendar year. Any such mid-year rate adjustments must be published at least 45 days prior to becoming effective and will apply to policies with effective dates between the effective date of the adjusted rate through December 31 of that calendar year or until the Board issues a new rate, whichever is later.

Section 500-7 establishes that all assessment monies received shall first be deposited into a clearing account established for the purpose of receiving assessments. Assessment revenue will be applied pursuant to WCL § 151-8 in accordance with each then applicable financing agreement prior to application for any other purpose. Once any and all amounts required by applicable financing agreements have been met for the year, assessments will then be applied from the clearing account, at the discretion of the Chair, to the administrative and special fund expenses described herein.

Section 500-8 establishes that assessment should be remitted as follows:

(a) The assessment rate established by the Board shall apply to all employers required to secure compensation for their employees.

(b) Until such time as the Board can establish a direct employer payment process, the remittance to the Board of all required assessments shall be as follows:

1. For those employers obtaining coverage: (a) through a policy with the State Insurance Fund; (b) through a policy with an authorized carrier; (c) through a county self-insurance plan under Article V of the WCL; or (d) through a private or public group self-insurer; such assessment amounts shall be collected from the employer and remitted to the Board by the State Insurance Fund, carrier, county plan, or self-insured group.

The State Insurance Fund, carrier, county plan, or self-insured group shall complete the reports identified in section 500.9 herein, apply the applicable assessment rate as established by the Board and timely remit both the report and the corresponding payment to the Board on the schedule set forth in paragraph (c) below.

2. For those private or public employers that self-insure individually, said employers shall pay assessment amounts directly to the Board. Such employers shall complete the report identified in section 500.9 herein, apply the applicable assessment rate as established by the Board and, timely remit both the report and the corresponding payment to the Board on the schedule set forth in paragraph (c) below.

(c) Both the report identified in section 500.9 below and the required assessment payment shall be remitted to the Board in accordance with the following schedule:

Assessments related to the quarter ending March 31 postmarked on or before April 30.

Assessments related to the quarter ending June 30 postmarked on or before July 31.

Assessments related to the quarter ending September 30 postmarked on or before October 31.

Assessment related to the quarter ending December 31 postmarked on or before January 31.

(d) If the above cited due dates fall on a weekend or holiday the remittances shall be due the next following business day.

(e) In addition at any time prior to March 31, June 30, September 30, or December 31, the Board may identify any employer that has refused or neglected to pay assessments pursuant to WCL § 50(3-a)(7)(b). In such instance the Board shall calculate a charge to be imposed on such employer in addition to the assessment required herein. Such charge shall be a percentage of the standard premium as defined herein and shall range from between 10 and 30 percent based upon: 1) the length of time the employer has been delinquent in its WCL § 50(3-a)(7)(b) assessment obligations; 2) the amount of the WCL § 50(3-a)(7)(b) assessment delinquency; and 3) the amount of the insolvent group self-insurance trust's obligations that remain unmet at the time of the calculation of the surcharge, the Board shall inform the employer's current provider of coverage of the neglect or delinquency. The employer's current provider of coverage shall collect and remit such additional surcharge in the manner provided for above. All monies recovered from the payment of such charge shall be credited to: 1) the employer's unmet obligations under the WCL; and 2) the group self-insurance Trusts' unmet obligations under the WCL.

Section 500-9 describes the required reports:

(a) The assessment payment remitted quarterly shall be accompanied by reports prescribed by the Chair. Depending upon whether the remitter is a carrier, the State Insurance Fund, private or public self-insured employer, or private or public group self-insured employer, these reports may contain but not be limited to: written premium; total payroll; payroll by classification; adjustments from prior periods; etc. Annual reports prescribed by the Chair may also be required.

(b) All such prescribed reports will require an attestation by an authorized representative that all information is true, correct and complete. A payer that knowingly makes a material misrepresentation of information related to assessments shall be guilty of a Class E Felony.

(c) To the extent that a payer is also required to report the information requested by this section, or substantially similar values, to other governmental entities including but not limited to state and federal agencies, then the information reported by the payer to the Board shall be consistent with the payer's reporting to other entities. To the extent that the payer's reporting to the Board is materially inconsistent with the payer's reports to other governmental entities, then the payer shall disclose such inconsistency in the reports submitted to the Board and supply an explanation for such inconsistency.

Section 500-10 establishes that, in the event of a carrier, the State Insurance Fund, a private or public self-insured employer, or a private or public group self-insured employer's failure to remit assessment payments and reports in accordance with the requirements contained herein the Board may undertake any or all of the following collection activities with respect to the assessments:

(a) Refer the matter to the Office of the Attorney General for commencement of a collection action; assessment.

(b) Withhold any and all payments to the carrier, the State Insurance Fund, private or public self-insured employer or private or public group self-insured employer including but not limited to special fund reimbursements, until such time as all assessments have been paid in full;

(c) The failure of a private or public self-insured employer or private or public group self-insured employer to timely remit assessments and required reports shall constitute good cause for the Board to revoke said self-insurers self-insured status.

