

# 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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## Department of Agriculture and Markets

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

#### Definitions, Standards of Identity and/or Standards of Enrichment Relating to Food, Food Packaging and Labeling Requirements

I.D. No. AAM-08-14-00006-P

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

**Proposed Action:** This is a consensus rule making to amend Parts 250, 252 and 259; sections 261.8, 262.1, 265.1, 266.1, 267.1, 271-4.7, 271-5.3(h), (j), 271-5.4(g), 277.1, 279.1 and 280.1; renumber sections 261.9 and 261.10 to 261.10 and 261.11; and add section 261.9 and Part 281 to Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 16, 18, 214-b and 215-a

**Subject:** Definitions, Standards of Identity and/or Standards of Enrichment relating to food, food packaging and labeling requirements.

**Purpose:** To update incorporations by reference with current federal regulations.

**Substance of proposed rule:** The proposed amendments to Parts 250, 252 and 259 of 1 NYCRR would conform the incorporations by reference contained in these Parts to current Federal regulations relating to definitions and standards for food and food additives and requirements for the packaging and labeling of food.

Part 250, specifically sections 250.1(a), 250.2(a) and 250.3(a), would be amended to adopt standards of identity and/or standards of quality, and

tolerances for food and food products as published in Title 21 of the Code of Federal Regulations (21 CFR), revised as of April 1, 2013. These Federal regulations establish definitions and standards for the following foods: canned fruits; canned fruit juices; fruit butters; jellies; preserves and related products; fruit pies; canned vegetables; vegetable juices; frozen vegetables; eggs and egg products; fish and shellfish; cacao products; tree nut and peanut products; nonalcoholic beverages; margarine; sweeteners and table syrups; and food dressings and flavorings. Part 250 would also be amended to adopt dietary food labeling requirements and requirements for the labeling of fresh produce treated with post-harvest wax or resin as published in 21 CFR, revised as of April 1, 2013.

Part 252, specifically section 252.1(a) and 252.2(a), would be amended to adopt current Federal regulations in the area of food ingredients, as published in 21 CFR, revised as of April 1, 2013. These Federal regulations include the following categories of ingredients: Prior-Sanctioned Food Ingredients; Substances Generally Recognized as Safe; Direct Food Substances Affirmed as Generally Recognized as Safe; Indirect Food Substances Affirmed as Generally Recognized as Safe; and Substances Prohibited from Use in Human Food.

Part 259, specifically section 259.1, would be amended to adopt current Federal regulations in the area of food packaging and labeling, as published in 21 CFR, revised as of April 1, 2013. These Federal regulations include definitions and standards for food packaging and labeling.

Section 261.8(a) would be amended to adopt current Federal regulations in the area of acidified foods, as published in 21 CFR, revised as of April 1, 2013.

Sections 261.9 and 261.10 would be renumbered 261.10 and 261.11, and a new 261.9 would be added to adopt current Federal regulations in the production, storage and transportation of shell eggs, as published in 21 CFR, revised as of April 1, 2013.

Section 262.1(c) would be amended to adopt current Federal regulations in the area of processed fish, as published in 21 CFR, revised as of April 1, 2013.

Sections 265.1(a), 266.1(a) and 267.1(a) would be amended to adopt definitions and standards of identity for specific categories of food, as published in 21 CFR, revised as of April 1, 2013. Section 265.1(a) sets forth definitions and standards of identity for wheat flour, corn flour and rice, as well as for products related thereto. Section 266.1(a) sets forth definitions and standards of identity for macaroni and noodle products, including enriched macaroni and noodle products. Section 267.1(a) sets forth definitions and standards of identity for bakery products, specifically, bread, white bread, rolls, white rolls, buns and white buns, as well as enriched bread, enriched rolls and enriched buns.

Section 271-4.7(b) would be amended to adopt current Federal regulations, as published in 21 CFR, revised as of April 1, 2013, in the area of lubricants not made of safe materials to prevent such lubricants from leaking or dripping on food-contact surfaces of equipment requiring such lubrication.

Section 271-5.3(h)(5)(6) would be amended to adopt current Federal regulations, as published in 21 CFR, revised as of April 1, 2013, in the area of chemical sanitizing solutions.

Section 271-5.3(j) would be amended to adopt current Federal regulations, as published in 21 CFR, revised as of April 1, 2013, governing chemical sanitizers which exceed prescribed concentrations.

Section 271-5.4(g)(6) would be amended to adopt current Federal regulations, as published in 21 CFR, revised as of April 1, 2013, requiring that chemical sanitizers shall meet the requirements of the Federal regulations.

Section 277.1(a) would be amended to adopt current Federal regulations, as published in 21 CFR, revised as of April 1, 2013, in the area of thermally processed low acid foods packaged in hermetically sealed containers.

Section 279.1(a) would be amended to adopt current Federal regulations, as published in 21 CFR, revised as of April 1, 2013, in the area of fish and fishery products.

Section 280.1(a) would be amended to adopt current Federal regulations, as published in 21 CFR, revised as of April 1, 2013, in the area of labeling and processing juices.

A new Part 281, entitled Dietary Supplements, would be added. A new section 281.1 would be added in that Part to adopt current Federal regulations, as published in 21 CFR, revised as of April 1, 2013, in the area of dietary supplements.

**Text of proposed rule and any required statements and analyses may be obtained from:** Stephen D. Stich, Dir., Div. of Food Safety and Inspection, NYS Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-4492

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

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

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

#### Consensus Rule Making Determination

The Department has considered the proposed amendments to Parts 250, 252 and 259; sections 261.8, 262.1, 265.1, 266.1, 267.1, 271-4.7, 271-5.3(h), 271-5.3(j), 271-5.4(g), 272-2.1, 277.1, 279.1 and 280.1 of 1 NYCRR and has determined that this rule is a consensus rule within the meaning of section 102(11) of the State Administrative Procedure Act (SAPA).

Section 102(11) of SAPA defines consensus rule to be a rule proposed by an agency for adoption on an expedited basis pursuant to the expectation that no person is likely to object to its adoption because it merely (a) repeals regulatory provisions which are no longer applicable to any person, (b) implements or conforms to non-discretionary statutory provisions, or (c) makes technical changes or is otherwise non-controversial.

The proposed amendments to Parts 250, 252 and 259 of 1 NYCRR would update the incorporations by reference contained in these Parts with current Federal regulations, relating to definitions and standards for food and food additives and requirements for the packaging and labeling of food.

Section 261.8 would be amended to adopt current Federal regulations in the area of acidified foods.

Sections 261.9 and 261.10 would be renumbered 261.10 and 261.11, and a new 261.9 would be added to adopt current Federal regulations in the production, storage and transportation of shell eggs.

Section 262.1 would be amended to adopt current Federal regulations in the area of processed fish.

Sections 265.1, 266.1 and 267.1 would be amended to adopt definitions and standards of identity for specific categories of food, as published in Federal regulations. Section 265.1 sets forth definitions and standards of identity for wheat flour, corn flour and rice, as well as for products related thereto. Section 266.1 sets forth definitions and standards of identity for macaroni and noodle products, including enriched macaroni and noodle products. Section 267.1 sets forth definitions and standards of identity for bakery products, specifically, bread, white bread, rolls, white rolls, buns and white buns, as well as enriched bread, enriched rolls and enriched buns.

Section 271-4.7 would be amended to adopt current Federal regulations in the area of lubricants not made of safe materials to prevent such lubricants from leaking or dripping on food-contact surfaces of equipment requiring such lubrication.

Section 271-5.3(h) would be amended to adopt current Federal regulations in the area of chemical sanitizing solutions. Section 271-5.3(j) would be amended to adopt current Federal regulations governing chemical sanitizers which exceed prescribed concentrations. Section 271-5.4 would be amended to adopt current Federal regulations, requiring that chemical sanitizers shall meet the requirements of the Federal regulations.

Section 277.1 would be amended to adopt current Federal regulations, as published in Federal regulations, in the area of thermally processed low acid foods packaged in hermetically sealed containers.

Section 279.1 would be amended to adopt current Federal regulations, in the area of fish and fishery products.

Section 280.1 would be amended to adopt current Federal regulations, in the area of labeling and processing juices.

A new Part 281, entitled Dietary Supplements, would be added and a new section 281.1 would be added in that Part to adopt current Federal regulations, in the area of dietary supplements.

The food industry and consumers will benefit by the proposed amendments. Since State standards and requirements are substantially the same as the current Federal Standards and requirements, the food industry will benefit by not having to change the ingredients or the processes in the manufacturing of the products. The food industry will also benefit in that honest competition will be promoted by the existence and enforcement of standards of identity and labeling requirements which are uniform throughout the country. Consumers will benefit in that they will continue

to be able to purchase food products which are made with the appropriate ingredients in the appropriate manner. Consumers will also continue to be able to rely on the labeling information, sufficient to enable them to make informed decisions in the market place.

Accordingly, since the proposed amendments will benefit regulated parties and the general public alike and will update the incorporations by reference to current Federal regulations, no person is likely to object to the rule as written since it is non-controversial [SAPA section 102(11)(c)].

#### Job Impact Statement

It is anticipated that the proposed amendments will have no adverse effect on job or job opportunities in the State, due to the fact that the food industry will benefit by the proposed amendments. Since State standards and requirements are substantially the same as the current Federal standards and requirements, the food industry will benefit by not having to change the ingredients or the processes in the manufacturing of the products. Additionally, the food industry will benefit by the promotion of honest competition, made possible by the existence and enforcement of standards of identity and labeling requirements which are uniform throughout the country.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Requirements for Identifying, Washing, Packing and Labeling Food Represented as Kosher

**I.D. No.** AAM-08-14-00022-P

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

**Proposed Action:** Repeal of Part 255 of Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 16, 18 and 214-b

**Subject:** Requirements for identifying, washing, packing and labeling food represented as kosher.

**Purpose:** To repeal requirements for identifying, washing, packing and labeling food represented as kosher.

**Text of proposed rule:** Part 255 of 1 NYCRR is repealed.

**Text of proposed rule and any required statements and analyses may be obtained from:** Mr. Stephen D. Stich, Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-4492, email: Stephen.Stich@agriculture.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.

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

#### Regulatory Impact Statement

##### 1. Statutory Authority:

Agriculture and Markets Law (AML) sections 16, 18 and 214-b authorizes the Commissioner of Agriculture and Markets to, generally, promulgate regulations to enforce the provisions of the Agriculture and Markets Law and to, specifically, enforce the provision of the Agriculture and Markets Law relating to the manufacture and sale of food represented to be kosher.

##### 2. Legislative Objectives:

In chapter 151 of the laws of 2004, the Legislature enacted the Kosher Law Protection Act ("the Act"). The Act requires those who manufacture and/or sell food represented as kosher to, among other things, properly label such food and to disclose the name and qualifications of the person who has certified the food to be kosher. The Act was passed subsequent to the repeal of a previous kosher law that was held to be unconstitutional because it had the effect of promoting religion and entangling the State in religious matters (see *Commack Self Service Kosher Meats, Inc. v. Rubin*, 106 F. Supp 2d 445 [E.D.N.Y. 2000], affirmed 294 F. 3d 415 [2nd Cir. 2002] cert. denied 123 S. Ct. 1250 [2003]). 1 NYCRR Part 255 currently sets forth requirements for foods represented to be kosher, including how meat and meat products must be washed and identified and how containers of foods represented to be kosher must be labeled. These requirements generally set forth "orthodox Hebrew requirements", which, pursuant to the court's decision in *Commack Self Service Kosher Meats, Inc.*, the State cannot enforce. The proposed rule, by repealing Part 255, will do away with unenforceable requirements and will allow the Department of Agriculture and Markets to better enforce the Act as well as 1 NYCRR Part 254, which embody and reflect the legislature's current intent in this area.

3. Needs and Benefits:

The proposed rule is needed so that those people who manufacture and sell food represented as kosher are not misled to believe that the State can, does, or will require them to use only certain procedures for identifying parts of animals, for washing meats, and for packing meats that are currently set forth in 1 NYCRR Part 255. Manufacturers and sellers of such food will benefit by the elimination of unenforced and unenforceable requirements.

4. Costs:

- a. Costs to regulated parties: None
- b. Costs to the agency, the state and local governments: None

5. Local Government Mandates:

There are no additional programs, services, duties or responsibilities imposed upon any county, city, village, school district, fire district or other special district by this proposal.

6. Paperwork:

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

7. Duplication:

These regulations do not duplicate existing State and Federal regulations.

8. Alternatives:

No alternatives were considered; repeal of 1 NYCRR Part 255 would eliminate a rule that was promulgated to implement provisions of the AML which were repealed in 2004.

9. Federal Standards:

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

10. Compliance Schedule:

Because the proposed rule repeals certain requirements, no compliance with the proposed rule is required.

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

The proposed rule repeals 1 NYCRR Part 255 which sets forth requirements for the identification, washing, packing, and labeling of kosher food. In light of the decision in *Commack Self Service Kosher Meats, Inc. v. Rubin*, 106 F. Supp 2d 445 (E.D.N.Y. 2000), affirmed 294 F. 3d 415 (2nd Cir. 2002), cert. denied 123 S. Ct. 1250 (2003), such requirements are unconstitutional and have not been enforced since 2003. By repealing unenforceable and unenforced requirements, the proposed rule will not impose an adverse economic impact upon small businesses, local governments, or rural areas, nor will it require small businesses, local governments, or public and private entities located in rural areas to engage in any reporting, record keeping or other compliance activities. Furthermore, the proposed rule will not have a substantial impact on jobs or employment opportunities. Those firms that manufacture and pack food represented to be kosher may continue to employ people to identify, wash, pack and label such food in a manner as presently required in 1 NYCRR Part 255. Those firms that do not wish to identify, wash, pack or label such food will not be required to do so and may decide to terminate employees although it is highly unlikely that any firm employs persons whose duties are only to engage in such activities.

**Office of Alcoholism and Substance Abuse Services**

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

**Repeal of 14 NYCRR Part 1034**

**I.D. No.** ASA-08-14-00005-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 1034 of Title 14 NYCRR.

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

**Subject:** Repeal of 14 NYCRR Part 1034.

**Purpose:** To repeal an outdated regulation.

**Text of proposed rule:** Part 1034 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**

Repeal of Outdated Rule 14 NYCRR Part 1034:

Requirements for the Operation of Inpatient Substance Abuse Treatment and Rehabilitation Programs

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 Part 1034 was promulgated by the Division of Substance Abuse Services in June 1989; in 1992 the Division and the Division of Alcoholism and Alcohol Abuse were combined to create the Office of Alcoholism and Substance Abuse Services within the Department of Mental Hygiene. Regulations for the combined agency were created in 14 NYCRR Part 800s and provisions from Part 1000s and Part 300s were consolidated into corresponding provisions. The provisions of this Part were incorporated into 14 NYCRR Parts 816, 818 and 819; Part 1034 was not repealed at that time because some programs were still certified pursuant to that Part.

There are currently no OASAS programs certified pursuant to Part 1034 and the provisions are redundant or obsolete and therefore 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 an outdated and redundant regulation, the provisions of which have been incorporated into 14 NYCRR Parts 816, 818 and 819.

**Department of Civil Service**

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

**Jurisdictional Classification**

**I.D. No.** CVS-08-14-00007-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 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 Mental Hygiene under the subheading "Office of Mental Health," 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-03-14-00003-P, Issue of January 22, 2014.

**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-03-14-00003-P, Issue of January 22, 2014.

#### **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-03-14-00003-P, Issue of January 22, 2014.

#### **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-03-14-00003-P, Issue of January 22, 2014.

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

#### **Jurisdictional Classification**

**I.D. No.** CVS-08-14-00008-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 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

**Purpose:** To classify positions 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 increasing the number of positions of Special Assistant from 12 to 14.

**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-03-14-00003-P, Issue of January 22, 2014.

#### **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-03-14-00003-P, Issue of January 22, 2014.

#### **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-03-14-00003-P, Issue of January 22, 2014.

#### **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-03-14-00003-P, Issue of January 22, 2014.

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

#### **Jurisdictional Classification**

**I.D. No.** CVS-08-14-00009-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 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 "Office for the Aging," by adding thereto the position of Advocacy Specialist 3 (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-03-14-00003-P, Issue of January 22, 2014.

#### **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-03-14-00003-P, Issue of January 22, 2014.

#### **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-03-14-00003-P, Issue of January 22, 2014.

#### **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-03-14-00003-P, Issue of January 22, 2014.

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

#### **Jurisdictional Classification**

**I.D. No.** CVS-08-14-00010-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 1 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

**Purpose:** To classify positions 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 the Welfare Inspector General," by increasing the number of positions of Investigative Assistant from 2 to 4, Investigative Counsel from 5 to 7 and Investigator from 5 to 7 and by adding thereto the positions of Investigative Auditor (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-03-14-00003-P, Issue of January 22, 2014.

#### **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-03-14-00003-P, Issue of January 22, 2014.

**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-03-14-00003-P, Issue of January 22, 2014.

**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-03-14-00003-P, Issue of January 22, 2014.

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

**Jurisdictional Classification**

**I.D. No.** CVS-08-14-00011-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 2 of Title 4 NYCRR.

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

**Subject:** Jurisdictional Classification.

**Purpose:** To delete positions from 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 the Department of Financial Services, by deleting therefrom the positions of øAssociate Attorney (Banking) (5) and øAssociate Attorney (Insurance Industry Investigations) (5) and by adding thereto the positions of øAssociate Attorney (Financial Services) (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-03-14-00003-P, Issue of January 22, 2014.

**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-03-14-00003-P, Issue of January 22, 2014.

**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-03-14-00003-P, Issue of January 22, 2014.

**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-03-14-00003-P, Issue of January 22, 2014.

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

**Jurisdictional Classification**

**I.D. No.** CVS-08-14-00012-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 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 "Office of Parks, Recreation and Historic Preservation," by deleting therefrom the position of Empire State Games Operations Manager (1) and by increasing the number of positions of øRegional Manager for Parks and Recreation from 6 to 7.

**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-03-14-00003-P, Issue of January 22, 2014.

**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-03-14-00003-P, Issue of January 22, 2014.

**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-03-14-00003-P, Issue of January 22, 2014.

**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-03-14-00003-P, Issue of January 22, 2014.

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**Education Department**

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**EMERGENCY  
RULE MAKING**

**Podiatric Ankle Surgery Privileges**

**I.D. No.** EDU-48-13-00001-E

**Filing No.** 130

**Filing Date:** 2014-02-11

**Effective Date:** 2014-02-17

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

**Action taken:** Addition of section 65.8 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2)(a), 7001(1), (2), 7009(1), (2), 7010; and L. 2012, ch. 438

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

**Specific reasons underlying the finding of necessity:** The proposed amendment to the Regulations of the Commissioner of Education is necessary to implement Chapter 438 of the Laws of 2012, which amended Education Law section 7001 and added Education Law sections 7009 and 7010 regarding the scope of practice of podiatry, the creation of standard and advanced podiatric ankle surgery privileges, and the creation of ankle surgery limited permits.

The proposed rule has been adopted as a permanent rule at the February 10-11, 2014 Regents meeting. Pursuant to SAPA § 203(1), the earliest effective date of the permanent rule is February 26, 2014, the date a Notice of Adoption will be published in the State Register. However, Chapter 438 of the Laws of 2012 becomes effective on February 17, 2014. Therefore,

emergency action is necessary at the February 2014 Regents meeting for the preservation of the public health and general welfare in order to ensure that the rule is in effect on the effective date of Chapter 438 of the Laws of 2012 so that the Chapter may be timely implemented.

**Subject:** Podiatric ankle surgery privileges.

**Purpose:** Specifies the required training and experience for issuance of the podiatric standard and advanced ankle surgery privileges.

**Text of emergency rule:** Section 65.8 of the Regulations of the Commissioner of Education is added, effective February 17, 2014, to read as follows:

§ 65.8 Podiatric ankle surgery privileges.

(a) Definitions. As used in this section:

(1) "Accrediting agency acceptable to the department" shall mean an organization accepted by the department as a reliable authority for the purpose of accrediting podiatric residencies and as having accreditation standards that are applied in a fair, consistent, and nondiscriminatory manner.

(2) "Certification standards acceptable to the department" shall mean standards accepted by the department as reliable for the purpose of granting board qualification and certification to podiatrists engaged in reconstructive rearfoot and ankle surgery and applied in a fair, consistent, and nondiscriminatory manner.

(b) For issuance of a privilege to perform podiatric standard ankle surgery, as that term is used in Education Law section 7001(2), the applicant shall:

- (1) file an application with the department;
- (2) be licensed as a podiatrist in the state;
- (3) pay a fee of \$220 to the department; and
- (4) either:

(i) (a) have graduated on or after June 1, 2006 from a three-year residency program in podiatric medicine and surgery that was accredited by an accrediting agency acceptable to the department; and

(b) be certified in reconstructive rearfoot and ankle surgery by a national certifying board having certification standards acceptable to the department; or

(ii) (a) have graduated on or after June 1, 2006 from a three-year residency program in podiatric medicine and surgery that was accredited by an accrediting agency acceptable to the department; and

(b) be board qualified but not yet certified in reconstructive rearfoot and ankle surgery by a national certifying board having certification standards acceptable to the department; and

(c) provide documentation acceptable to the department that he or she has acceptable training and experience in standard or advanced midfoot, rearfoot and ankle procedures that consist of not less than 10 ankle procedures in the five years immediately preceding application, provided that not less than five procedures shall be osseous procedures and not less than five procedures shall be soft tissue procedures, and further provided that procedures performed in a residency program in podiatric medicine may be used to satisfy the requirements of this clause, if performed within the time constraints of this clause; or

(iii) (a) have graduated before June 1, 2006 from a two-year residency program in podiatric medicine and surgery that was accredited by an accrediting agency acceptable to the department; and

(b) be certified in reconstructive rearfoot and ankle surgery by a national certifying board having certification standards acceptable to the department; and

(c) provide documentation acceptable to the department that he or she has acceptable training and experience in standard or advanced midfoot, rearfoot and ankle procedures that consist of not less than 20 ankle procedures in the five years immediately preceding application, provided that not less than 10 procedures shall be osseous procedures and not less than 10 procedures shall be soft tissue procedures.

(c) For issuance of a privilege to perform podiatric advanced ankle surgery, as that term is used in Education Law section 7001(2), the applicant shall:

- (1) file an application with the department;
- (2) be licensed as a podiatrist in the state;
- (3) pay a fee of \$220 to the department; and
- (4) either:

(i) (a) have graduated on or after June 1, 2006 from a three-year residency program in podiatric medicine and surgery that was accredited by an accrediting agency acceptable to the department; and

(b) be certified in reconstructive rearfoot and ankle surgery by a national certifying board having certification standards acceptable to the department; and

(c) provide documentation acceptable to the department that he or she has acceptable training and experience in advanced midfoot, rearfoot and ankle procedures that consist of:

- (1) not less than 10 ankle procedures in the five years im-

mediately preceding application, provided that not less than five procedures shall be osseous procedures and not less than five procedures shall be soft tissue procedures, and further provided that procedures performed in a residency program in podiatric medicine may be used to satisfy the requirements of this subclause, if performed within the time constraints of this subclause; and

(2) not less than 15 procedures in the following categories in the ten years immediately preceding application, which shall include the specified numbers for each type of procedure, provided that procedures performed in a residency program in podiatric medicine may be used to satisfy the requirements of this subclause, if performed within the time constraints of this subclause, and further provided that the same procedure may be used to satisfy the requirements of both this subclause and subclause (1) of this clause, if it, in fact, meets the requirements of both:

(i) not less than three ankle fracture fixation procedures, which may include, but are not limited to:

(A) the insertion or removal of external fixation pins into or from the tibial diaphysis at or below the level of the myotendinous junction of the triceps surae; and

(B) the insertion and removal of retrograde tibiotalar-caneal intramedullary rods and locking screws up to the level of the myotendinous junction of the triceps surae;

(ii) not less than three ankle fusion procedures; and

(iii) not less than one ankle arthroscopy; or

(ii) (a) have graduated before June 1, 2006 from a two-year residency program in podiatric medicine and surgery that was accredited by an accrediting agency acceptable to the department; and

(b) be certified in reconstructive rearfoot and ankle surgery by a national certifying board having certification standards acceptable to the department; and

(c) provide documentation acceptable to the department that he or she has acceptable training and experience in advanced midfoot, rearfoot and ankle procedures that consist of:

(1) not less than 20 ankle procedures in the five years immediately preceding application, provided that not less than 10 procedures shall be osseous procedures and not less than 10 procedures shall be soft tissue procedures; and

(2) not less than 15 procedures in the following categories in the ten years immediately preceding application, which shall include the specified numbers for each type of procedure, provided that procedures performed in a residency program in podiatric medicine may be used to satisfy the requirements of this subclause, if performed within the time constraints of this subclause, and further provided that the same procedure may be used to satisfy the requirements of both this subclause and subclause (1) of this clause, if it, in fact, meets the requirements of both:

(i) not less than three ankle fracture fixation procedures, which may include, but are not limited to:

(A) the insertion or removal of external fixation pins into or from the tibial diaphysis at or below the level of the myotendinous junction of the triceps surae; and

(B) the insertion and removal of retrograde tibiotalar-caneal intramedullary rods and locking screws up to the level of the myotendinous junction of the triceps surae;

(ii) not less than three ankle fusion procedures; and

(iii) not less than one ankle arthroscopy.

**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-48-13-00001-P, Issue of November 27, 2013. The emergency rule will expire May 11, 2014.

**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:

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

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

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations in administering the admission to and the practice of the professions.

Subdivisions (1) and (2) of section 7001 of the Education Law define the practice of podiatry. Subdivision (2) of section 7001 of the Education Law authorizes those podiatrists who have received a podiatric ankle surgery privilege to perform surgery on parts of the ankle that were previously beyond the scope of practice of podiatry.

Subdivision (1) of section 7009 of the Education Law establishes the requirements for podiatrists to qualify for the privilege to perform podiatric standard ankle surgery and authorizes the State Education Department to determine appropriate residency, board certification, and training and experience requirements for such privilege. Subdivision (2) of section 7009 of the Education Law establishes the requirements for podiatrists to qualify for the privilege to perform podiatric advanced ankle surgery and authorizes the State Education Department to determine appropriate residency, board certification, and training and experience requirements for such privilege. Subdivisions (1) and (2) of section 7009 also establish fees on applicants for the podiatric standard and advanced ankle surgery privileges. In addition to the submission of an application, licensure as a podiatrist, and the payment of a fee, the applicant must meet specified training and certification requirements. There are three training and certification routes available to podiatrists seeking the standard privilege and two routes available to those seeking the advanced privilege.

Education Law section 7010 establishes ankle surgery limited permits to authorize the performance of podiatric standard ankle surgery only under the direct personal supervision of a licensed podiatrist holding a standard or advanced privilege or of a licensed physician certified in orthopedic surgery by a national certifying board having certification standards acceptable to the department. The limited permits will enable licensed podiatrists to obtain the additional training they may need to qualify for an ankle surgery privilege. Section 7010 also establishes fees for the ankle surgery limited permit.

Chapter 438 of the Laws of 2012, which will become effective on February 17, 2014, amended the Education Law to expand the scope of practice of podiatry. In addition, the statute authorizes the provision of ankle surgery by podiatrists who obtain a privilege from the State Education Department to perform such surgery. The law provides for the issuance of two levels of privilege. Holders of the standard ankle surgery privilege will be able to perform soft tissue and osseous procedures on the ankle, except for those procedures which are reserved to podiatrists holding the advanced ankle surgery privilege. The reserved procedures are:

- ankle fracture fixation;
- ankle fusion;
- ankle arthroscopy;
- insertion or removal of external fixation pins into or from the tibial diaphysis at or below the level of the myotendinous junction of the triceps surae; and
- insertion and removal of retrograde tibiototalcanal intramedullary rods and locking screws up to the level of the myotendinous junction of the triceps surae.

#### 2. LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the authority conferred by the above statutes and is necessary to implement Chapter 438 of the Laws of 2012 by establishing the required training and experience for issuance of the podiatric standard or advanced ankle surgery privileges.

#### 3. NEEDS AND BENEFITS:

Each of the routes for obtaining an ankle surgery privilege requires completion of an accredited residency program in podiatric medicine and surgery and either national board certification or qualification in reconstructive rearfoot and ankle surgery. Four of the five routes also require additional training, acceptable to the Department, in midfoot, rearfoot, and ankle procedures. The proposed regulations:

1. define the term "accrediting agency acceptable to the department" with regard to the accreditation of podiatric residencies;
2. define the term "certification standards acceptable to the department" with regard to the certification of podiatric residency programs; and
3. set the requirements for the approval of the additional training that may be required for issuance of an ankle surgery privilege. Within each level of the privilege, the shorter the residency program undertaken by the podiatrist and the lower his or her board certification status, the greater the amount of additional training and experience required by the Department.

#### 4. COSTS:

(a) Costs to State government: None beyond those inherent in the legislation, which will be offset by the fees imposed by law for the podiatric standard and advanced ankle privileges and for the ankle surgery limited permit.

(b) Costs to local government: None.

(c) Cost to private regulated parties. The only fees are those imposed by law on the applicant including fees of \$220 for the podiatric standard and advanced ankle surgery privileges, a fee of \$105 for the ankle surgery limited permit and a renewal fee of \$50 for the limited permit.

(d) Cost to the regulatory agency: None beyond those inherent in the legislation, which will be offset by the fees imposed by law for the podiatric standard and advanced ankle privileges and for the ankle surgery limited permit.

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed rule does not impose any additional program, service, duty or responsibility upon local governments.

#### 6. PAPERWORK:

The proposed rule does not impose any new recordkeeping, reporting or other paperwork requirements beyond those inherent in Chapter 438 of the Laws of 2012. As required by Education Law section 7009, as added by Chapter 438 of the Laws of 2012, applicants who seek the privilege to perform podiatric standard or advanced ankle surgery will be required to file an application with the State Education Department.

#### 7. DUPLICATION:

The proposed rule is necessary to implement Chapter 438 of the Laws of 2012 by establishing the required training and experience for issuance of the podiatric standard or advanced ankle surgery privileges. There are no other State or Federal requirements on the subject matter of the proposed rule. Therefore, the amendment does not duplicate other existing State or Federal requirements.

#### 8. ALTERNATIVES:

The proposed rule implements statutory requirements. Consideration was given to limiting the acceptable board certifications to one particular certification, but this alternative was rejected in favor maintaining flexibility by allowing the Department to accept other certification agencies if they are found to be reliable and to have acceptable accreditation standards.

Consideration was also given to alternative suggestions for the additional training and experience needed for some of the routes to the ankle surgery privileges. Ultimately it was decided that the standards included in the proposed rule, taken together with the procedures performed during the required residencies and those performed to obtain board certification, provide the required public protection without unnecessarily burdening podiatrists seeking one of the privileges.

#### 9. FEDERAL STANDARDS:

There are no relevant Federal standards.

#### 10. COMPLIANCE SCHEDULE:

Chapter 438 of the Laws of 2012 takes effect on February 17, 2014. It is anticipated that podiatrists seeking a podiatric ankle surgery privilege will be able to apply for such privilege on or after that date.

#### *Regulatory Flexibility Analysis*

Section 7009 of the Education Law, as added by Chapter 438 of the Laws of 2012, establishes the requirements for individual podiatrists licensed in New York State to apply for a privilege to perform podiatric standard or advanced ankle surgery. The proposed rule implements the new law which expands the scope of practice of licensed podiatrists who obtain one of the podiatric surgery privileges. The amendment will not impose any new reporting, recordkeeping, or other compliance requirements beyond those inherent in the law, or have any adverse economic impact, on small businesses or local governments.

Because it is evident from the nature of the proposed amendment that it will not adversely affect small businesses or local governments, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required, and one has not been prepared.

#### *Rural Area Flexibility Analysis*

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

The proposed rule would implement Chapter 438 of the Laws of 2012 and therefore applies to all New York State licensed podiatrists who wish to perform podiatric standard or advanced ankle surgery, including those who are 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:

As required by Education Law section 7009, as added by Chapter 438 of the Laws of 2012, applicants who seek the privilege to perform podiatric standard or advanced ankle surgery will be required to file an application with the State Education Department.

No professional services are expected to be required to comply with the proposed rule.

##### 3. COSTS:

There are no costs beyond those imposed by Chapter 438 of the Laws of 2012, which include fees on the applicant of \$220 for the podiatric standard and advanced ankle surgery privileges and a fee of \$105 for the ankle surgery limited permit. A renewal fee of \$50 for the limited permit shall also apply.

##### 4. MINIMIZING ADVERSE IMPACT:

The proposed rule implements statutory requirements. Consideration was given to limiting the acceptable board certifications to one particular certification, but this alternative was rejected in favor maintaining flexibility by allowing the Department to accept other certification agencies if they are found to be reliable and to have acceptable accreditation standards.

Consideration was also given to alternative suggestions for the ad-

ditional training and experience needed for some of the routes to the ankle surgery privileges. Ultimately it was decided that the standards included in the proposed rule, taken together with the procedures performed during the required residencies and those performed to obtain board certification, provide the required public protection without unnecessarily burdening podiatrists seeking one of the privileges.

#### 5. RURAL AREAS PARTICIPATION:

Comments on the proposed rule were solicited from the State Board for Podiatry and from statewide organizations representing podiatrists and orthopedic surgeons. These groups have members who live or work in rural areas.

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

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment is necessary to implement statutory requirements under Education Law section 7009 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

Section 7009 of the Education Law, as added by Chapter 438 of the Laws of 2012, establishes the requirements for individual podiatrists licensed in New York State to apply for a privilege to perform podiatric standard or advanced ankle surgery. The proposed rule implements the new law which expands the scope of practice of licensed podiatrists who obtain one of the podiatric surgery privileges and thus will not have a substantial adverse impact on jobs and employment opportunities. Moreover, any impact on jobs and employment opportunities is attributable to the statutory requirement, not the proposed rule, which simply specifies the required training and experience for a podiatric surgery privilege, as required by law.

Because it is evident from the nature of the proposed rule, which implements specific statutory requirements and directives, that the proposed rule will have no impact on jobs or employment opportunities attributable to its adoption or only a positive impact, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

## EMERGENCY RULE MAKING

### New York State Common Core Learning Standards (CCLS)

**I.D. No.** EDU-49-13-00006-E

**Filing No.** 133

**Filing Date:** 2014-02-11

**Effective Date:** 2014-02-11

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

**Action taken:** Amendment of sections 100.5 and 100.18 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 is necessary to address miscellaneous Common Core Transition issues by providing for transition to the Common Core English Language Arts and mathematics examinations in the following areas: (1) students with disabilities local diplomas; (2) Regents diploma with advanced designation; (3) credit by examination; and (4) transfer credit; by providing at the local school district's discretion an additional opportunity, at the January 2014 examination administration, for students enrolled in Common Core English Language Arts courses to meet diploma requirements by passing either the Regents Comprehensive Examination in English in addition to the Regents Examination in English Language Arts (Common Core); and to reflect the change in name of the performance level descriptors.

The proposed amendment was adopted as an emergency action at the November 18-19, 2013 Regents meeting, effective November 19, 2013,

and has now been adopted as a permanent rule at the February 10-11, 2014 Regents meeting. Pursuant to SAPA § 203(1), the earliest effective date of the permanent rule is February 26, 2014, the date a Notice of Adoption will be published in the State Register. However, the November emergency rule will expire on February 16, 2014, 90 days after its filing with the Department of State on November 19, 2013. 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 November 2013 Regents meeting, and adopted as a permanent rule at the February 2014 Regents meeting, remains continuously in effect until the effective date of its permanent adoption.

**Subject:** New York State Common Core Learning Standards (CCLS).

**Purpose:** To transition to the Common Core English Language Arts (ELA) and mathematics examinations in the following areas: (1) students with disabilities local diplomas; (2) Regents diploma with advanced designation; (3) credit by examination; and (4) transfer credit; and enact technical changes.

**Substance of emergency rule:** The Commissioner of Education proposes to amend sections 100.5(g) and 100.18(b) of the Commissioner's Regulations as an emergency rule. The following is a summary of the substantive provisions of the emergency rule.

#### Commissioner's Regulations Part 100.5(g) – Diploma Requirements

The proposed amendment makes provisions for the new Regents Examinations in English Language Arts (ELA) and mathematics aligned to the Common Core to meet various diploma requirements. In each section below, the Common Core ELA and Mathematics Regents Examinations have been included as assessments allowable to meet diploma requirements. The proposed amendment also amends § 100.5(g)(1)(ii) to provide at the local school district's discretion an additional opportunity, at the January 2014 examination administration, for students enrolled in Common Core English Language Arts courses to meet diploma requirements by passing either the Regents Comprehensive Examination in English (2005) in addition to the Regents Examination in English Language Arts (Common Core). The regulation currently provides for this opportunity only during the June and August 2014 administrations.

#### 100.5(g)(1)(i) and (ii) - Students with disabilities

The proposed amendment establishes English and Mathematics requirements for students with disabilities to obtain a local diploma, as follows:

#### English requirements - 100.5(g)(1)(i):

- students with disabilities who first enter grade nine prior to September 2011 and who fail the Regents comprehensive examination in English, may meet the English requirements for a local diploma by passing the Regents competency test in reading and the Regents competency test in writing or their equivalents;

- students with disabilities who first enter grade nine in September 2005 and thereafter may also meet the English requirements for a local diploma by passing the Regents comprehensive examination in English with a score of 55-64 or by earning a score within a comparable range, as approved by the Board of Regents, on the Regents Examination in English Language Arts (Common Core).

#### Mathematics requirements - 100.5(g)(1)(ii):

- Students with disabilities who first enter grade nine in or after September 1997 and prior to September 2011 and who fail a Regents examination in mathematics may meet the mathematics requirements for a local diploma by passing the Regents competency test in mathematics or its equivalent.

- Students with disabilities who first enter grade nine in September 2005 and thereafter may meet the mathematics requirements for a local diploma by passing a Regents examination in mathematics with a score of 55-64 or such other minimum passing score as approved by the Board of Regents on a commencement level Regents examination in mathematics that measures the Common Core Learning Standards.

#### 100.5(g)(2) - Regents diploma with advanced designation

Beginning with the 2011-12 school year and thereafter, to earn a Regents diploma with an advanced designation, students must pass two or three commencement level Regents examinations in mathematics through one of the following combinations:

- Two examination combination. A student must pass (1) Mathematics A and Mathematics B, or (2) Mathematics A and Algebra 2/Trigonometry, or (3) Mathematics B and Integrated Algebra;

- Three examination combination. A student must pass (1) Mathematics A or Integrated Algebra or Algebra I (Common Core); and (2) Geometry or Geometry (Common Core); and (3) Mathematics B or Algebra 2/Trigonometry or Algebra II (Common Core).

#### 100.5(g)(3) - Credit by examination

A student may earn a maximum of 6 1/2 units of credit for either a

Regents or local diploma without completing units of study for such units of credit, if: (1) based on the student's past academic performance, the superintendent of a school district or the chief administrative officer of a registered nonpublic high school, or his or her designee, determines that the student will benefit academically by exercising this alternative; (2) the student achieves a score of at least 85, or its equivalent as determined by the commissioner, on a State-developed or State-approved assessment; (3) the student passes an oral examination or successfully completes a special project to demonstrate proficiency, in such knowledge, skills and abilities normally developed in the course of but not measured by the relevant Regents examination or State-approved examination if used, as determined by the principal; and (4) the student attends school, or received substantially equivalent instruction elsewhere until the age of 16.