In the event that a carrier, the State Insurance Fund, a private or public self-insured employer, or a private or public group self-insured employer

has underpaid an assessment as the result of inaccurate reporting, such payer shall pay all overdue assessments in full within 30 days of notification by the Board and may be subject to interest at a rate of 9% annually on the unpaid amount. Further, in the event that it is determined that the payer knew or should have known that the reported information was inaccurate an additional penalty of up to 20% of the unpaid amount may be imposed by the Board against such carrier, the State Insurance Fund, private or public self-insured employers.

Section 500-11 establishes that on an annual basis in conjunction with the November 1 publication of the assessment rate, the Board will prepare a report which supports the assessment rate established for policies effective in the succeeding calendar year. Such report shall also be prepared in the event an assessment rate modification is required pursuant to Section 500.6. Such report will include a summary of the projections or estimates made in the development of the assessment rate including the expenses covered by the rate and underlying assessment base.

Section 500.12 establishes that the Chair may conduct periodic audits on employers, self-insurers, carriers and the State Insurance Fund concerning any information or payment related to assessments.

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires January 19, 2014.

**Text of rule and any required statements and analyses may be obtained from:** Heather MacMaster, Workers' Compensation Board, 328 State Street, Office of General Counsel, Schenectady, NY 12305-2318, (518) 486-9564, email: regulations@wcb.ny.gov

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

Workers' Compensation Law Section 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Chapter 57 of the Laws of 2013 amends several sections of the WCL including section 151 which is repealed and a new section added.

Section 151 WCL directs the Board to promulgate an assessment rate by November 1, 2013 and assess that rate by January 1, 2014. Specifically, Section 151 (2) WCL states:

"on the first day of November two thousand thirteen, and annually thereafter, the chair shall establish an assessment rate for all affected employers in the state of New York in an amount expected to be sufficient to produce assessment receipts at least sufficient to fund all estimated annual expense pursuant to subdivision one of this section except those expenses for which an assessment is authorized for self-insurance pursuant to subdivision five of section fifty of this chapter. Such rate shall be assessed effective the first of January of the succeeding year and shall be based on a single methodology determined by the chair." The assessment rate funds statutorily required programs such as the Board's administrative expenses (151 WCL), the liabilities of the Special Disability Fund (15-8 WCL), the Fund for Reopened Cases (25-a WCL) and the Special Fund for Disability Benefits (214 WCL).

##### 2. Legislative objectives:

The legislation enacted sweeping reforms to the manner in which the WCB collects its assessments.

The WCB currently issues bills for the liabilities associated with each of the assessments noted above which, in total, are approximately \$1.2 billion for 2013. The new process will eliminate the need for the WCB to issue bills for these assessments and instead move towards a "pass through" assessment whereby employers ultimately remit their share of the assessment directly to the WCB. As written, the legislation envisions an employer based assessment process. Ultimately, it is expected that the assessments will be collected directly from employers. However, it is not feasible to go directly from a carrier based to employer based assessment, particularly given the aggressive timeframes imposed by the legislation which mandate a new process by January 1, 2014.

A transitional period is anticipated in the legislation as evidenced by the language which states that until such time as the WCB establishes a direct employer payment process, assessments shall be remitted to the WCB by carriers, the SIF, county plans and groups. Individual private and public self-insurers shall continue to pay assessments directly. Finally, the legislation also allows the WCB to enter into an agreement with the Dormitory Authority and issue up to \$900 million in bonds to address unmet self-insured obligations. The debt service costs of any such bonds issued would be included in the annual rate. The debt service for these bonds as well as the WAMO bonds would take priority over the administrative expenses, special funds and interdepartmental funds.

##### 3. Needs and benefits:

The new legislation and supporting regulations will address many issues with the current process. Specifically:

- Currently, a disconnect exists between the amounts that carriers collect from their policy holders and the amounts that the WCB bills those carriers. The new rule will result in the WCB no longer issuing assessment

bills and instead promulgating a rate that will fund the required programs. Carriers will collect the amount driven by the rate from their policyholders and remit that amount to the Board. Eventually, the employers will remit to the Board directly.

- The base factors currently used to calculate the various payers proportionate share of assessments are not currently audited and/or verified. The new process will include mechanisms to audit the data including verification of amounts included on other State mandated forms like the NYS-45 required by the Departments of Tax and Finance and Labor.

- The current process of assessments being based on paid indemnity for certain payers requires the accrual and funding of significant long term liabilities. This requires carriers, SIF and self-insured's to hold aside monies to pay assessment liabilities that they will not have to actually remit until several years later.

- The current process is administratively onerous and lacks transparency for both the WCB and the various payers. The new process will result in more verification and audit of the data submitted.

- Each carrier, SIF, private and public self-insurer is receiving as many as 23 invoices from the WCB annually. Also, the data collection used to apportion the different assessments is manual and paper-based. The system used to calculate and bill the assessments is a custom module to the financial system used by the WCB that is difficult to maintain, particularly when upgrades and/or legislative changes are necessary. The WCB will no longer issue invoices and eventually a system will be implemented to allow payers to view and pay their assessments electronically.