- A student who earns a score of at least 85, or a comparable score as approved by the Regents, on a Regents examination in mathematics and meets the requirements in (1), (3) and (4) above shall receive one unit of credit.

- A student who first entered grade nine prior to September 2013 and who earns a score of at least 85 on the Regents comprehensive examination in English or a comparable score, as approved by the Board of Regents, on the Regents Examination in English Language Arts (Common Core) and meets the requirements in (1), (3) and (4) above shall receive one unit of credit. A student who first entered grade nine in September 2013 or thereafter and who earns a score of at least 85, or a comparable score as approved by the Board of Regents, on the Regents Examination in English Language Arts (Common Core) and meets the requirements in (1), (3) and (4) above shall receive one unit of credit.

100.5(g)(4) - Transfer credit

- Students who enter a registered high school for the first time in grade 11 in the 2002-2003 school year and thereafter, other than those students who have received home instruction or who have been enrolled in a registered or non-registered public or nonpublic high school, in order to receive a high school diploma must pass the Regents Comprehensive Examination in English or the Regents Examination in English Language Arts (Common Core), a Regents examination in mathematics, a Regents examination in United States history and government, and a Regents examination in science, or approved alternatives.

- Students who enter a registered high school for the first time in grade 12 in the 2004-2005 school year and thereafter, other than those students who have received home instruction or who have been enrolled in a registered or non-registered public or nonpublic high school, in order to receive a high school diploma must pass the Regents comprehensive examination in English or the Regents Examination in English Language Arts (Common Core), a Regents examination in mathematics, a Regents examination in United States history and government, or approved alternatives.

100.5(g)(1)(i)(b) - Additional opportunity for Students enrolled in Common Core ELA to meet diploma requirements by passing the Regents Comprehensive Examination in ELA (2005)

- For the January 2014, 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 (2005) in addition to the Regents Examination in English Language Arts (Common Core), and may meet such English requirement by passing either examination.

Commissioner's Regulation section 100.18(b) – ESEA Accountability System

In addition to the above proposed revisions, the proposed amendment also amends § 100.18(b) of the Commissioner's Regulation to reflect the change in name of the performance level descriptors (PLDs) as follows:

- Level 1: Change from "below standards" to "well below proficient"
- Level 2: Change from "meets basic standards" to "below proficient"
- Level 3: Change from "meets proficiency standards" to "proficient"
- Level 4: Change from "exceeds in standards" to "excels in standards"

**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-49-13-00006-EP, Issue of December 4, 2013. The emergency rule will expire April 11, 2014.

**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 State Education Department (SED), with the Board of Regents at its head and the Commissioner of Education as the chief administrative officer, and charges SED with the general management and supervision of public schools and the educational work of the State.

Education Law section 207 empowers the Regents and the Commissioner to adopt rules and regulations to carry out laws regarding education and the functions and duties conferred on SED 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 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 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 SED to alter the subjects of required instruction.

2. LEGISLATIVE OBJECTIVES:

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

3. NEEDS AND BENEFITS:

The 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. At the July 2013 meeting the Board of Regents adopted by emergency action, effective July 30, 2013, a new Commissioner's Regulation § 100.5(g) to allow students to meet diploma requirements by passing Regents Examinations in English Language Arts and mathematics that are aligned to the New York State P-12 Common Core Learning Standards (see New York State Register, August 14, 2013; EDU-33-13-00022-EP). § 100.5(g) was permanently adopted at the October 2013 Regents meeting (New York State Register, November 6, 2013; EDU-33-13-00022-A). In order to address issues arising from that adoption, and allow students to continue to meet the requirements for all diploma types, (local, Regents and Regents with Advanced Designation) further revisions to the Commissioner's Regulations are necessary as the new Common Core Regents examinations are being phased-in and the Regents Examinations aligned to the 2005 Core are phased-out. These technical amendments do not result in any substantive policy changes, but rather serve only to reconcile existing regulations with newly adopted Common Core assessment regulations.

The proposed amendment provides for transition to the Common Core English Language Arts (ELA) and mathematics examinations in the following areas: (1) students with disabilities local diplomas; (2) Regents diploma with advanced designation; (3) credit by examination; and (4) transfer credit. The proposed amendment also provides, at the local school district's discretion, an additional opportunity for students to meet diploma requirements by passing either the Regents Comprehensive Examination in English or the Common Core ELA examination at the January 2014 test administration. The proposed amendment currently provides for this opportunity only during the June and August 2014 administrations. Finally, the proposed amendment updates the names of the performance level descriptors for accountability purposes under the Elementary and Secondary Education Act (ESEA).

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 is necessary to implement requirements for transitioning to Common Core ELA and mathematics examinations, and does not impose any costs on the State, school districts, charter schools or the State Education Department. The proposed amendment merely adds the Common Core ELA and mathematics examinations as assessments allowable to meet diploma requirements in the following areas: (1) student

with disabilities local diplomas; (2) Regents diploma with advanced designation; (3) credit by examination; and (4) transfer credit. The proposed amendment also provides, at the local school district's discretion, an additional opportunity for students to meet diploma requirements by passing either the Regents Comprehensive Examination in English or the Common Core ELA examination at the January 2014 test administration, and updates the names of the performance level descriptors for accountability purposes under the Elementary and Secondary Education Act (ESEA).

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to implement requirements for transitioning to Common Core ELA and mathematics examinations, and does not impose any additional program, service, duty or responsibility upon local governments. The proposed amendment merely adds the Common Core ELA and mathematics examinations as assessments allowable to meet diploma requirements in the following areas: (1) student with disabilities local diplomas; (2) Regents diploma with advanced designation; (3) credit by examination; and (4) transfer credit. The proposed amendment also provides, at the local school district's discretion, an additional opportunity for students to meet diploma requirements by passing either the Regents Comprehensive Examination in English or the Common Core ELA examination at the January 2014 test administration, and updates the names of the performance level descriptors for accountability purposes under the Elementary and Secondary Education Act (ESEA).

#### 6. PAPERWORK:

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

#### 7. DUPLICATION:

The rule does not duplicate existing State or federal requirements.

#### 8. ALTERNATIVES:

There are no significant alternatives to the rule and none were considered. The proposed amendment is necessary to implement requirements for transitioning to Common Core ELA and mathematics examinations. The proposed amendment merely adds the Common Core ELA and mathematics examinations as assessments allowable to meet diploma requirements in the following areas: (1) student with disabilities local diplomas; (2) Regents diploma with advanced designation; (3) credit by examination; and (4) transfer credit. The proposed amendment also provides, at local discretion, an additional opportunity for students to meet diploma requirements by passing either the Regents Comprehensive Examination in English or the Common Core ELA examination at the January 2014 test administration, and updates the names of the performance level descriptors for accountability purposes under the Elementary and Secondary Education Act (ESEA).

#### 9. FEDERAL STANDARDS:

There are no related federal standards.

#### 10. COMPLIANCE SCHEDULE:

The proposed amendment is necessary to implement requirements for transitioning to Common Core ELA and mathematics examinations, and does not impose any additional compliance requirements or costs on school districts or charter schools. It is anticipated regulated parties will be able to achieve compliance with the rule by its effective date.

### **Regulatory Flexibility Analysis**

#### **Small Businesses:**

The proposed amendment is necessary to implement requirements for transitioning to the New York State Common Core English Language Arts (ELA) and mathematics examinations. 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:

The proposed amendment is necessary to implement requirements for transitioning to Common Core ELA and mathematics examinations, and does not impose any additional compliance requirements on local governments. The proposed amendment merely adds the Common Core ELA and mathematics examinations as assessments allowable to meet diploma requirements in the following areas: (1) student with disabilities local diplomas; (2) Regents diploma with advanced designation; (3) credit

by examination; and (4) transfer credit. The proposed amendment also provides, at local discretion, an additional opportunity for students to meet diploma requirements by passing either the Regents Comprehensive Examination in English or the Common Core ELA examination at the January 2014 test administration, and updates the names of the performance level descriptors for accountability purposes under the Elementary and Secondary Education Act (ESEA).

#### 3. PROFESSIONAL SERVICES:

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

#### 4. COMPLIANCE COSTS:

The proposed amendment is necessary to implement requirements for transitioning to Common Core ELA and mathematics examinations, and does not impose any costs on school districts or charter schools. The proposed amendment merely adds the Common Core ELA and mathematics examinations as assessments allowable to meet diploma requirements in the following areas: (1) student with disabilities local diplomas; (2) Regents diploma with advanced designation; (3) credit by examination; and (4) transfer credit. The proposed amendment also provides, at local discretion, an additional opportunity for students to meet diploma requirements by passing either the Regents Comprehensive Examination in English or the Common Core ELA examination at the January 2014 test administration, and updates the names of the performance level descriptors for accountability purposes under the Elementary and Secondary Education Act (ESEA).

#### 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:

The proposed amendment is necessary to implement requirements for transitioning to Common Core ELA and mathematics examinations, and does not impose any additional compliance requirements or costs on school districts or charter schools. The proposed amendment merely adds the Common Core ELA and mathematics examinations as assessments allowable to meet diploma requirements in the following areas: (1) student with disabilities local diplomas; (2) Regents diploma with advanced designation; (3) credit by examination; and (4) transfer credit. The proposed amendment also provides, at local discretion, an additional opportunity for students to meet diploma requirements by passing either the Regents Comprehensive Examination in English or the Common Core ELA examination at the January 2014 test administration, and updates the names of the performance level descriptors for accountability purposes under the Elementary and Secondary Education Act (ESEA). 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.

#### 7. LOCAL GOVERNMENT PARTICIPATION:

Copies of the rule 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. 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:

The proposed amendment is necessary to implement requirements for transitioning to Common Core English Language Arts (ELA) and mathematics examinations, and does not impose any additional reporting, recordkeeping or other compliance requirements on entities in rural areas. The proposed amendment merely adds the Common Core ELA and mathematics examinations as assessments allowable to meet diploma requirements in the following areas: (1) student with disabilities local diplomas; (2) Regents diploma with advanced designation; (3) credit by examination; and (4) transfer credit. The proposed amendment also provides, at local discretion, an additional opportunity for students to meet diploma requirements by passing either the Regents Comprehensive Examination in English or the Common Core ELA examination at the January 2014 test administration, and updates the names of the performance level descriptors for accountability purposes under the Elementary and Secondary Education Act (ESEA). The proposed amendment does not impose any additional professional services requirements.

## 3. COMPLIANCE COSTS:

The proposed amendment is necessary to implement requirements for transitioning to Common Core ELA and mathematics examinations, and does not impose any costs on the State, school districts, charter schools or the State Education Department. The proposed amendment merely adds the Common Core ELA and mathematics examinations as assessments allowable to meet diploma requirements in the following areas: (1) student with disabilities local diplomas; (2) Regents diploma with advanced designation; (3) credit by examination; and (4) transfer credit. The proposed amendment also provides, at local discretion, an additional opportunity for students to meet diploma requirements by passing either the Regents Comprehensive Examination in English or the Common Core ELA examination at the January 2014 test administration, and updates the names of the performance level descriptors for accountability purposes under the Elementary and Secondary Education Act (ESEA).

## 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement requirements for transitioning to Common Core ELA and mathematics examinations, and does not impose any additional compliance requirements or costs on school districts or charter schools in rural areas. The proposed amendment merely adds the Common Core ELA and mathematics examinations as assessments allowable to meet diploma requirements in the following areas: (1) student with disabilities local diplomas; (2) Regents diploma with advanced designation; (3) credit by examination; and (4) transfer credit. The proposed amendment also provides, at local discretion, an additional opportunity for students to meet diploma requirements by passing either the Regents Comprehensive Examination in English or the Common Core ELA examination at the January 2014 test administration, and updates the names of the performance level descriptors for accountability purposes under the Elementary and Secondary Education Act (ESEA). 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.

## 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. 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 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.

## Assessment of Public Comment

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

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

### Annual Professional Performance Reviews (APPR)

**I.D. No.** EDU-08-14-00023-EP

**Filing No.** 137

**Filing Date:** 2014-02-11

**Effective Date:** 2014-02-11

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

**Proposed Action:** Amendment of Subpart 30-2 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 305(1), (2) and 3012-c

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

**Specific reasons underlying the finding of necessity:** Because the Board of Regents meets at scheduled intervals, the earliest the proposed amendment could be presented for regular (non-emergency) adoption, after publication in the State Register and expiration of the 45-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(1) and (5), is the April 2014 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed amendment, if adopted at the February 2014 meeting, would be May 14, 2014, the date a Notice of Adoption would be published in the State Register. However, emergency action to adopt the proposed rule is necessary now for the preservation of the general welfare to ensure that school districts and BOCES are aware of the prohibition against the use of certain assessments on students in grades K through 2 purposes of annual professional performance reviews and the removal of the locally determined option to choose an assessment for these grades from the State approved list of third-party assessments. Districts and BOCES also need to be aware of the option to file for an expedited material change if they wish to amend their APPR plan to eliminate unnecessary assessments on students. In addition, for districts and BOCES that will be submitting material changes to their plans for the 2014-2015 school year, they need to be notified that they will be required to submit a signed certification from the superintendent, district superintendent or chancellor that no more than one percent of instructional time will be spent taking third party assessments or district, BOCES or regional assessments.

It is anticipated that the emergency rule will be presented to the Board of Regents for adoption as a permanent rule at the April 2014 Regents meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative Procedure Act for proposed rulemakings.

**Subject:** Annual Professional Performance Reviews (APPR).

**Purpose:** To prohibit school districts and boards of cooperative educational services from administering traditional standardized assessments on students in grades K through 2 solely for the purpose of conducting annual professional performance reviews (APPRs) pursuant to Education Law § 3012-c. To remove a school district's and BOCES' option to select an assessment for these grades from the State approved list of third-party assessments. To provide school district and BOCES with the option to file for an expedited material change if they wish to amend their APPR plan to eliminate unnecessary assessments on students. To require any school district or BOCES submitting material changes to their plans for the 2014-2015 school year, to submit a signed certification from the superintendent, district superintendent or chancellor that no more than one percent of instructional time will be spent taking third party assessments or district, BOCES or regional assessments.

**Text of emergency/proposed rule:** 1. Subdivision (b) of section 30-2.2 of the Rules of the Board of Regents shall be amended, effective February 11, 2014, to read as follows:

(b) Approved student assessment shall mean a standardized student assessment approved by the commissioner for inclusion in the State Education Department's lists of approved standardized student assessments for

the locally selected measures subcomponent and/or to measure student growth in non-tested subjects for the State assessment or other comparable measures subcomponent. *Effective March 2, 2014, all traditional standardized assessments for students in kindergarten through grade two shall be removed from the list of approved student assessments for use in annual professional performance review plans for the 2014-2015 school year and thereafter. However, any school district or board of cooperative education services with an annual professional performance review plan approved or determined by the Commissioner for use in the 2013-2014 school year that provides for the use of an approved student assessment for students in kindergarten through grade two remains in effect in accordance with Education Law § 3012-c(1)(2) and the district or board of cooperative educational services may continue to use such assessments until a material change is made and approved by the Commissioner to eliminate such use.*

2. Paragraph (2) of subdivision (a) of section 30-2.3 of the Rules of the Board of Regents shall be amended, effective February 11, 2014, to read as follows:

(2) By July 1, 2012, the governing body of each school district and BOCES shall adopt a plan, on a form prescribed by the Commissioner, for the annual professional performance review of all of its classroom teachers and building principals in accordance with the requirements of Education Law § 3012-c and this Subpart, and shall submit such plan to the Commissioner for approval. The plan may be an annual or multi-year plan, for the annual professional performance review of all of its classroom teachers and building principals. The Commissioner shall approve or reject the plan by September 1, 2012, or as soon as practicable thereafter. The Commissioner may also reject a plan that does not rigorously adhere to the provisions of Education Law § 3012-c and the requirements of this Subpart. Should any plan be rejected, the Commissioner shall describe each deficiency in the submitted plan and direct that each such deficiency be resolved through collective bargaining to the extent required under article fourteen of the Civil Service Law. If any material changes are made to the plan, the school district or BOCES must submit the material changes, on a form prescribed by the Commissioner, to the Commissioner for approval. *If material changes are made to a plan that solely relate to the elimination of unnecessary assessments on students, the Commissioner shall expedite his or her review of such material changes and solely review those sections of the plan that relate to the eliminated assessments to ensure compliance with Education Law § 3012-c and this Subpart, provided that the superintendent, district superintendent or chancellor shall provide a written explanation of the changes made to the plan, on a form prescribed by the commissioner, and certify that no other material changes have been made to the plan.* To the extent that by July 1, 2012 or by July 1 of any subsequent year, if all of the terms of the plan have not been finalized as a result of unresolved collective bargaining negotiations, the entire plan shall be submitted to the Commissioner upon resolution of all of its terms, consistent with Article 14 of the Civil Service Law.

3. A new paragraph (4) shall be added to subdivision (a) of section 30-2.3 of the Rules of the Board of Regents, effective February 11, 2014, to read as follows:

(4) *Any plan submitted to the Commissioner on or after March 2, 2014 for use in the 2014-2015 school year and thereafter shall include a signed certification, on a form prescribed by the Commissioner by the superintendent, district superintendent or chancellor, attesting that no more than one percent of total instructional time in each classroom or program of the district or BOCES is spent taking any locally determined traditional standardized assessments from the approved list or district, regional or BOCES developed assessments for purposes of Education Law § 3012-c. This paragraph shall not apply to assessments used for formative or diagnostic purposes.*

4. Subparagraph (iii) of paragraph (1) of subdivision (b) of section 30-2.3 of the Rules of the Board of Regents shall be amended, effective February 11, 2014, to read as follows:

(iii) Except as otherwise provided in subparagraphs (i) and (ii) of this paragraph, for classroom teachers who teach one of the core subjects, as defined in this subparagraph, where there is no approved growth or value-growth model at that grade level or in that subject, the school district or BOCES shall measure student growth based on a State-determined district-or BOCES-wide student growth goal setting process using a State assessment if one exists, or a Regents examination or department-approved alternative examination as described in section 100.2(f) of this Title (including, but not limited to, advanced placement examinations, International Baccalaureate examinations, SAT II, etc.). If there is no State assessment or Regents examination for these grades/subjects, the district or BOCES must measure student growth based on the State determined goal-setting process with an approved student assessment, or a department-approved alternative examination as described in section 100.2(f) of this Title or a district, regional or BOCES developed assessment that is rigorous and comparable across classrooms. For purposes of

this subparagraph, core subjects shall be defined as science [and social studies] in grades six to grade eight and high school courses in English language arts, mathematics, science and social studies that lead to a Regents examination in the 2010-2011 school year, or a State assessment in the 2012-2013 school year or thereafter. A school district or BOCES shall generate a score from 0 to 20 points for this subcomponent.

5. A new subdivision (e) shall be added to section 30-2.5 of the Rules of the Board of Regents shall be amended, effective February 11, 2014, to read as follows:

(e) *Notwithstanding any other provision of this Subpart to the contrary, no annual professional performance review plan shall be approved by the Commissioner for use in the 2014-2015 school year or thereafter that provides for the administration of traditional standardized assessments to students in kindergarten through grade two that are not being used for diagnostic purposes or are required to be administered by federal law, including but not limited to assessments developed by any vendor, third party or other comparable entity; except that nothing in this subdivision shall preclude the use of school- or BOCES-wide, group or team results using State assessments that are administered to students in higher grades in the school or a district, regional or BOCES developed student assessment that is developed in collaboration with a vendor, if otherwise allowed under this section or guidelines of the Commissioner. However, this subdivision shall not apply to any annual professional performance review plan approved or determined by the Commissioner for use in the 2013-2014 school year which remains in effect in the 2014-2015 or thereafter in accordance with Education Law § 3012-c(2)(l).*

6. Subdivision (a) of section 30-2.8 of the Rules of the Board of Regents shall be amended, effective February 11, 2014, to read as follows:

(a) Approval of student assessments for the evaluation of classroom teachers and building principals. An assessment provider who seeks to place an assessment on the list of approved student assessments under this section shall submit to the Commissioner a written application in a form and within the time prescribed by the Commissioner. *Pursuant to section 30-2.2 of this Subpart, effective March 2, 2014, the Commissioner will remove the names of any traditional standardized assessments approved for use in kindergarten through grade two from the list of approved assessments for use in the 2014-2015 school year and thereafter.*

**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 May 11, 2014.

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

**Data, views or arguments may be submitted to:** Peg Rivers, State Education Department, Office of Higher Education, Room 979, Washington Avenue, 89 Washington Ave., Albany, NY 12234, (518) 486-3633, email: regcomments@mail.nysed.gov

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

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

Education Law section 101 charges the Department with the general management and supervision of the educational work of the State and establishes the Regents as head of the Department.

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

Education Law section 215 authorizes the Commissioner to require reports from schools under State educational supervision.

Education Law section 305(1) authorizes the Commissioner to enforce laws relating to the State educational system and execute Regents educational policies. Section 305(2) provides the Commissioner with general supervision over schools and authority to advise and guide school district officers in their duties and the general management of their schools.

Education Law section 3012-c, as added by Chapter 103 of the Laws of 2010 and amended by Chapter 21 of the Laws of 2012, establishes requirements for the conduct of annual professional performance reviews (APPR) of classroom teachers and building principals employed by school districts and boards of cooperative educational services (BOCES).

##### 2. LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above authority vested in the Regents and Commissioner to carry into effect State educational laws and policies, and is necessary to support the commitment made by the Board of Regents and the Commissioner to ensure that students are not unnecessarily burdened by over-testing or testing that takes away from the core instructional time in our classrooms and schools. Further, these amend-

ments help to ensure that our youngest students in grades kindergarten through second grade are not subject to traditional standardized testing.

### 3. NEEDS AND BENEFITS:

The proposed amendment makes a series of changes to Subpart 30-2 of the Rules of the Board of Regents, that support the commitment made by the Board of Regents and the Commissioner to ensure that students are not unnecessarily burdened by over-testing or testing that takes away from the core instructional time in our classrooms and schools. Further, these amendments help to ensure that our youngest students in grades kindergarten through second grade are not subject to traditional standardized testing.

First, the proposed amendment provides that no APPR plan shall be approved by the Commissioner for use in the 2014-2015 school year or thereafter that provides for the administration of traditional standardized assessments to students in kindergarten through grade two that are not being used for diagnostic purposes or are required to be administered by federal law, including but not limited to assessments developed by any vendor, third party or other comparable entity. The proposed amendment does not preclude the use of school- or BOCES-wide, group, or team results using State assessments that are administered to students in higher grades in the school or a district, regional or BOCES-developed student assessment that is developed in collaboration with a vendor, if otherwise allowed under this section or guidelines of the Commissioner. If the proposed amendment is adopted, on March 2, 2014, the Department will remove all traditional standardized assessments approved for use in kindergarten through grade two from the list of approved student assessments for use in APPR plans for the 2014-2015 school year and thereafter. However, the proposed amendment ensures that any APPR plan that has been approved by the Commissioner for use in the 2013-2014 school year shall remain in effect in accordance with Education Law § 3012-c(2)(i) and those districts and BOCES will be able to continue to use those assessments until a material change is made to their APPR plan to eliminate the use of such assessments.

Second, the proposed amendment provides that if any district or BOCES wishes to make material changes to a plan that solely relate to the elimination of unnecessary assessments that are used on students for APPR purposes, the Department shall expedite the review of such changes and will only review those sections of the plan that relate to the eliminated assessments to ensure compliance with Education Law § 3012-c and Subpart 30-2.

The proposed amendment also requires that for any APPR plan submitted to the Commissioner for approval for use in the 2014-2015 school year, the plan must include a signed certification by the superintendent, district superintendent or chancellor that attests that no more than one percent of total instructional time in each classroom or program of the district or BOCES is spent taking any locally determined traditional standardized assessments from the state's approved list or district, regional, or BOCES-developed assessments for APPR purposes. This certification does not, however, apply to assessments used for formative or diagnostic purposes.

The proposed amendment also re-defines core subject areas for the State growth or other comparable measures subcomponent to remove sixth through eighth grade social studies and sixth through seventh science from the definition. This revision will help to provide additional, no-cost options to districts and BOCES who may wish to utilize a school-wide, group, or team measure based on one or more State or Regents assessments in sixth through eighth social studies and/or sixth through seventh science.

### 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 will not impose any costs on the State, local government, private regulated parties or the State Education Department. The proposed amendment ensures that students are not unnecessarily burdened by over-testing or testing that takes away from the core instructional time in our classrooms and schools.

### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district. The proposed amendment ensures that students are not unnecessarily burdened by over-testing or testing that takes away from the core instructional time in our classrooms and schools.

### 6. PAPERWORK:

The proposed amendment requires that for any APPR plan submitted to the Commissioner for approval for use in the 2014-2015 school year, the plan must include a signed certification by the superintendent, district superintendent or chancellor that attests that no more than one percent of

total instructional time in each classroom or program of the district or BOCES is spent taking any locally determined traditional standardized assessments from the state's approved list or district, regional, or BOCES-developed assessments for APPR purposes. This certification does not, however, apply to assessments used for formative or diagnostic purposes.

### 7. DUPLICATION:

The rule does not duplicate existing State or Federal requirements.

### 8. ALTERNATIVES:

The rule has been carefully drafted to address the concerns raised by the public relating to unnecessary testing while at the same time providing flexibility to school districts and BOCES in their annual professional review plans for teachers and principals. Since Education Law § 3012-c applies equally to all school districts and BOCES throughout the State, it was not possible to establish different compliance and reporting requirements for regulated parties.

### 9. FEDERAL STANDARDS:

There are no applicable Federal standards concerning the APPR for classroom teachers and building principals as established in Education Law section 3012-c.

### 10. COMPLIANCE SCHEDULE:

The proposed amendment will become effective on its stated effective date. No further time is needed to comply.

### *Regulatory Flexibility Analysis*

#### (a) Small businesses:

The purpose of the proposed rule is make a series of changes to Subpart 30-2 of the Rules of the Board of Regents, that support the commitment made by the Board of Regents and the Commissioner to ensure that students are not unnecessarily burdened by over-testing or testing that takes away from the core instructional time in our classrooms and schools. Further, these amendments help to ensure that our youngest students in grades kindergarten through second grade are not subject to traditional standardized testing.

The proposed rule does not impose any reporting, recordkeeping or other compliance requirements, and will not have an adverse economic impact, on small business. 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 all school districts and boards of cooperative educational services ("BOCES") in the State.

##### 2. COMPLIANCE REQUIREMENTS:

The proposed amendment makes a series of changes to Subpart 30-2 of the Rules of the Board of Regents, that support the commitment made by the Board of Regents and the Commissioner to ensure that students are not unnecessarily burdened by over-testing or testing that takes away from the core instructional time in our classrooms and schools. Further, these amendments help to ensure that our youngest students in grades kindergarten through second grade are not subject to traditional standardized testing.

First, the proposed amendment provides that no APPR plan shall be approved by the Commissioner for use in the 2014-2015 school year or thereafter that provides for the administration of traditional standardized assessments to students in kindergarten through grade two that are not being used for diagnostic purposes or are required to be administered by federal law, including but not limited to assessments developed by any vendor, third party or other comparable entity. The proposed amendment does not preclude the use of school- or BOCES-wide, group, or team results using State assessments that are administered to students in higher grades in the school or a district, regional or BOCES-developed student assessment that is developed in collaboration with a vendor, if otherwise allowed under this section or guidelines of the Commissioner. If the proposed amendment is adopted, on March 2, 2014, the Department will remove all traditional standardized assessments approved for use in kindergarten through grade two from the list of approved student assessments for use in APPR plans for the 2014-2015 school year and thereafter. However, the proposed amendment ensures that any APPR plan that has been approved by the Commissioner for use in the 2013-2014 school year shall remain in effect in accordance with Education Law § 3012-c(2)(i) and those districts and BOCES will be able to continue to use those assessments until a material change is made to their APPR plan to eliminate the use of such assessments.

Second, the proposed amendment provides that if any district or BOCES wishes to make material changes to a plan that solely relate to the elimination of unnecessary assessments that are used on students for APPR purposes, the Department shall expedite the review of such changes and will only review those sections of the plan that relate to the eliminated assessments to ensure compliance with Education Law § 3012-c and Subpart 30-2.

The proposed amendment also requires that for any APPR plan submitted to the Commissioner for approval for use in the 2014-2015 school year, the plan must include a signed certification by the superintendent, district superintendent or chancellor that attests that no more than one percent of total instructional time in each classroom or program of the district or BOCES is spent taking any locally determined traditional standardized assessments from the state's approved list or district, regional, or BOCES-developed assessments for APPR purposes. This certification does not, however, apply to assessments used for formative or diagnostic purposes.

The proposed amendment also re-defines core subject areas for the State growth or other comparable measures subcomponent to remove sixth through eighth grade social studies and sixth through seventh science from the definition. This revision will help to provide additional, no-cost options to districts and BOCES who may wish to utilize a school-wide, group, or team measure based on one or more State or Regents assessments in sixth through eighth social studies and/or sixth through seventh science.

### 3. PROFESSIONAL SERVICES:

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

### 4. COMPLIANCE COSTS:

The proposed amendment does not impose any compliance costs on school districts and BOCES, beyond those imposed by Education Law § 3012-c.

### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The rule does not impose any additional technological requirements on school districts or BOCES. Economic feasibility is addressed above under Compliance Costs.

### 6. MINIMIZING ADVERSE IMPACT:

The rule has been carefully drafted to address the concerns raised by the public relating to unnecessary testing while at the same time providing flexibility to school districts and BOCES in their annual professional review plans for teachers and principals. Since Education Law § 3012-c applies equally to all school districts and BOCES throughout the State, it was not possible to establish different compliance and reporting requirements.

### 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.

During the public comment period, the Department will also be seeking comments on the proposed amendment from representatives of teachers, principals, superintendents of schools, school boards, school districts and board of cooperative educational services officials, and other interested parties.

### *Rural Area Flexibility Analysis*

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

The proposed amendment applies to all school districts and boards of cooperative educational services (BOCES) in the State, 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 makes a series of changes to Subpart 30-2 of the Rules of the Board of Regents, that support the commitment made by the Board of Regents and the Commissioner to ensure that students are not unnecessarily burdened by over-testing or testing that takes away from the core instructional time in our classrooms and schools. Further, these amendments help to ensure that our youngest students in grades kindergarten through second grade are not subject to traditional standardized testing.

First, the proposed amendment provides that no APPR plan shall be approved by the Commissioner for use in the 2014-2015 school year or thereafter that provides for the administration of traditional standardized assessments to students in kindergarten through grade two that are not being used for diagnostic purposes or are required to be administered by federal law, including but not limited to assessments developed by any vendor, third party or other comparable entity. The proposed amendment does not preclude the use of school- or BOCES-wide, group, or team results using State assessments that are administered to students in higher grades in the school or a district, regional or BOCES-developed student assessment that is developed in collaboration with a vendor, if otherwise allowed under this section or guidelines of the Commissioner. If the proposed amendment is adopted, on March 2, 2014, the Department will remove all traditional standardized assessments approved for use in kindergarten through grade two from the list of approved student assessments for use in APPR plans for the 2014-2015 school year and thereafter. However, the

proposed amendment ensures that any APPR plan that has been approved by the Commissioner for use in the 2013-2014 school year shall remain in effect in accordance with Education Law § 3012-c(2)(i) and those districts and BOCES will be able to continue to use those assessments until a material change is made to their APPR plan to eliminate the use of such assessments.

Second, the proposed amendment provides that if any district or BOCES wishes to make material changes to a plan that solely relate to the elimination of unnecessary assessments that are used on students for APPR purposes, the Department shall expedite the review of such changes and will only review those sections of the plan that relate to the eliminated assessments to ensure compliance with Education Law § 3012-c and Subpart 30-2.

The proposed amendment also requires that for any APPR plan submitted to the Commissioner for approval for use in the 2014-2015 school year, the plan must include a signed certification by the superintendent, district superintendent or chancellor that attests that no more than one percent of total instructional time in each classroom or program of the district or BOCES is spent taking any locally determined traditional standardized assessments from the state's approved list or district, regional, or BOCES-developed assessments for APPR purposes. This certification does not, however, apply to assessments used for formative or diagnostic purposes.

The proposed amendment also re-defines core subject areas for the State growth or other comparable measures subcomponent to remove sixth through eighth grade social studies and sixth through seventh science from the definition. This revision will help to provide additional, no-cost options to districts and BOCES who may wish to utilize a school-wide, group, or team measure based on one or more State or Regents assessments in sixth through eighth social studies and/or sixth through seventh science.

### 3. COSTS:

The proposed amendment does not impose any additional costs on a school district or BOCES beyond those imposed by Education Law § 3012-c. Instead, the proposed amendment may result in a cost-savings to school districts and BOCES to the extent the proposed amendment eliminates unnecessary testing.

### 4. MINIMIZING ADVERSE IMPACT:

The rule has been carefully drafted to address the concerns received by the public relating to unnecessary testing while at the same time providing flexibility to school districts and BOCES in their annual professional performance reviews of teachers and principals. Since Education Law § 3012-c applies to all school districts and BOCES throughout the State, it was not possible to establish different compliance and reporting requirements for regulated parties in rural areas, or to exempt them from the rule's provisions.

### 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.

The Department will be also be seeking comments on the proposed amendment from representatives of teachers, principals, superintendents of schools, school boards, school districts and board of cooperative educational services officials, and other interested parties, whose members live and work in rural areas of this state.

### *Job Impact Statement*

The purpose of the proposed rule is make a series of changes to Subpart 30-2 of the Rules of the Board of Regents, that support the commitment made by the Board of Regents and the Commissioner to ensure that students are not unnecessarily burdened by over-testing or testing that takes away from the core instructional time in our classrooms and schools. Further, these amendments help to ensure that our youngest students in grades kindergarten through second grade are not subject to traditional standardized testing. 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.

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

**Protection of People with Special Needs Act (L. 2012, Ch. 501)**

**I.D. No.** EDU-28-13-00009-ERP

**Filing No.** 136

**Filing Date:** 2014-02-11

**Effective Date:** 2014-02-11

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

**Action Taken:** Amendment of sections 200.7, 200.15 and 200.22 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 4002(1)-(3), 4212(a), 4314(a), 4358(a), 4403(11), 4308(3), 4355(3), 4401(2), 4402(1)-(7), 4403(3), (11), (13), 4410(1)-(13); and L. 2012, ch. 501

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

**Specific reasons underlying the finding of necessity:** The proposed amendment is necessary to conform the Commissioner's Regulations to Chapter 501 of the Laws of 2012 and the regulations, guidelines and procedures established by the Justice Center, which became effective June 30, 2013.

The proposed amendment was adopted as an emergency rule at the June 16-17, 2013 Regents meeting, effective June 30, 2013. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on July 10, 2013. The proposed amendment was subsequently re-adopted by emergency action at the September 16-17, 2013 and November 17-18, 2013 Regents meetings, and at the January 13-14, 2014 Regents meeting, to keep the rule continuously in effect until it can be adopted as a permanent rule. During this time, the State Education Department (SED) has continued to work closely with the Justice Center and the other State oversight agencies on implementing the provisions of Chapter 501.

As a result of those discussions, the proposed amendment has been substantially revised as set forth in the Revised Regulatory Impact Statement submitted herewith. Because the Board of Regents meets at scheduled intervals the earliest the revised proposed amendment could be presented for regular (non-emergency) adoption, after publication of a Notice of Revised Rule Making in the State Register and expiration of the 30-day public comment period for revised rule makings prescribed in State Administrative Procedure Act (SAPA) section 202(4-a), is the April 28-29, 2014 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the revised proposed amendment, if adopted at the April meeting, would be May 14, 2014, the date a Notice of Adoption would be published in the State Register. However, emergency action to adopt the proposed rule is necessary for the preservation of the general welfare to immediately adopt revisions to the proposed amendment that conform the Commissioner's Regulations to the guidelines, procedures and other requirements established by the Justice Center to implement Chapter 501 of the Laws of 2012, and to otherwise ensure that the emergency rule adopted at the June 16-17, 2013 Regents meeting, and re-adopted at the September and November 2013 Regents meetings and January 2014 Regents meeting, remains continuously in effect until the effective date of its adoption as a permanent rule at a subsequent Regents meeting, and thereby ensure that students attending residential schools are protected against abuse, neglect and significant incidents that may jeopardize their health, safety and welfare.

It is anticipated that the proposed rule will be presented for permanent adoption at the April 28-29, 2014 Regents meeting, which is the first Regents meeting scheduled after publication of the proposed revised rule in the State Register on February 26, 2014 and expiration of the 30-day public comment period for revised rules established by the State Administrative Procedure Act.

**Subject:** Protection of People with Special Needs Act (L. 2012, ch. 501).

**Purpose:** To conform Commissioner's Regulations relating to students attending residential schools to L. 2012, ch. 501.

**Substance of emergency/revised rule:** Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on July 10, 2013, the proposed amendment has been revised and adopted as an emergency rule, effective February 11, 2014. The following is a summary of the substance of the emergency revised rule.

Consistent with Chapter 501, section 200.7(b)(3) is amended to add that

the code of conduct developed by the Justice Center must govern the conduct of custodians with respect to the safety, dignity and welfare of students in residential schools. Section 200.7(b)(6) is amended to require preschool programs and municipalities who contract for related services approved pursuant to section 4410 of the Education Law to conduct personnel screenings in accordance with the provisions of sections 424-a and 495 of the Social Services Law.

Section 200.15 is amended to conform State regulations to Chapter 501 of the NYS Laws of 2012 relating to definitions abuse, neglect and significant incidents; personnel screening procedures; staff supervision; procedures for the protection of students in in-State and out-of-State residential schools from reportable incidents; staff orientation to procedures regarding the protection of students; instruction of students in techniques and procedures to protect themselves from reportable incidents; incident review committees; and access to residential schools and their records necessary to carry out the provisions of Chapter 501.

Section 200.15(b)(3)(i) has been revised to clarify that the term "abuse" includes physical abuse, sexual abuse, psychological abuse, deliberate inappropriate use of restraints, unauthorized use of aversive interventions, obstruction of reports of reportable incidents, and unlawful use or administration of a controlled substance.

Section 200.15(b)(5) has been revised to add the definition of "subject of the report," consistent with the definition of such term in Chapter 501.

Section 200.15(f)(2)(iv)(a) has been revised to change the term "alleged perpetrator" to "subject of the report," consistent with terminology used in Chapter 501.

Section 200.15(f)(3)(i) has been revised to clarify that in addition to requests for information from the Justice Center or the State Education Department, residential schools must also comply with such requests from a representative or designee of the Justice Center.

Section 200.15(f)(3)(iii) has been revised to delete the specific guidelines for conducting an investigation and the information to be included in the report of the findings, when a residential school is directed to investigate a significant incident, and to add that investigations must be conducted and reports submitted consistent with guidelines issued by the Department; and change the timeline for the submitting the report of findings, when a residential school is directed to conduct the investigation of a significant incident, from 45 days to 60 days.