#### 4. Costs:

This proposal will not impose any new costs on the regulated parties, the Board, the State or local governments since all of these entities are currently required to pay assessments. The total projected need for 2014 of \$893 million is significantly less than the average amounts billed for assessments for the past three years of more than \$1 billion. The Fund for Reopened Cases was closed to new cases and for the short term will not be included in the assessment rate because the fund balance will support the claims. Additionally, roughly \$7.4 million was billed on average related to the administration of the Disability Benefits program; these amounts will be rolled into the workers' compensation assessment rate. Although many of the payers of the DB assessment will still be paying WCB assessments (as they also write workers' compensation or have an active self-insurance program) they will no longer be paying a separate assessment related to DB. This adjustment adds to the administrative efficiency of the new method as it is not cost beneficial to have a separate rate and/or assessment for less than 1% of the overall amounts collected in a given year. Collectively, it is estimated that the municipal self-insurers will pay \$90 million less in assessments for 2014. However, the impact on the specific payers will be determined based on actual payroll.

For policies effective for calendar year 2014, the rate will be established as a percentage of standard premiums as follows: Total Estimated Annual Expenses Divided by Total Estimated Statewide Premiums. The estimated annual expenses to be covered by the rate total \$893 million. Statewide standard premiums are projected to be \$6.4 billion. Accordingly, the assessment rate for 2014 will be set at 13.8%.

#### 5. Local government mandates:

Since local governments have always been required to pay WCB assessments, this law does not impose any new requirements on these entities.

#### 6. Paperwork:

This proposed rule modifies the reporting requirements for municipalities, but does not impose additional reporting requirements. Eventually, it is the Board's intent to streamline the reporting process and allow entities to report and pay their assessments electronically, but this is not an enhancement we could offer at the outset given the abbreviated timeframes for implementation.

#### 7. Duplication:

The proposed rule does not duplicate or conflict with any state or federal requirements.

#### 8. Alternatives:

The legislation directed the Board to promulgate an assessment rate and rules and regulations to establish the process by which carriers, self-insured's, SIF and the political subdivisions would pay the assessments to the Board. Because of the short timeframes to implement a new assessment process, and the ultimate goal of transitioning to an employer based payment stream, the only practical basis on which to calculate the assessment in the short term is premium. Premium information is readily available for the vast majority (more than 80%) of employers that obtain a policy from a carrier or the SIF. A standard premium equivalent can be determined for the self-insured employers (both private and municipal) thus providing a similar basis for all employers, regardless of what type of coverage they maintain.

#### 9. Federal standards:

There are no federal standards applicable to this proposed rule.

#### 10. Compliance schedule:

It is expected that the affected parties will be able to comply with this change immediately.

#### **Regulatory Flexibility Analysis**

##### 1. Effect of rule:

Pursuant to Section 50 WCL, most businesses and local governments are required to carry workers' compensation coverage for their employees. They may obtain a policy from the State Insurance Fund, apply to, and become self-insured or obtain a policy from an insurance carrier licensed to write workers' compensation in New York. All entities that carry workers compensation are required to pay assessments to the Workers Compensation Board. There are approximately 1,900 payers in New York currently paying assessments including the carriers, SIF, private and public self-insurers. Most small businesses and local governments are currently paying WCB assessments. Depending on how they secure their workers compensation will determine the impact of the apportionment methodology and new rate on their assessment amounts. However, virtually all categories of payers will see a net decrease in their assessments in 2014 whether they are carrier covered or self-insured.

##### 2. Compliance requirements:

There is minimal impact on local governments and small businesses to comply with this rule.

##### 3. Professional services:

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

##### 4. Compliance costs:

This proposal will not impose any compliance costs on small business or local governments.

##### 5. Economic and technological feasibility:

No implementation or technology costs are anticipated for small businesses and local governments for compliance with the proposed rule. Therefore, it will be economically and technologically feasible for small businesses and local governments affected by the proposed rule to comply with the rule.

##### 6. Minimizing adverse impact:

Because the net result of the change in the assessment methodology, the proposed rule would be beneficial to local governments and small businesses. This rule provides only a benefit to small businesses and local governments.

##### 7. Small business and local government participation:

The Board received input from various stakeholder groups which provide coverage for many small businesses and local governments. A decrease in assessments was recognized as a major benefit to these groups.

#### **Rural Area Flexibility Analysis**

##### 1. Types and estimated numbers of rural areas:

This rule applies to all carriers, the State Insurance Fund, self-insured employers and political subdivisions in all areas of the state.

##### 2. Reporting, recordkeeping and other compliance requirements:

This rule applies to all carriers, the State Insurance Fund, self-insured employers and political subdivisions in all areas of the state. Impact on reporting and compliance for all entities is minimal.

##### 3. Costs:

This proposal will not impose any compliance costs on rural areas.

##### 4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides only a benefit to small businesses and local governments.

##### 5. Rural area participation:

The Board consulted with carriers and some municipalities on the rule making process.

#### **Job Impact Statement**

The proposed regulation will not have an adverse impact on jobs. The regulation merely changes the apportionment and methodology for entities to calculate and pay their required assessments to the Workers' Compensation Board. These regulations ultimately benefit the participants to the workers' compensation system by streamlining the assessment process and reducing their liability in 2014.