Section 200.15(4) has been revised to: clarify that plans of prevention and remediation may be required to be developed to address the investigative findings for any report of abuse or neglect that identifies the need for corrective action; add requirements for developing, implementing and submitting a plan of prevention and remediation associated with a report of a significant incident to the Department; and conform the requirement for parent notification of findings of investigations of significant incidents with statutory requirements.

Section 200.15(g) has been amended to correct a cross citation. Section 200.15(h) has been revised relating to training curriculum components to eliminate those that, by statute, pertain only to the Justice Center.

Section 200.15(1)(2) has been revised to clarify that only the records of in-state residential schools must be made available for public inspection and copying when such records relate to abuse and neglect of students. Section 200.22(d)(3) has been amended to correct a cross citation to section 200.15(h)(1).

**This notice is intended** to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on July 10, 2013, I.D. No. EDU-28-13-00009-EP. The emergency rule will expire April 11, 2014.

**Emergency rule compared with proposed rule:** Substantial revisions were made in sections 200.15(b)(3), (5), (f)(3), (4), (5), (h)(1), (3) and 200.22(d)(3).

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

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

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

**Revised Regulatory Impact Statement**

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on July 10, 2013, the proposed amendment has been revised as follows.

Section 200.15(b)(3)(i) has been revised to clarify that the term "abuse" includes physical abuse, sexual abuse, psychological abuse, deliberate inappropriate use of restraints, unauthorized use of aversive interventions,

obstruction of reports of reportable incidents, and unlawful use or administration of a controlled substance.

Section 200.15(b)(5) has been revised to add the definition of "subject of the report," consistent with the definition of such term in Chapter 501.

Section 200.15(f)(2)(iv)(a) has been revised to change the term "alleged perpetrator" to "subject of the report," consistent with terminology used in Chapter 501.

Section 200.15(f)(3)(i) has been revised to clarify that in addition to requests for information from the Justice Center or the State Education Department, residential schools must also comply with such requests from a representative or designee of the Justice Center.

Section 200.15(f)(3)(iii) has been revised to delete the specific guidelines for conducting an investigation and the information to be included in the report of the findings, when a residential school is directed to investigate a significant incident, and to add that investigations must be conducted and reports submitted consistent with guidelines issued by the Department; and change the timeline for the submitting the report of findings, when a residential school is directed to conduct the investigation of a significant incident, from 45 days to 60 days.

Section 200.15(4) has been revised to: clarify that plans of prevention and remediation may be required to be developed to address the investigative findings for any report of abuse or neglect that identifies the need for corrective action; add requirements for developing, implementing and submitting a plan of prevention and remediation associated with a report of a significant incident to the Department; and conform the requirement for parent notification of findings of investigations of significant incidents with statutory requirements.

Section 200.15(g) has been amended to correct a cross citation. Section 200.15(h) has been revised relating to training curriculum components to eliminate those that, by statute, pertain only to the Justice Center.

Section 200.15(1)(2) has been revised to clarify that only the records of in-state residential schools must be made available for public inspection and copying when such records relate to abuse and neglect of students. Section 200.22(d)(3) has been amended to correct a cross citation to section 200.15(h)(1).

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

#### 6. PAPERWORK:

Consistent with Chapter 501 of the Laws of 2012, the proposed amendment would add additional paperwork requirements pertaining to reporting reportable incidents to the Justice Center. However, many of the new requirements will predominantly utilize electronic format. The proposed rule adds requirements for in-State residential schools to provide parents with written information regarding reporting responsibilities and processes. In-State residential schools will also be required to provide staff at the time of initial employment, and at least annually thereafter, with a copy of the code of conduct developed by the Justice Center; submit to SED reports of incident patterns and trends and patterns and trends in the reporting and response to reportable incidents; and provide copies of records to the Justice Center when a request is made to the Justice Center for public inspection and copying of records relating to the abuse and neglect of students. The proposed amendment also adds additional paperwork requirements for out-of-State residential schools to forward the findings of abuse and neglect investigations not conducted by the Justice Center to the Justice Center, SED, and the student's committee on special education and, as appropriate, the social services district in NYS.

#### *Revised Regulatory Flexibility Analysis*

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on July 10, 2013, the proposed amendment has been revised as set forth in the Revised Regulatory Impact Statement submitted with this statement.

The revisions require that the Compliance Requirements section of the previously published Regulatory Flexibility Analysis be revised to read as follows.

#### 2. COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to conform the Commissioner's Regulations to recent changes in State statute (as amended by Chapter 501 of the Laws of 2012), and does not impose any additional compliance requirements on small businesses and local governments beyond those imposed by State statutes and regulations.

Consistent with Chapter 501, section 200.7(b)(3) is amended to add that the code of conduct developed by the Justice Center must govern the conduct of custodians with respect to the safety, dignity and welfare of students in residential schools. Section 200.7(b)(6) is amended to require preschool programs and municipalities who contract for related services approved pursuant to section 4410 of the Education Law to conduct personnel screenings in accordance with the provisions of sections 424-a and 495 of the Social Services Law.

Section 200.15 is amended to conform State regulations to Chapter 501

of the Laws of 2012 relating to definitions abuse, neglect and significant incidents; personnel screening procedures; staff supervision; procedures for the protection of students in in-State and out-of-State residential schools from reportable incidents; staff orientation to procedures regarding the protection of students; instruction of students in techniques and procedures to protect themselves from reportable incidents; incident review committees; and access to residential schools and their records necessary to carry out the provisions of Chapter 501.

Consistent with Chapter 501 of the Laws of 2012, the proposed amendment would add additional paperwork requirements pertaining to reporting reportable incidents to the Justice Center. However, many of the new requirements will predominantly utilize electronic format. The proposed rule adds requirements for in-State residential schools to provide parents with written information regarding reporting responsibilities and processes. In-State residential schools will also be required to provide staff at the time of initial employment, and at least annually thereafter, with a copy of the code of conduct developed by the Justice Center; submit to SED reports of incident patterns and trends and patterns and trends in the reporting and response to reportable incidents; and provide copies of records to the Justice Center when a request is made to the Justice Center for public inspection and copying of records relating to the abuse and neglect of students. The proposed amendment also adds additional paperwork requirements for out-of-State residential schools to forward the findings of abuse and neglect investigations not conducted by the Justice Center to the Justice Center, SED, and the student's committee on special education and, as appropriate, the social services district in NYS.

#### *Revised Rural Area Flexibility Analysis*

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on July 10, 2013, the proposed amendment has been revised as set forth in the Revised Regulatory Impact Statement submitted with this statement.

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

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

The proposed amendment is necessary to conform the Commissioner's Regulations to recent changes in State statute (as amended by Chapter 501 of the Laws of 2012), and does not impose any compliance requirements upon small businesses and local governments in rural areas beyond those imposed by State statutes and regulations.

Consistent with Chapter 501, section 200.7(b)(3) is amended to add that the code of conduct developed by the Justice Center must govern the conduct of custodians with respect to the safety, dignity and welfare of students in residential schools. Section 200.7(b)(6) is amended to require preschool programs and municipalities who contract for related services approved pursuant to section 4410 of the Education Law to conduct personnel screenings in accordance with the provisions of sections 424-a and 495 of the Social Services Law.

Section 200.15 is amended to conform State regulations to Chapter 501 of the New York State Laws of 2012 relating to definitions abuse, neglect and significant incidents; personnel screening procedures; staff supervision; procedures for the protection of students in in-State and out-of-State residential schools from reportable incidents; staff orientation to procedures regarding the protection of students; instruction of students in techniques and procedures to protect themselves from reportable incidents; incident review committees; and access to residential schools and their records necessary to carry out the provisions of Chapter 501.

Consistent with Chapter 501 of the Laws of 2012, the proposed amendment would add additional paperwork requirements pertaining to reporting reportable incidents to the Justice Center. However, many of the new requirements will predominantly utilize electronic format. The proposed rule adds requirements for in-State residential schools to provide parents with written information regarding reporting responsibilities and processes. In-State residential schools will also be required to provide staff at the time of initial employment, and at least annually thereafter, with a copy of the code of conduct developed by the Justice Center; submit to SED reports of incident patterns and trends and patterns and trends in the reporting and response to reportable incidents; and provide copies of records to the Justice Center when a request is made to the Justice Center for public inspection and copying of records relating to the abuse and neglect of students. The proposed amendment also adds additional paperwork requirements for out-of-State residential schools to forward the findings of abuse and neglect investigations not conducted by the Justice Center to the Justice Center, SED, and the student's committee on special education and, as appropriate, the social services district in NYS.

#### *Revised Job Impact Statement*

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on July 10, 2013, the proposed amend-

ment has been revised as set forth in the Revised Regulatory Impact Statement submitted with this statement.

The revised proposed amendment is necessary to conform the Commissioner's Regulations to recent changes to the Education Law, Social Services Law and Executive Law, as amended by Chapter 501 of the New York State Laws of 2012 ("Protection of People with Special Needs Act"), and the regulations, guidelines and procedures established by the Justice Center, to ensure that students attending residential schools are protected against abuse, neglect and significant incidents that may jeopardize their health, safety and welfare. The proposed amendment, as revised, will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the revised amendment that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

#### Assessment of Public Comment

The agency received no public comment.

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

#### Elementary and Secondary Education Act (ESEA) Flexibility and School and School District Accountability

**I.D. No.** EDU-04-14-00004-ERP

**Filing No.** 132

**Filing Date:** 2014-02-11

**Effective Date:** 2014-02-11

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

**Action Taken:** Amendment of sections 100.4 and 100.18 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided), 209(not subdivided), 210(not subdivided), 215(not subdivided), 305(1), (2), (20), 308(not subdivided), 309(not subdivided), 3204(3), 3713(1) and (2)

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

**Specific reasons underlying the finding of necessity:** On December 20, 2013, the United States Department of Education (USDE) granted the State Education Department a one-year waiver (for the 2013-2014 school year) from Elementary and Secondary Education Act (ESEA) sections 1111(b)(1)(B) and 1111(b)(3)(C)(i) so that the Department may use, with respect to a student who is not yet enrolled in high school but who takes mathematics coursework and the corresponding Algebra I or Geometry Regents Examination in grade 7 or 8, the student's score on that assessment for federal accountability purposes for the grade in which the student is enrolled. However, the result on the Regents Examination in Algebra I (Common Core) or Geometry taken in grade 7 or 8 will not count towards the participation rate or the Performance Index in mathematics for the high school in which they later enroll.

The proposed amendment of section 100.18(b)(14) of the Commissioner's Regulations, which conforms existing regulations with the newly-granted waiver, was adopted as an emergency rule at the January 13-14, 2014 Regents meeting, effective January 14, 2014. Since its January adoption, the proposed amendment has been revised to make a technical, conforming change. Specifically, Commissioner's Regulation section 100.4(e)(2), which requires mathematics assessments to be administered in grades 7 and 8 beginning with the 2005-2006 school year, has been amended to provide that for the 2013-2014 school year, students who attend grade seven or eight may take a Regents examination in mathematics in lieu of or in addition to the Grade 7 or 8 mathematics assessment, in accordance with section 100.18(b)(14) of this Part. This amendment is necessary in order to make section 100.4(e)(2) consistent with the January amendment of section 100.18(b)(14).

It is anticipated that the emergency rule will be presented to the Board of Regents for adoption as a permanent rule at the April 28-29, 2014 Regents meeting, which is the first scheduled meeting after expiration of the 30-day public comment period for revised rulemakings mandated by the State Administrative Procedure Act (SAPA).

Pursuant to SAPA § 203(1), the earliest effective date of the permanent rule, if adopted at the April Regents meeting, is May 14, 2014, the date a Notice of Adoption will be published in the State Register. However, the

mathematics assessments for grades 7 and 8 are scheduled to be administered in April. Emergency action is therefore necessary for the preservation of the general welfare to immediately repeal the January emergency rule and adopt the revised proposed amendment, and thereby ensure that local educational agencies (LEAs) are given sufficient notice to timely implement the USDE waiver regarding the administration of Regents Examinations in Algebra I (Common Core) and Geometry to grade 7 and 8 students for the 2013-14 school year.

**Subject:** Elementary and Secondary Education Act (ESEA) Flexibility and school and school district accountability.

**Purpose:** To provide flexibility to LEAs in the administration of Regents mathematics examinations (Common Core) to students in grades 7-8.

**Text of emergency/revised rule:** 1. The emergency rule amending paragraph (14) of subdivision (b) of section 100.18 of the Regulations of the Commissioner of Education, which was adopted at the January 13-14, 2014 meeting of the Board of Regents, is repealed, effective February 11, 2014.

2. Paragraph (2) of subdivision (e) of section 100.4 of the Regulations of the Commissioner of Education is amended, effective February 11, 2014, as follows:

(2) Beginning with the 1998-99 school year, the mathematics intermediate assessment shall be administered in grade eight. Beginning with the 2005-2006 school year, mathematics assessments shall be administered in grades seven and eight, *provided that, for the 2013-2014 school year, students who attend grade seven or eight may take a Regents examination in mathematics in lieu of or in addition to the grade 7 or 8 mathematics assessment, in accordance with section 100.18(b)(14) of this Part.*

3. Paragraph (14) of subdivision (b) of section 100.18 of the Regulations of the Commissioner of Education is amended, effective February 11, 2014, as follows:

(14) Performance levels shall mean:

(i) for elementary and middle grades:

(a) level 1 (well below proficient)

(1) not on track to be proficient: a score of level 1 on State assessments in English language arts and mathematics provided that using the student's three-year percentile growth targets as established by the commissioner, the student's growth percentile does not meet or exceed his or her growth percentile target; or the student does not have a growth percentile target; or a score of level 1 on a State alternate assessment; *or a score of 64 or less, or a comparable score as approved by the Board of Regents, on a Regents examination in mathematics for a student in grade 7 or grade 8.*

(2) on track to be proficient: a score of level 1 on State assessments in English language arts and mathematics, provided that using the student's three-year percentile growth targets as established by the commissioner, the student's growth percentile meets or exceeds his or her growth percentile target;

(3) for science: a score of level 1 on State assessments in science or other State assessments, or a score of level 1 on a State alternate assessment;

(b) level 2 (below proficient)

(1) not on track to be proficient: a score of level 2 on State assessments in English language arts and mathematics provided that using the student's three-year percentile growth targets as established by the commissioner, the student's growth percentile does not meet or exceed his or her growth percentile target; or the student does not have a growth percentile target; or a score of level 2 on a State alternate assessment;

(2) on track to be proficient: a score of level 2 on State assessments in English language arts and mathematics, provided that using the student's three-year percentile growth targets as established by the commissioner, the student's growth percentile meets or exceeds his or her growth percentile target;

(3) for science: a score of level 2 on State assessments in science or other State assessments, or a score of level 2 on a State alternate assessment;

(c) level 3 (proficient)

(1) a score of level 3 on State assessments in English language arts, mathematics and science or a score of level 3 on a State alternate assessment;

(2) a score of 65 or higher, *or a comparable score as approved by the Board of Regents, on a Regents Examination in science or mathematics for students in grade seven or eight pursuant to subdivision 100.4(d) of this Part;*

(d) level 4 (excels in standards): a score of level 4 on State assessments in English language arts, mathematics and science or a score of level 4 on a State alternate assessment;

(ii) for high school:

(a) level 1 (well below proficient)

(1) a score of 64 or less on the Regents comprehensive examination in English or a Regents mathematics examination;

(2) a failing score on a State-approved alternative examination for those Regents examinations;

(3) a score of level 1 on a State alternate assessment;

(4) a cohort member who has not been tested on the Regents comprehensive examination in English or a Regents mathematics examination or State-approved alternative examination for these Regents examinations;

(b) level 2 (below proficient)

(1) a score between 65 and 74 on the Regents comprehensive examination in English or between 65 and 79 on a Regents examination in mathematics;

(2) a score of level 2 on a State alternate assessment;

(c) level 3 (proficient)

(1) a score between 75 and 89 on the Regents comprehensive examination in English or between 80 and 89 on a Regents examination in mathematics; or [passes] a *passing score* on a State-approved alternative to those Regents examinations;

(2) a score of level 3 on a State alternate assessment;

(d) level 4 (excels in standards)

(1) a score of 90 or higher on the Regents comprehensive examination in English or a Regents mathematics examination;

(2) a score of level 4 on a State alternate assessment;

(iii) *Notwithstanding the provisions of this section:*

(a) *For students who attend grade 7 or 8 and take a Regents examination in mathematics in the 2013-2014 school year, but do not take the Grade 7 or 8 Mathematics Assessment, participation and accountability determinations for the school in which the student attends grade 7 or 8 shall be based upon such student's performance on the Regents examination in mathematics. Participation and accountability determinations for the high school in which such student later enrolls shall be based upon such student's performance on mathematics assessments taken after the student first enters grade 9. For such students, a score of 65 or above, or a comparable score as approved by the Board of Regents, on a Regents Examination in mathematics taken in grade 9 or thereafter will be credited as level 3 for purposes of calculating the High School Performance Index.*

(b) *For students who attend grade 7 or 8 and who take both the Grade 7 or 8 Mathematics Assessment and a Regents Examination in mathematics during the 2013-2014 school year, participation and accountability determinations for the school such students attend in grade 7 or 8 shall be based upon the student's performance on the Grade 7 or 8 Mathematics Assessment.*

**This notice is intended** to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on January 29, 2014, I.D. No. EDU-04-14-00004-EP. The emergency rule will expire April 11, 2014.

**Emergency rule compared with proposed rule:** Substantial revisions were made in section 100.4(e)(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

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

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

#### **Revised Regulatory Impact Statement**

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the *State Register* on January 29, 2014, the proposed amendment has been substantially revised as follows:

Commissioner's Regulation section 100.4(e)(2), which requires mathematics assessments to be administered in grades 7 and 8 beginning with the 2005-2006 school year, has been amended to provide that for the 2013-2014 school year, students who attend grade seven or eight may take a Regents examination in mathematics in lieu of or in addition to the Grade 7 or 8 mathematics assessment, in accordance with section 100.18(b)(14) of this Part. This amendment is necessary in order to make section 100.4(e)(2) consistent with the January amendment of section 100.18(b)(14).

The above revision requires that the NEEDS AND BENEFITS section of the previously published Regulatory Impact Statement be revised to read as follows:

#### 3. NEEDS AND BENEFITS:

At its October 2013 meeting, the Board of Regents directed the State Education Department (SED or "the Department") to submit a request to the United States Department of Education (USDE) to waive provisions of the federal Elementary and Secondary Education Act (ESEA) [Sections 1111(b)(1)(B) and 1111(b)(3)(C)(i)] that require states to measure the

achievement of standards in mathematics using the same assessments for all students.

On December 20, 2013, USDE granted SED a one-year waiver (for the 2013-2014 school year) from ESEA sections 1111(b)(1)(B) and 1111(b)(3)(C)(i) so that the Department may use, with respect to a student who is not yet enrolled in high school but who takes mathematics coursework and the corresponding Algebra I or Geometry Regents Examination in grade 7 or 8, the student's score on that assessment for federal accountability purposes for the grade in which the student is enrolled. However, the result on the Regents Examination in Algebra I (Common Core) or Geometry taken in grade 7 or 8 will not count towards the participation rate or the Performance Index in mathematics for the high school in which they later enroll. The proposed amendment will conform existing regulations with the newly-granted waiver.

Currently, seventh and eighth grade students who are receiving instruction in Algebra I and who take the Regents Examination in Algebra I (Common Core) are also required to take the NYS Common Core Mathematics Test for the grade in which they are enrolled. The same requirement also applies to students who are receiving instruction in Geometry and who take the Regents Examination in Geometry.

Based on the waiver, the proposed amendment to 8 NYCRR sections 100.4(e)(2) and 100.18(b)(14) will permit local educational agencies (LEAs) to administer only the Regents Examination in Algebra I (Common Core) to these students during the 2013-2014 school year, thus eliminating the need for "double-testing" in grades 7 and 8. This provision also applies to students in grades 7 and 8 who receive instruction in Geometry and who take the Regents Examination in Geometry. The waiver serves to relieve students, teachers, and schools from having to prepare students in seventh and eighth grade who are receiving instruction in Algebra I or Geometry for multiple end-of-year assessments.

The proposed amendment also reflects the way in which student results will be used for institutional accountability purposes under the waiver:

- If a district opts to have accelerated students take the NYS Grade 7 or 8 Common Core Mathematics Test in addition to one or both Regents Examinations in Algebra, the results from the NYS Grade 7 or 8 Common Core Mathematics Test will be used for institutional accountability purposes rather than the results from a Regents Examination in mathematics. Students who take the Regents Examination in Algebra I (Common Core) in grade 7 or 8 will be counted as participants when determining the participation rate in mathematics for the school they attend in grade 7 or 8. The result on the Regents Examination in Algebra I (Common Core) taken in grade 7 or 8 will not count towards the participation rate in mathematics for the high school in which they later enroll. The same rule would apply for any students who take the Regents Examination in Geometry in grade 7 or 8.

- Results for students who take only the Regents Examination in Algebra I (Common Core) in grade 7 or 8 will be incorporated into the Performance Index for the school in which the student is enrolled. Grade 7 or 8 students who accelerate and obtain, at a minimum, the score on the Regents Examination in Algebra I (Common Core) necessary to meet Regents Diploma requirements will, for the purposes of calculating a school's or a district's Performance Index, be counted at the "full credit" level. Grade 7 or 8 students who do not obtain scores on the Regents Examination in Algebra I (Common Core) necessary to meet Regents Diploma requirements will earn the school or district "no credit" for the student's performance. The same rule will apply to seventh and eighth grade students who take another Regents Examination in mathematics (e.g., Geometry).

- The waiver and proposed regulatory amendments pertain to institutional accountability requirements, not to the requirements that individual students must meet in order to graduate from high school. The waiver does not change (i.e., the waiver neither increases nor decreases) the requirements students must currently meet in order to obtain a diploma. However, for institutional accountability, high schools will only get credit in the Performance Index for Regents exams or their equivalents that are taken after a student first enters ninth grade, even if students have taken Regents exams in math or their equivalents in grade 7 or 8.

#### **Revised Regulatory Flexibility Analysis**

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the *State Register* on January 29, 2014, the proposed amendment has been substantially revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The revisions does not require any changes to the previously published Regulatory Flexibility Analysis.

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

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the *State Register* on January 29, 2014, the proposed amendment has been substantially revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The revisions does not require any changes to the previously published Rural Area Flexibility Analysis.

**Revised Job Impact Statement**

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on January 29, 2014, the proposed amendment has been substantially revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The proposed amendment, as revised, relates to public school and school district accountability and is necessary to conform to the Commissioner’s Regulations to, and to otherwise implement, the one-year waiver (for the 2013-2014 school year) granted to the State Education Department by the United State Department of Education from Elementary and Secondary Education Act (ESEA) sections 1111(b)(1)(B) and 1111(b)(3)(C)(i) so that SED may use, with respect to a student who is not yet enrolled in high school but who takes mathematics coursework and the corresponding Algebra I or Geometry Regents Examination in grade 7 or 8, the student’s score on that assessment for federal accountability purposes for the grade in which the student is enrolled. The State and local educational agencies (LEAs) are required to comply with the ESEA as a condition to their receipt of federal funds under Title I of the ESEA Act of 1965, as amended.

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**State High School Equivalency Diploma**

**I.D. No.** EDU-41-13-00010-A

**Filing No.** 135

**Filing Date:** 2014-02-11

**Effective Date:** 2014-02-26

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

**Action taken:** Amendment of section 100.7 of Title 8 NYCRR.

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

**Subject:** State High School Equivalency diploma.

**Purpose:** To permit, for a limited time, acceptance of partial passing scores on one or more sub-tests of the current GED examination for the corresponding sub-test on the new State High School Equivalency examination (the Test Assessing Secondary Completion – TASC).

**Text or summary was published** in the October 9, 2013 issue of the Register, I.D. No. EDU-41-13-00010-P.

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

**Revised rule making(s) were previously published in the State Register** on December 31, 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

**Initial Review of Rule**

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

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Podiatric Ankle Surgery Privileges**

**I.D. No.** EDU-48-13-00001-A

**Filing No.** 131

**Filing Date:** 2014-02-11

**Effective Date:** 2014-02-26

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

**Action taken:** Addition of section 65.8 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 6504 (not subdivided), 6507(2)(a), 7001(1), (2), 7009(1), (2), 7010; and L. 2012, ch. 438

**Subject:** Podiatric ankle surgery privileges.

**Purpose:** Specifies the required training and experience for issuance of the podiatric standard and advanced ankle surgery privileges.

**Text or summary was published** in the November 27, 2013 issue of the Register, I.D. No. EDU-48-13-00001-P.

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

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

**Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, 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 November 27, 2013 State Register, the State Education Department received one comment which is summarized as follows.

**COMMENT:**

The commenter noted that the proposed regulations reflect informed discussions by the State Board for Podiatry and consideration of the commenter’s previously shared concerns. Specifically, the commenter expressed support for the proposed regulatory provisions regarding the number of years within which the required experience must be acquired and the categorization of procedures necessary to demonstrate the required training and experience for award of the advanced podiatric ankle surgery privilege.

The commenter opposes certain proposed requirements related to specific procedures as over-reaching and impractical. Specifically, the commenter wrote that the enabling statute for the proposed regulations created categories of procedures to be authorized under the advanced privilege but did not require experience in each of those procedures. The commenter indicated that some procedures are not performed with sufficient regularity to afford applicants for the advanced privilege the opportunity to meet the proposed requirements. The commenter recommended employing the concept of “surgical alternatives” in the development of the regulations rather than the proposed requirement of completing a specific number of specific procedures as the single approach by which requisite training and experience may be demonstrated.

**DEPARTMENT RESPONSE:**

In developing the proposed regulation, the State Board for Podiatry and the Department considered the objections and alternative suggested by this commenter and modified the approach taken in earlier drafts to allow for more flexibility. The proposed requirements are designed to assure that applicants for the advanced privilege have the training and experience necessary to be able to perform the procedures that are limited to those holding that privilege, while at the same time not requiring the completion of procedures for which there will not be sufficient opportunities to perform.

**NOTICE OF ADOPTION**

**New York State Common Core Learning Standards (CCLS)**

**I.D. No.** EDU-49-13-00006-A

**Filing No.** 134

**Filing Date:** 2014-02-11

**Effective Date:** 2014-02-26

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

**Action taken:** Amendment of sections 100.5 and 100.18 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:** New York State Common Core Learning Standards (CCLS).

**Purpose:** To transition to the Common Core English Language Arts (ELA) and mathematics examinations in the following areas: (1) students with disabilities local diplomas; (2) Regents diploma with advanced designation; (3) credit by examination; and (4) transfer credit; and enact technical changes.

**Text or summary was published** in the December 4, 2013 issue of the Register, I.D. No. EDU-49-13-00006-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 2019, 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.

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

**Hearings on Charges of Tenured School Employees**

**I.D. No.** EDU-08-14-00020-P

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

**Proposed Action:** Addition of section 82-1.10(j) to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 305(1), (2) and 3020-a

**Subject:** Hearings on charges of tenured school employees.

**Purpose:** To allow, under certain circumstances, tenured teachers and principals to raise as a defense in a section 3020-a hearing that their school district failed to timely implement the Common Core in the 2012-2013 and/or 2013-2014 school year.

**Text of proposed rule:** Subdivision (j) of section 82-1.10 of the Regulations of the Commissioner of Education is added, effective May 14, 2014, as follows:

(j) *Where an expedited hearing brought based solely upon a charge of a pattern of ineffective teaching or performance of a classroom teacher or principal, or a hearing brought on a charge of incompetency, is based on an ineffective rating on the state growth and/or locally selected measures subcomponents of the teacher's or principal's annual professional performance review resulting from student performance on the Common Core state assessments administered in the 2012-2013 and/or 2013-2014 school years, the employee may raise as a defense an alleged failure by the employer to timely implement the Common Core by providing adequate professional development, guidance on curriculum or other supports to the employee.*

**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 EBA, 89 Washington Ave., Albany, NY 12234, (518) 486-3633, email: regcomments@mail.nysed.gov

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

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

**Regulatory Impact Statement**

**STATUTORY AUTHORITY:**

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

Education Law section 305(1) authorizes the Commissioner to enforce laws relating to the State educational system and execute Regents educational policies.

Section 305(2) provides the Commissioner with general supervision over schools and authority to advise and guide school district officers in their duties and the general management of their schools.

Education Law section 3020-a establishes requirements for hearings on charges of tenured school employees.

**2. LEGISLATIVE OBJECTIVES:**

The proposed amendment is consistent with the above authority vested in the Regents and Commissioner to carry into effect State educational laws and policies and to prescribe criteria for hearings on charges of tenured school employees.

**3. NEEDS AND BENEFITS:**

In December 2013, a Work Group of the Board of Regents P-12 Committee was charged with reviewing the feedback the Board of Regents and the State Education Department ("Department") have received from various constituencies and presenting to the Board additional ideas to continue to improve the implementation of the Common Core State Standards ("Common Core") at the State and district level for the Board's consideration. The Work Group was asked to review feedback received by the Regents and the Department on the first 3 1/2 years of the 7 year phase-in of the Common Core from educators, parents, community leaders, and others in order to:

(1) Identify assessment policy adjustments to be presented for consideration as part of the NYSED Elementary and Secondary Education Act waiver renewal application for 2014-2015;

(2) Identify adjustment options to be presented for consideration to the Board of Regents policies governing professional development (including NYSED monitoring of the use of federal and state funds by districts to support professional development and use of the required 175 professional development hours);

(3) Review the development processes - including the role of NYS educators - for the optional Common Core State Standards curriculum materials created pursuant to Race to the Top and the federally required state assessments in grades 3-8 and high school English Language Arts and Mathematics now measuring the Common Core State Standards, and present options for adjustments to consider as appropriate; and

(4) Analyze the practices of districts experiencing the greatest success with Common Core State Standards implementation and identify policy options for replicating those practices across the state.

At the February 2014 Regents meeting, the Work Group discussed its progress in meeting the charge and provided the Regents with several options to consider to improve implementation of the Common Core. In light of the options presented, and in order to provide a mechanism by which teachers and principals facing certain Education Law § 3020-a charges are not harmed by untimely implementation of the Common Core, Department staff propose an amendment to § 82-1.10 of the Commissioner's Regulations that would, under certain circumstances, allow a teacher or principal to raise as a defense in a tenured teacher hearing initiated pursuant to Education Law § 3020-a that their school district failed to timely implement the Common Core in the 2012-2013 and/or 2013-2014 school years.

The proposed amendment provides that where an expedited hearing brought based solely upon a charge of a pattern of ineffective teaching or performance of a classroom teacher or principal, or a hearing brought on a charge of incompetency, is based on an ineffective rating on the state growth and/or locally selected measures subcomponents of the teacher's or principal's annual professional performance review resulting from student performance on the Common Core State assessments administered in the 2012-2013 and/or 2013-14 school years, the employee may raise as a defense an alleged failure by the employer to timely implement the Common Core by providing adequate professional development, guidance on curriculum or other supports to the employee during those school years. The proposed amendment would thus protect tenured teachers and principals from termination based on an ineffective Annual Professional Performance Review (APPR) rating resulting from student performance on the Common Core assessments where they can prove that the district did not provide the professional development, curriculum materials or other supports needed for Common Core implementation during the 2012-2013 and/or 2013-2014 school years.

**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 will not impose any costs on the State, local government, private regulated parties or the State Education Department. The proposed amendment merely permits, under certain circumstances, tenured teachers and principals to raise as a defense in an Education Law § 3020-a hearing that their school district failed to timely implement the Common Core in the 2012-2013 and/or 2013-2014 school years by providing adequate professional development, guidance on curriculum or other supports to the employee.

**5. LOCAL GOVERNMENT MANDATES:**

The proposed amendment does not impose any additional program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district. The proposed amendment merely permits, under certain circumstances, tenured teachers and principals to raise as a defense in an Education Law § 3020-a hearing that their school district failed to timely implement the Common Core in the 2012-2013 and/or 2013-2014 school years by providing adequate profes-

sional development, guidance on curriculum or other supports to the employee. The proposed amendment would thus protect tenured teachers and principals from termination based on an ineffective APPR rating resulting from student performance on the Common Core assessments where they can prove that the district did not provide the professional development, curriculum materials or other supports needed for Common Core implementation during the 2012-2013 and/or 2013-2014 school years.

**6. PAPERWORK:**

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

**7. DUPLICATION:**

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

**8. ALTERNATIVES:**

The proposed amendment is necessary to protect tenured teachers and principals from termination based on an ineffective APPR rating resulting from student performance on the Common Core assessments where they can prove that the district did not provide the professional development, curriculum materials or other supports needed for Common Core implementation during the 2012-2013 and/or 2013-2014 school years. There are no significant alternatives that would not require statutory change and none were considered.

**9. FEDERAL STANDARDS:**

There are no applicable Federal standards concerning hearings for tenured school employees.

**10. COMPLIANCE SCHEDULE:**

The proposed amendment merely permits, under certain circumstances, tenured teachers and principals to raise as a defense in an Education Law § 3020-a hearing that their school district failed to timely implement the Common Core in the 2012-2013 and/or 2013-2014 school years by providing adequate professional development, guidance on curriculum or other supports to the employee. The proposed amendment would thus protect tenured teachers and principals from termination based on an ineffective APPR rating resulting from student performance on the Common Core assessments where they can prove that the district did not provide the professional development, curriculum materials or other supports needed for Common Core implementation during the 2012-2013 and/or 2013-2014 school years. It is anticipated that regulated parties may achieve compliance with the proposed amendment by its effective date.

**Regulatory Flexibility Analysis**

**(a) Small businesses:**

The proposed amendment relates to hearings on charges of tenured school employees brought pursuant to Education Law § 3020-a, and does not impose any reporting, recordkeeping or other compliance requirements, and will not have an adverse economic impact, on small business. 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 was 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 all school districts and boards of cooperative educational services ("BOCES") in the State.

**2. COMPLIANCE REQUIREMENTS:**

The proposed amendment does not impose any compliance requirements on local governments. The proposed amendment merely permits, under certain circumstances, tenured teachers and principals to raise as a defense in an Education Law § 3020-a hearing that their school district failed to timely implement the Common Core in the 2012-2013 and/or 2013-2014 school years by providing adequate professional development, guidance on curriculum or other supports to the employee. The proposed amendment would thus protect tenured teachers and principals from termination based on an ineffective APPR rating resulting from student performance on the Common Core assessments where they can prove that the district did not provide the professional development, curriculum materials or other supports needed for Common Core implementation during the 2012-2013 and/or 2013-2014 school years.

**3. PROFESSIONAL SERVICES:**

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

**4. COMPLIANCE COSTS:**

The proposed amendment will not impose any costs on local governments. The proposed amendment merely permits, under certain circumstances, tenured teachers and principals to raise as a defense in an Education Law § 3020-a hearing that their school district failed to timely implement the Common Core in the 2012-2013 and/or 2013-2014 school years by providing adequate professional development, guidance on curriculum or other supports to the employee.

**5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

The rule does not impose any additional costs or technological requirements on local governments.

**6. MINIMIZING ADVERSE IMPACT:**

The proposed amendment does not impose any additional compliance requirements or costs on local governments. The proposed amendment merely permits, under certain circumstances, tenured teachers and principals to raise as a defense in an Education Law § 3020-a hearing that their school district failed to timely implement the Common Core in the 2012-2013 and/or 2013-2014 school years by providing adequate professional development, guidance on curriculum or other supports to the employee. The proposed amendment would thus protect tenured teachers and principals from termination based on an ineffective APPR rating resulting from student performance on the Common Core assessments where they can prove that the district did not provide the professional development, curriculum materials or other supports needed for Common Core implementation during the 2012-2013 and/or 2013-2014 school years.

**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.

**Rural Area Flexibility Analysis**

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

The proposed amendment applies to all school districts and boards of cooperative educational services (BOCES) in the State, 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 on entities in rural areas. The proposed amendment merely permits, under certain circumstances, tenured teachers and principals to raise as a defense in an Education Law § 3020-a hearing that their school district failed to timely implement the Common Core in the 2012-2013 and/or 2013-2014 school years by providing adequate professional development, guidance on curriculum or other supports to the employee. The proposed amendment would thus protect tenured teachers and principals from termination based on an ineffective APPR rating resulting from student performance on the Common Core assessments where they can prove that the district did not provide the professional development, curriculum materials or other supports needed for Common Core implementation during the 2012-2013 and/or 2013-2014 school years.

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

**3. COSTS:**

The proposed amendment will not impose any costs on entities in rural areas. The proposed amendment merely permits, under certain circumstances, tenured teachers and principals to raise as a defense in an Education Law § 3020-a hearing that their school district failed to timely implement the Common Core in the 2012-2013 and/or 2013-2014 school years by providing adequate professional development, guidance on curriculum or other supports to the employee.

**4. MINIMIZING ADVERSE IMPACT:**

The proposed amendment does not impose any additional compliance requirements or costs on entities in rural areas. The proposed amendment merely permits, under certain circumstances, tenured teachers and principals to raise as a defense in an Education Law § 3020-a hearing that their school district failed to timely implement the Common Core in the 2012-2013 and/or 2013-2014 school years. The proposed amendment would thus protect tenured teachers and principals from termination based on an ineffective APPR rating resulting from student performance on the Common Core assessments where they can prove that the district did not provide the professional development, curriculum materials or other supports needed for Common Core implementation during the 2012-2013 and/or 2013-2014 school years. Since the statute applies to all school districts and BOCES throughout the State, it was not possible to establish different compliance and reporting requirements for regulated parties in rural areas, or to exempt them from the rule's provisions.

**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.

**Job Impact Statement**

The proposed amendment relates to hearings on charges of tenured school employees brought pursuant to Education Law § 3020-a. The proposed amendment permits, under certain circumstances, tenured teach-

ers and principals to raise as a defense in an Education Law § 3020-a hearing that their school district failed to timely implement the Common Core in the 2012-2013 and/or 2013-2014 school years by providing adequate professional development, guidance on curriculum or other supports to the employee. The proposed amendment would thus protect tenured teachers and principals from termination based on an ineffective Annual Professional Performance Review (APPR) rating resulting from student performance on the Common Core assessments where they can prove that the district did not provide the professional development, curriculum materials or other supports needed for Common Core implementation during the 2012-2013 and/or 2013-2014 school years.

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

### Mathematics Graduation Requirements

**I.D. No.** EDU-08-14-00021-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 100.5(g)(2) 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:** Mathematics graduation requirements.

**Purpose:** To provide flexibility in the transition to Common Core-aligned Regents Examinations.

**Text of proposed rule:** Subparagraph (ii) of paragraph (2) of subdivision (g) of section 100.5 of the Regulations of the Commissioner is amended, effective May 14, 2014, as follows:

(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; provided that:

(a) 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; and

(b) for the June 2015, August 2015 and January 2016 administrations only, students receiving Geometry (Common Core) instruction may, at the discretion of the applicable school district, take the Regents Examination in Geometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Geometry (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.

**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, Deputy Commissioner, Office of Curriculum, Assessment and Educational Technology, EBA Room 875, 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.

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

Education Law 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 Mathematics which measures the New York State CCLS. The proposed amendment would provide flexibility with respect to the Regents Examination in Geometry, by allowing, at the discretion of the applicable school district and for the June 2015, August 2015 and January 2016 administrations only, students receiving Geometry (Common Core) instruction to take the Regents Examination in Geometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Geometry (Common Core), and meet the mathematics requirement for graduation by passing either examination.

#### 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 would provide flexibility with respect to the Regents Examination in Geometry, by allowing, at the discretion of the applicable school district and for the June 2015, August 2015 and January 2016 administrations only, students receiving Geometry (Common Core) instruction to take the Regents Examination in Geometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Geometry (Common Core), and meet the mathematics requirement for graduation by passing either examination. School districts may choose or decline to exercise the flexibility provided by the proposed amendment. 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:

The proposed amendment is necessary to implement requirements for transitioning to Common Core mathematics examinations, and does not impose any additional program, service, duty or responsibility upon local governments. The proposed amendment would provide flexibility with respect to the Regents Examination in Geometry, by allowing, at the discretion of the applicable school district and for the June 2015, August 2015 and January 2016 administrations only, students receiving Geometry (Common Core) instruction to take the Regents Examination in Geometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Geometry (Common Core), and meet the mathematics requirement for graduation by passing either examination. School districts may

choose or decline to exercise the flexibility provided by the proposed amendment.

**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 Mathematics that measure the New York State CCLS.

**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. The first administration of the Regents Examination in Geometry that measures the CCLS will be in June 2015, and the last administration of the current Regents Examination that measures the 2005 Learning Standards in Geometry will be in January 2016.

**Regulatory Flexibility Analysis**

**Small Businesses:**

The proposed amendment is necessary to implement requirements for transitioning to the new Regents examinations in Mathematics which measure the New York State Common Core Learning Standards (CCLS). The proposed amendment would provide flexibility with respect to the Regents Examination in Geometry, by allowing, at the discretion of the applicable school district and for the June 2015, August 2015 and January 2016 administrations only, students receiving Geometry (Common Core) instruction to take the Regents Examination in Geometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Geometry (Common Core), and meet the mathematics requirement for graduation by passing either examination.

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:**

The proposed amendment is necessary to implement requirements for transitioning to Common Core mathematics examinations, and does not directly impose any additional compliance requirements upon local governments. The proposed amendment would provide flexibility with respect to the Regents Examination in Geometry, by allowing, at the discretion of the applicable school district and for the June 2015, August 2015 and January 2016 administrations only, students receiving Geometry (Common Core) instruction to take the Regents Examination in Geometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Geometry (Common Core), and meet the mathematics requirement for graduation by passing either examination. School districts may choose or decline to exercise the flexibility provided by the proposed amendment.

**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 the State, school districts, charter schools or the State Education Department. The proposed amendment would provide flexibility with respect to the Regents Examination in Geometry, by allowing, at the discretion of the applicable school district and for the June 2015, August 2015 and January 2016 administrations only, students receiving Geometry (Common Core) instruction to take the Regents Examination in Geometry aligned to the

2005 Learning Standards in addition to the Regents Examination in Geometry (Common Core), and meet the mathematics requirement for graduation by passing either examination. School districts may choose or decline to exercise the flexibility provided by the proposed amendment. 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 Mathematics that measure the CCLS. The proposed amendment would provide flexibility with respect to the Regents Examination in Geometry by allowing, at the discretion of the applicable school district and for the June 2015, August 2015 and January 2016 administrations only, students receiving Geometry (Common Core) instruction to take the Regents Examination in Geometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Geometry (Common Core), and meet the mathematics requirement for graduation by passing either examination. School districts may choose or decline to exercise the flexibility provided by the proposed amendment.

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. The first administration of the Regents Examination in Geometry that measures the CCLS will be in June 2015, and the last administration of the current Regents Examination that measures the 2005 Learning Standards in Geometry will be in January 2016. 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:**

The proposed amendment is necessary to implement requirements for transitioning to Common Core mathematics examinations, and does not directly impose any additional compliance requirements upon school districts or charter schools in rural areas. The proposed amendment would provide flexibility with respect to the Regents Examination in Geometry, by allowing, at the discretion of the applicable school district and for the June 2015, August 2015 and January 2016 administrations only, students receiving Geometry (Common Core) instruction to take the Regents Examination in Geometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Geometry (Common Core), and meet the

mathematics requirement for graduation by passing either examination. School districts and charter schools may choose or decline to exercise the flexibility provided by the proposed amendment.

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

### 3. COMPLIANCE COSTS:

The proposed amendment does not impose any direct costs on school districts or charter schools in rural areas. The proposed amendment would provide flexibility with respect to the Regents Examination in Geometry, by allowing, at the discretion of the applicable school district and for the June 2015, August 2015 and January 2016 administrations only, students receiving Geometry (Common Core) instruction to take the Regents Examination in Geometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Geometry (Common Core), and meet the mathematics requirement for graduation by passing either examination. School districts and charter schools may choose or decline to exercise the flexibility provided by the proposed amendment. 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 Mathematics that measure the CCLS. The proposed amendment would provide flexibility with respect to the Regents Examination in Geometry by allowing, at the discretion of the applicable school district and for the June 2015, August 2015 and January 2016 administrations only, students receiving Geometry (Common Core) instruction to take the Regents Examination in Geometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Geometry (Common Core), and meet the mathematics requirement for graduation by passing either examination. 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 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. School districts or charter schools may choose or decline to exercise the flexibility provided by the proposed amendment. 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. The first administration of the Regents Examination in Geometry that measures the CCLS will be in June 2015, and the last administration of the current Regents Examination that measures the 2005 Learning Standards in Geometry will be in January 2016. 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 Mathematics which measure the New York State Common Core Learning Standards (CCLS). The proposed amendment would provide flexibility with respect to the Regents Examination in Geometry, by allowing, at the discretion of the applicable school district and for the June 2015, August 2015 and January 2016 administrations only, students receiving Geometry (Common Core) instruction to take the Regents Examination in Geometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Geometry (Common Core), and meet the mathematics requirement for graduation by passing either examination.

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.

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## Department of Financial Services

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### EMERGENCY RULE MAKING

#### License, Financial Responsibility, Education and Test Requirements for Mortgage Loan Originators

**I.D. No.** DFS-08-14-00004-E

**Filing No.** 127

**Filing Date:** 2014-02-10

**Effective Date:** 2014-02-13

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

**Action taken:** Addition of Part 420; amendment of Supervisory Procedure MB 107; and repeal of Supervisory Procedure MB 108 of Title 3 NYCRR.

**Statutory authority:** Banking Law, arts. 12-D and 12-E

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

**Specific reasons underlying the finding of necessity:** Article 12-E of the Banking Law provides for the regulation of mortgage loan originators (MLOs). Article 12-E was recently amended in order to conform the regulation of MLOs in New York to new federal legislation (Title V of the Housing and Economic Recovery Act of 2008, known as the "SAFE Act").

The SAFE Act authorized the federal Department of Housing and Urban Development ("HUD") to assume the regulation of MLOs in any state that did not enact acceptable implementing legislation by August 1, 2009. In response, the Legislature enacted revised Article 12-E.

The emergency rulemaking revises the existing MLO regulations, which implement the prior version of Article 12-E, to conform to the changes in the statute.

Under the new legislation, MLOs, including those already engaged in the business of originating mortgage loans, must complete new education, testing and bonding requirements prior to licensure. Meeting these requirements will likely entail significant time and effort on the part of individuals subject to the revised law and regulations.

Emergency adoption of the revised regulations is necessary in order to afford such individuals sufficient advance notice of the new substantive rules and licensing procedures for MLOs that they will have an adequate opportunity to comply with the new licensing requirements and in order to protect against federal preemption of the regulation of MLOs in New York.

**Subject:** License, financial responsibility, education and test requirements for mortgage loan originators.

**Purpose:** To require that individuals engaging in mortgage loan origination activities must be licensed by the Superintendent of Financial Services.

**Substance of emergency rule:** Section 420.1 summarizes the scope and application of Part 420. It notes that all individuals unless exempt must be licensed under Article 12-E to engage in mortgage loan originator ("MLO") activities. It also sets forth the basic authority of the Superintendent to revoke or suspend a license.

Section 420.2 sets out the exemptions available to individuals from the general license requirements. Specifically, the proposed regulation includes a number of exemptions, including exemptions for individuals who work for banking institutions as mortgage loan originators and individuals who arrange mortgage loans for family members. Also, individuals who work for mortgage loan servicers and negotiate loan modifications are only subject to the license requirement if required by HUD. The Superintendent is authorized to approve other exemptions for good cause.

Section 420.3 contains a number of definitions of terms that are used in Part 420. These include definitions for "mortgage loan originator," "originating entity," "residential mortgage loan" and "loan processor or underwriter".

Section 420.4 describes the applications procedures for applying for a license as an MLO. It also provides important transitional rules for individuals already engaging in mortgage loan origination activities pur-

suant to the authority of the prior version of Article 12-E or, in the case of individuals engaged in the origination of manufactured homes, not previously subject to regulation by the Department of Financial Services (formerly the Banking Department).

Section 420.5 describes the circumstances in which originating entities may employ or contract with MLOs to engage in mortgage loan origination activities during the application process.

Section 420.6 sets forth the steps the Superintendent of Financial Services (formerly the Superintendent of Banks) must take upon determining to approve or disapprove an application for an MLO license.

Section 420.7 describes the circumstances when an MLO license is inactive and how an MLO may maintain his or her license during such periods.

Section 420.8 sets forth the circumstances when an MLO license may be suspended or terminated. Specifically, the proposed regulation provides that an MLO license shall terminate if the annual license renewal fee has not been paid or the requisite number of continuing education credits have not been taken. The Superintendent also may issue an order suspending an MLO license if the licensee does not file required reports or maintain a bond. The license of an MLO that has been suspended pursuant to this authority shall automatically terminate by operation of law after 90 days unless the licensee has cured all deficiencies within this time period.

Section 420.9 sets forth the process for the annual renewal of an MLO license.

Section 420.10 sets forth the process by which an MLO may surrender his or her license.

Section 420.11 sets forth the pre-licensing educational requirements applicable to applicants seeking an MLO license. Twenty hours of educational courses are required, including courses related to federal law and state law issues.

Section 420.12 sets out the requirement that pre-licensing education and continuing education courses and education course providers must be approved by the Nationwide Mortgage Licensing System and Registry (the "NMLS"). This represents a change from the prior law pursuant to which the Superintendent issued such approvals.

Section 420.13 sets forth the pre-licensing testing requirements for applicants for an MLO license. It also sets out the testing location requirements and the minimum passing grades to obtain a license.

Section 420.14 sets out the continuing education requirements applicable to MLOs seeking to renew their licenses.

Section 420.15 sets out the new requirements that MLOs have a surety bonds in place as a condition to being licensed under Article 12-E. It also sets out the minimum amounts of such bonds.

Section 420.16 requires the Superintendent to make reports to the NMLS annually regarding violations by, and enforcement actions against, MLOs. It also provides a mechanism for MLOs to challenge the content of such reports.

Section 420.17 sets forth the process for calculating and collecting fees applicable to MLO licensing.

Sections 420.18 and 420.19 set forth the various duties of MLOs and originating entities. Section 420.20 also describes conduct prohibited for MLOs and loan originators.

Finally, Section 420.21 describes the administrative action and penalties that the Superintendent may take against an MLO for violations of law or regulation.

Section 107.1 contains definitions of defined terms used in the Supervisory Procedure. Importantly, it defines the National Mortgage Licensing System (NMLS), the web-based system with which the Superintendent has entered into a written contract to process applications for initial licensing and applications for annual license renewal for MLOs.

Section 107.2 contains general information about applications for initial licensing and annual license renewal as an MLO. It states that a sample of the application form (which must be completed online) may be found on the Department's website and includes the address where certain information required in connection with the application for licensing must be mailed.

Section 107.3 describes the parts of an application for initial licensing. The application includes (1) the application form, (2) fingerprint cards, (3) the fees, (4) applicant's credit report, (5) an affidavit subscribed under penalty of perjury in the form prescribed by the Superintendent, and (6) any other information that may be required by the Superintendent. It also describes the procedure when the Superintendent determines that the information provided by the application is not complete.

Section 107.4 describes the required submissions for annual license renewal of an MLO.

Section 107.5 covers inactive status.

Section 107.6 provides information on places where applicants may obtain additional instructions and assistance on the Department's website, by email, by mail, and by telephone.

Supervisory Procedure MB 108 is hereby repealed.

**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 May 10, 2014.

**Text of rule and any required statements and analyses may be obtained from:** Sam L. Abram, New York State Department of Financial Services, One State Street, New York, NY 10004-1417, (212) 709-1658, email: sam.abram@dfs.ny.gov

#### **Regulatory Impact Statement**

##### **1. Statutory Authority.**

Revised Article 12-E of the Banking Law became effective on July 11, 2009 when Governor Paterson signed into law Chapter 123 of the Laws of 2009. The revised version of Article 12-E is modeled on the provisions of Title V of the federal Housing and Economic Recovery Act of 2008, also known as the S.A.F.E. Mortgage Licensing Act (the "SAFE Act") pertaining to the regulation of mortgage loan originators. Hence, the licensing and regulation of mortgage loan regulators in New York now closely tracks the federal standard.

Current Part 420 of the Superintendent's Regulations, implementing the prior version of Article 12-E, was adopted on an emergency basis in December of 2008. Since the new version of Article 12-E is already effective, it is necessary to revise Part 420 and adopt the revised version on an emergency basis. An earlier draft of this regulation was published on the Department's website on August 27, 2009. To date, the Department has received two sets of comments, and these have been incorporated into the current version of the revised regulation as appropriate.

New Section 599-a of the Banking Law sets forth the legislative purpose of new Article 12-E. It notes that the new Article is intended to enhance consumer protection, reduce fraud and ensure the public welfare. It also notes that the new regulatory scheme is to be consistent with the SAFE Act.

Section 599-b sets forth the definitions used in the new Article. Defined terms include: mortgage loan originator ("MLO"); mortgage loan processor -- an individual who may not need to be licensed; residential mortgage loans -- loans for which an MLO must be licensed; residential real property; and the Nationwide Mortgage Licensing System and Registry (the "NMLS").

Section 599-c sets forth the requirements for being licensed as an MLO, the effective date for licensing and exemptions from the licensing requirements. Exemptions include ones for individuals who work for insured financial institutions, licensed attorneys who negotiate the terms of a loan for a client as an ancillary to the attorney's representation of the client, and, unless required to be licensed by the U.S. Department of Housing and Urban Development ("HUD"), certain individuals employed by a mortgage loan servicer.

Section 599-d sets out the process for obtaining an MLO license. It also sets out the Department's authority for imposing fees, the authority of the NMLS to collect such fees, the ability of the Superintendent of Financial Services (formerly the Superintendent of Banks) to modify the requirements of Article 12-E in order to ensure compliance with the SAFE Act, the requirement that filings be made electronically and required background information from all applicants.

Section 599-e sets forth the findings that the Superintendent must make before a license is issued. These include a finding that the applicant not have any felony convictions within seven years or any fraud convictions at any time, that the applicant demonstrate acceptable character and fitness, educational and testing criteria and a bonding requirement. An MLO also must be affiliated with an originating entity -- a licensed mortgage banker or registered mortgage broker (or other licensed entity in the case of individuals originating manufactured homes) -- or working for mortgage loan servicers.

Section 599-f sets out the pre-licensing education requirements, and Section 599-g sets forth the pre-licensing testing requirements. Section 599-h imposes a reporting requirement on entities employing MLOs. Such entities must make annual filings through the NMLS.

Section 599-i sets forth the annual license renewal requirements for MLOs. In addition to continuing to satisfy the initial requirements for licensing, MLOs must satisfy annual continuing educational requirements and must have paid all fees. Failure to meet these requirements shall result in the automatic termination of an MLO's license. The statute also provides for a licensee going into inactive status, provided the individual continues to pay all applicable fees and to take required education courses.

Section 599-j sets forth the continuing education requirements for MLOs, and Section 599-k sets forth the requirements for a surety bond. Section 599-l requires the Superintendent to report through the NMLS at least annually on all violations of Article 12-E and all enforcement actions. MLOs may challenge the information contained in such reports. Section 599-m sets forth the records and reports that originating entities must maintain or make on MLOs employed by, or working for, such entities.

This section also requires the Superintendent to maintain on the internet a list of all MLOs licensed by the Department and requires reporting to the Department by MLOs.

Section 599-n sets forth the enforcement authority of the Superintendent. In addition to "for good cause" suspension authority, the Superintendent may revoke a license for stated reasons (after a hearing), and the Superintendent may suspend a license if a required surety bond is allowed to lapse or thirty days after a required report is not filed. This section also sets out the requirements for surrendering a license and the implications of any surrender, revocation, termination or suspension of a license.

Section 599-o sets forth the authority of the Superintendent to adopt rules and regulations implementing Article 12-E, including the authority to adopt expedited review and licensing procedures for individuals previously authorized under the prior version of Article 12-E to act as MLOs. It also authorizes the Superintendent to investigate licensees and the entities with which they are associated.

Section 599-p requires that the unique identifier of every originator be clearly shown on certain documents. Section 599-q provides certain confidentiality protections for information provided to the Superintendent by an MLO, notwithstanding the sharing of such information with other regulatory bodies.

#### 2. Legislative Objectives.

As noted, new Article 12-E was intended to conform New York Law to federal law and to enhance the regulation of MLOs operating in this state. These objectives have taken on increased urgency with the problems evidenced in the mortgage banking industry over the past few years.

The regulations implement this statute. New Part 420 differs from the prior version in a number of respects. The following is a summary of the major changes from the previous regulation:

1. The definition of a mortgage loan originator is broadened to include any individual who takes a mortgage application or offers or negotiates the terms of the mortgage with a consumer.

2. Individuals who originate loans on manufactured homes will be subject to the regulation for the first time.

3. If licensing of individuals who work for mortgage loan servicers and who engage in loan modification activities is required by the U.S. Department of Housing and Urban Development, such individuals may be subject to the licensing requirements of the new law and to the new regulation.

4. Individuals who have applied for "authorization" under the prior version of Article 12-E and Part 420 have a simplified process for becoming licensed and may continue to originate loans until they are licensed under the revised regulation or their applications are denied.

5. Individuals with a felony conviction within the last seven years or a felony conviction for fraud at any time are now prohibited from being licensed as MLOs in New York State.

6. Individuals must satisfy new pre-license education and testing requirements. There also are new bonding requirements and continuing education requirements.

7. A license automatically terminates if the licensee does not pay his or her annual license renewal fee or take the requisite amount of continuing education credits. The authority of the Superintendent to suspend an individual for good cause also has been clarified.

When Part 420 was originally adopted on an emergency basis, the Superintendent also adopted Supervisory Procedures MB 107 and MB 108. Supervisory Procedure MB 107 deals with applications to become an MLO. It has been updated in line with the revisions to Article 12-E and Part 420.

Supervisory Procedure MB 108, relating to the approval of education providers and courses, was originally adopted because the prior version of Article 12-E required the Superintendent to approve both courses and providers. This activity has been transferred to the NMLS under new Article 12-E. Accordingly, Supervisory Procedure MB 108 is being rescinded.

#### 3. Needs and Benefits.

The SAFE Act is intended to impose a nationwide standard for MLO regulation; new Article 12-E constitutes New York's effort to adopt a regulatory regime consistent with this uniform standard. This regulation is needed to implement revised Article 12-E and is necessary to address problems that have surfaced over the last several years in the mortgage industry.

As has now been recognized at the federal level in the SAFE Act, increased oversight of mortgage loan originators is necessary to curb disreputable and deceptive businesses practices by MLOs. Individuals engaging in abusive practices have avoided detection by moving from company to company and in some instances, from state to state. The licensing of MLOs will greatly assist the Department in its efforts to oversee the mortgage industry and protect consumers. The regulation will enable the Department to identify, track and hold accountable those individuals who engage in abusive practices, and ensure continuing education for all MLOs that are licensed by the Department.

These regulatory requirements will improve accountability among mortgage industry professionals, protect and promote the integrity of the mortgage industry, and improve the quality of service, thereby helping to restore consumer confidence.

If New York did not adopt the new federal standards for MLO regulation or failed to implement its requirements, the SAFE Act requires that HUD assume the licensing of MLOs in New York State. This would result in ceding an important responsibility and element of state sovereignty to the federal government.

#### 4. Costs.

MLOs are already experiencing increased costs as a result of the fees and continuing education requirements associated with the prior version of Article 12-E. These costs will continue under the new law and regulations.

The amount of the fingerprint fee is set by the State Division of Criminal Justice Services and the processing fees of the National Mortgage Licensing System and Registry are set by that body.

The ability by the Department to regulate MLOs is expected to substantially decrease losses to consumers and the mortgage industry, as well as to assist in decreasing the number of foreclosures in the State and the associated direct and indirect costs of such foreclosures. It is expected also to reduce consumer complaints regarding MLO conduct.

The regulations will not result in any fiscal implications to the State. The Department is funded by the regulated financial services industry. Fees charged to the industry will be adjusted periodically to cover Department expenses incurred in carrying out this regulatory responsibility.

#### 5. Local Government Mandates.

None.

#### 6. Paperwork.

An application process has been established for MLOs electronically through the NMLS. Over time, the application process is expected to become virtually paperless; accordingly, while a limited number of documents, including fingerprints where necessary, currently have to be submitted to the Department in paper form, these requirements should diminish with the passage of time.

The specific procedures that are to be followed in order to apply for licensing as a mortgage loan originator are detailed in revised Supervisory Procedure MB 107.

#### 7. Duplication.

The revised regulation does not duplicate, overlap or conflict with any other regulations.

#### 8. Alternatives.

The purpose of the regulation is to carry out the statutory mandate to license and regulate MLOs in a manner consistent with the SAFE Act. As noted above, the alternative would be to cede this responsibility to the federal government. By enacting revised Article 12-E, the Legislature has indicated its desire to retain this responsibility at the state level.

#### 9. Federal Standards.

Currently, mortgage loan originators are required under the SAFE Act to be licensed under requirements nearly identical to those set forth in new Article 12-E.

#### 10. Compliance Schedule.

New Article 12-E became effective on July 11, 2009.

A transitional period is provided for mortgage loan originators who, as of July 11, 2009, were authorized to act as MLOs or had filed applications to be so authorized. Such MLOs may continue to engage in MLO activities, provided they submit any additional, updated information required by the Superintendent. The transitional period runs until January 1, 2011, in the case of authorized persons, and until July 31, 2010, in the case of applicants (unless their applications are denied or withdrawn as of an earlier date). Applicants are required to complete their applications considerably in advance of these dates under the regulations in order to allow the Department to complete their processing.

### **Regulatory Flexibility Analysis**

#### 1. Effect of the Rule:

The revised regulation will not have any impact on local governments. However, many of the originating entities who employ or are affiliated with mortgage loan originators are mortgage bankers or mortgage brokers who are considered small businesses. In excess of 2,700 of these businesses are licensed or registered by the Department of Financial Services (formerly the Banking Department).

#### 2. Compliance Requirements:

The revised regulation reflects the changes made in revised Article 12-E of the Banking Law. The small businesses that MLOs are employed by or affiliated with will be required to ensure that all MLOs employed by them have been duly licensed, report four times a year on the MLOs newly employed by them or dismissed for actual or alleged violations, determine that each MLO employed by or affiliated with them has the character, fitness and education qualifications to warrant the belief he or she will engage in mortgage loan originating honestly, fairly and efficiently; and,

finally, retain acceptable documentation as evidence of satisfactory completion of required education courses for each MLO for a period of six years. In addition to these requirements, originating entities will be required to assign MLOs to registered locations and to ensure that an MLO's unique identifier is recorded on each mortgage application he or she originates.

3. Professional Services:

None.

4. Compliance Costs:

As under the existing Part 420, some mortgage entities may choose to pay for costs associated with initial licensing and annual license renewal for their MLOs and with continuing education requirements, but are not required to do so. Costs associated with electronic filing of quarterly employment reports and retaining for six years evidence of completion by MLOs of required continuing education are expected to be minimal.

5. Economic and Technological Feasibility:

The rule-making should impose no adverse economic or technological burden on small businesses that MLOs are employed by or affiliated with.

6. Minimizing Adverse Impacts:

The industry, and specifically small businesses who are licensed and registered mortgage businesses, supported passage of the previous Banking Law Article 12-E and had substantial opportunity to comment on the specific requirements of this statute and its supporting regulations. In addition, these businesses were involved in a policy dialogue with the Department during rule development. In order to minimize any potential adverse economic impact of the rulemaking, outreach was conducted with associations representing the industries that would be affected thereby (mortgage bankers, and mortgage brokers).

The revised regulation implements changes in Article 12-E of the Banking Law. An earlier draft of the revised regulation was published on the Department's website on August 27, 2009. Changes incorporating the comments have been made in the regulation where appropriate.

7. Small Business and Local Government Participation:

See response to Item 6 above.

**Rural Area Flexibility Analysis**

Types and Estimated Numbers. The New York State Department of Financial Services (formerly the Banking Department) licenses over 1,045 mortgage bankers and brokers, of which over 761 are located in the state. It has received 19,000 applications from MLOs under the present regulations and anticipates receiving approximately 500 initial licensing applications from individuals who seek to enter and/or re-enter the market as the economy stabilizes. Many of these entities and MLOs will be operating in rural areas of New York State and would be impacted by the regulation.

Compliance Requirements. Mortgage loan originators in rural areas must be licensed by the Superintendent of Financial Services (formerly the Superintendent of Banks) to engage in the business of mortgage loan origination. The application process established by the regulations requires an MLO to apply for a license electronically and to submit additional background information to the Mortgage Banking unit of the Department. This additional information consists of fingerprints, a recent credit report, supplementary background information and an attestation as to the truthfulness of the applicant's statements. Mortgage brokers and bankers are required to ensure that all MLOs employed by them have been duly licensed, report four times a year on the MLOs newly employed by them or dismissed for cause, determine that each MLO employed by or affiliated with them has the character, fitness and education qualifications to warrant the belief he or she will engage in mortgage loan originating honestly, fairly and efficiently; and, finally, retain acceptable documentation as evidence of satisfactory completion of required education courses for each MLO for a period of six years. The Department believes that this rule will not impose a burdensome set of requirements on entities operating in rural areas.

Costs. Some mortgage businesses in rural areas may choose to pay the increased costs associated with the continuing education requirements and the fees associated with licensing and annual renewal of their MLOs, but are not required to do so. The regulation sets forth the manner in which the background investigation fee, the initial license processing fee and the annual renewal fee are established. There will also be a fee for the processing of fingerprints and fees to cover the cost of third party processing of the application. Fees charged to the industry will be adjusted periodically to cover Department expenses incurred in carrying out its regulatory responsibilities. Costs associated with electronic filing of quarterly employment reports and retaining for six years evidence of completion by MLOs of required continuing education courses are expected to be minimal. The cost of continuing education is estimated to be approximately \$500 every two years. The Department's increased effectiveness in fighting mortgage fraud and predatory lending will lower costs related to litigation and will decrease losses to consumers and the mortgage industry by hundreds of millions of dollars.

Minimizing Adverse Impacts. The industry supported passage of the

prior Article 12-E and had substantial opportunity to comment on the specific requirements of this statute and its supporting regulation. In addition, the industry was involved in a dialogue with the Department during rule development.

The revised regulations implement revised Article 12-E of the Banking Law, which in turn closely tracks the provisions of Title V of the federal Housing and Economic Recovery Act of 2008, also known as the S.A.F.E. Mortgage Licensing Act (the "SAFE Act"). Hence, the licensing and regulation of mortgage loan originators in New York now closely tracks the federal standard. If New York did not adopt this standard, the SAFE Act requires that the federal Department of Housing and Urban Development assume the licensing of MLOs in New York State.

Rural Area Participation. Representatives of various entities, including mortgage bankers and brokers conducting business in rural areas and entities that conduct mortgage originating in rural areas, participated in outreach meetings that were conducted during the process of drafting the prior Article 12-E and the implementing regulations. As noted above, the revised statute and regulations closely track the provisions of the federal SAFE Act.

**Job Impact Statement**

Revised Article 12-E of the Banking Law, effective on July 11, 2009, replaces the prior version of Article 12-E with respect to the licensing and regulation of mortgage loan servicers. This regulation sets forth the application, exemption and approval procedures for licensing registration as a Mortgage Loan Originator (MLO), as well as financial responsibility requirements for individuals engaging in MLO activities. The regulation also provides transition rules for individuals who engaged in MLO activities under the prior version of the article to become licensed under the new statute.

The requirement to comply with the regulations is not expected to have a significant adverse effect on jobs or employment activities within the mortgage loan servicing industry. This is because individuals were already subject to regulation under the prior version of Article 12-E of the Banking Law. New Article 12-E and Part 420 are intended to conform the regulation of MLOs to the requirements of federal law. Absent action by New York to conform this regulation to federal requirements, federal law authorized the Department of Housing and Urban Affairs to take control of the regulation of MLOs in New York State.

As with their predecessors, the new statute and regulations require the use of the internet-based National Mortgage Licensing System and Registry (NMLS), developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses a common on-line application for MLO registration in New York and other participating states. It is believed that any remaining adverse impact would be due primarily to the nature and purpose of the statutory licensing requirement rather than the provisions of the regulations.

Supervisory Procedure 108 relates to the approval by the Superintendent of Financial Services (formerly the Superintendent of Banks) of educational courses and course providers for MLOs. Under revised Article 12-E, this function has been transferred to the NMLS. Moreover, educational requirements have been increased under the new law and regulation by the Superintendent.

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## Department of Health

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### NOTICE OF WITHDRAWAL

#### Physician Assistants and Specialist Assistants

I.D. No. HLT-33-13-00014-W

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

**Action taken:** Notice of proposed rulemaking, I.D. No. HLT-33-13-00014-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on August 14, 2013.

**Subject:** Physician Assistants and Specialist Assistants.

**Reason(s) for withdrawal of the proposed rule:** The Department of Health received a public comment letter during the 45-day public comment period.

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

**Physician Assistants and Specialist Assistants**

**I.D. No.** HLT-08-14-00001-P

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

**Proposed Action:** Amendment of Part 94 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 3308, 3701 and 3702

**Subject:** Physician Assistants and Specialist Assistants.

**Purpose:** Allows LPAs to prescribe controlled substances (including Schedule II) to patients under the care of the supervising physician.

**Text of proposed rule:** Pursuant to the authority vested in the Commissioner of Health by Sections 3308, 3701 and 3702 of the Public Health Law, and in accordance with Sections 6541 and 6542 of the Education Law, Part 94 (Physician's Assistants and Specialist's Assistants) of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby amended, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

PART 94

PHYSICIAN[']S ASSISTANTS AND SPECIALIST[']S ASSISTANTS

Section 94.1 Definitions.

(a) [Registered] *licensed physician[']s* assistant means an individual who is currently [registered] *licensed* as a physician[']s assistant by the New York State Department of Education.

(b) Registered specialist[']s assistant means an individual who is currently registered as a specialist[']s assistant by the New York State Department of Education.

(c) Hospital means an institution or facility possessing a valid operating certificate issued pursuant to article 28 of the Public Health Law and authorized to employ physician[']s assistants pursuant to part 707 of the State Hospital Code.

(d) Physician means a practitioner of medicine licensed to practice medicine pursuant to article 131 of the Education Law.

94.2 Supervision and scope of duties.

(a) A [registered] *licensed physician[']s* assistant or a registered specialist[']s assistant may perform medical services but only when under the supervision of a physician. Such supervision shall be continuous but shall not necessarily require the physical presence of the supervising physician at the time and place where the services are performed. The licensed physician assistant or registered specialist assistant shall retain records documenting the continuous supervision by the physician who is responsible for such supervision.

(b) Medical acts, duties and responsibilities performed by a [registered] *licensed physician[']s* assistant or registered specialist[']s assistant must:

(1) be assigned to him or her by the supervising physician;

(2) be within the scope of practice of the supervising physician; and

(3) be appropriate to the education, training and experience of the [registered] *licensed physician[']s* assistant or registered specialist[']s assistant.

(c) No physician may employ or supervise more than [two] *four* [registered] *licensed physician[']s* assistants and two specialist[']s assistants in his or her private practice.

(d) No physician may supervise more than six [registered] *licensed physician[']s* assistants or registered specialist[']s assistants or any combination thereof in a hospital setting, no matter if the licensed physician assistants or registered specialist assistants are employed or contracted by a hospital.

(e) Prescriptions and medical orders may be *issued* [written] by a [registered] *licensed physician[']s* assistant as provided in this subdivision when assigned by the supervising physician.

(1) A [registered] *licensed physician[']s* assistant may [write] *issue* prescriptions for a patient who is under the care of the physician responsible for the supervision of the [registered] *licensed physician[']s* assistant. The prescription shall be *issued in accordance with Section 281 and Article 33 of the Public Health Law and Part 80 of this Title* [written on the form of the supervising physician] and shall include the name, address and telephone number of the physician *and the name of the licensed physician assistant and the supervising physician*. The prescription shall also bear the name, the address, the age of the patient and the date on which the prescription was written.

(2) *A licensed physician assistant, in good faith and acting within his or her lawful scope of practice, and to the extent assigned by his or her supervising physician, may prescribe controlled substances as a practitioner under Article 33 of the Public Health Law, to patients under the care of such physician responsible for his or her supervision. [Prescriptions for controlled substances not listed under section 80.67 of this Part shall be written on the blank form of the supervising physician and shall include all other information required by Article 28 of the Public Health Law and Part 80 of this Title.] Licensed physician assistants may issue prescriptions for controlled substances under section 3306 of the Public Health Law provided that such prescriptions shall be issued in accordance with Section 281 and Article 33 of the Public Health Law and Part 80 of this Title.*

(3) [Registered physician's assistants may write prescriptions for those controlled substances listed under section 80.67 of this Part which are not classified as Schedule II controlled substances, provided that such prescriptions shall be written on official New York State forms issued to the physician's assistant.] *The licensed physician assistant shall sign all such prescriptions with his or her own name followed by the letters L.P.A. and his or her State Education Department registration number, except that an electronic prescription must contain the electronic signature of the licensed physician assistant and shall include the name, address and telephone number of the supervising physician.*

(4) [The registered physician's assistant shall sign all such prescriptions by printing the name of the supervising physician, printing his/her own name and additionally signing his/her own name followed by the letters R.P.A. and his/her State Education Department registration number.] *A licensed physician assistant employed or extended privileges by a hospital may, if permissible under the bylaws, policies and procedures of the hospital, issue prescriptions for controlled substances listed under section 3306 of the Public Health Law on official New York State prescription forms issued to the hospital. Such prescriptions shall be issued in accordance with Section 281 and Article 33 of the Public Health Law and Part 80 of this Title and must include the name of the licensed physician assistant and the name of the physician responsible for his or her supervision.*

[(5) Registered physician's assistants may not write prescriptions for controlled substances listed under section 3306 of the Public Health Law as Schedule II controlled substances.]

[(6)] (5) A [registered] *licensed physician[']s* assistant employed or extended privileges by a hospital may, if permissible under the bylaws, [rules and regulations] *policies and procedures* of the hospital, write medical orders, including those for controlled substances, for inpatients under the care of the physician responsible for his supervision. Countersignature of such orders may be required if deemed necessary and appropriate by the supervising physician or the hospital, but in no event shall countersignature be required prior to execution.

(f) A physician supervising or employing a [registered] *licensed physician[']s* assistant or registered specialist[']s assistant shall remain medically responsible for the medical services performed by the [registered] *licensed physician[']s* assistant or registered specialist[']s assistant whom such physician supervises or employs.

(g) Qualified individuals may be registered as specialist[']s assistants in the following categories:

(1) Orthopedic assistant. A specialist[']s assistant registered in this category is an individual:

(i) who satisfactorily completed a program for the training of orthopedic assistants approved by the New York State Department of Education; or

(ii) who possesses equivalent education, training and experience. Training and experience while in military service which led to an orthopedic specialist, orthopedic cast room technician, or orthopedic clinic technician rating and two years of satisfactory experience as an orthopedic assistant working under the supervision of an orthopedic surgeon within the past five years; or completion of medical corps school and five years of satisfactory experience as an orthopedic assistant working under the supervision of an orthopedic surgeon within the past eight years may be considered equivalent education, training and experience for the purpose of registration in this category.

(2) Urologic assistant. A specialist[']s assistant registered in this category is an individual:

(i) who satisfactorily completed a program for the training of urologic assistants approved by the New York State Department of Education; or

(ii) who possesses equivalent education, training and experience. Training and experience while in military service which led to a urology

surgical technician or urological technician or clinical specialist rating and two years of satisfactory experience as a urologic assistant working under the supervision of a urologist within the past five years; or completion of medical corps school and five years of satisfactory experience as an urologic assistant working under the supervision of a urologist within the past eight years may be considered equivalent education, training and experience for the purpose of registration in this category.

(3) Acupuncture. A specialist[’s] assistant registered in this category shall be employed or supervised only by a physician authorized to administer acupuncture in accordance with the rules and regulations of the New York State Department of Education and is an individual:

(i) who satisfactorily completed a program of training in acupuncture approved by the New York State Department of Education; or

(ii) who possesses equivalent education and training acceptable to the New York State Department of Education; and

(iii) in addition to satisfying the requirements of subparagraphs (i) and (ii) of this paragraph has completed at least five years of experience in the use of acupuncture acceptable to the New York State Department of Education.

(4) Radiologic assistant. A specialist[’s] assistant in this category is an individual:

(i) who is licensed as a radiologic technologist by the New York State Department of Health; and

(ii) who satisfactorily completed a program for the training of radiologic assistants approved by the New York State Education Department.

**Text of proposed 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 authority for the promulgation of these regulations is contained in Sections 3308, 3701 and 3702 of the Public Health Law (PHL) and in accordance with Section 6541 and 6542 of the Education Law. PHL Section 3308 authorizes and empowers the commissioner to make rules or regulations necessary and proper to supplement the provisions in PHL Article 33 (Controlled Substances) to effectuate the purposes and intent, or to clarify its provisions to provide the procedure or details to secure effective and proper enforcement of its provisions. PHL Section 3701 authorizes the commissioner to adopt rules and regulations necessary to implement the provisions in PHL Article 37 (Physician’s Assistants and Specialist’s Assistants). PHL Section 3702 (Special Provisions) sets forth provisions that include authority for licensed physician assistants (LPAs) to prescribe controlled substances, and authorizes the Commissioner of Health in consultation with the Commissioner of Education to promulgate regulations necessary to carry out the purposes of PHL Section 3702. Education Law Section 6542 prohibits a physician from employing or supervising more than four physician assistants in his or her private practice. Education Law Section 6541 provides for the licensing, as opposed to the registration, of physician assistants in accordance with amendments found under Section 3 of Chapter 48 of the Laws of New York of 2012.

Legislative Objectives:

The legislative objectives of PHL Article 33 are to “combat the illegal use of and trade in controlled substances; and to allow legitimate use of controlled substances in health care, including palliative care; veterinary care; research and other uses authorized by this article or other law; under appropriate regulation and subject to this article, title eight (the professions) of the education law, and other applicable law.” The legislative objective and purpose of PHL Article 37 is “to provide for the registration [licensing] of physician’s assistants and specialist’s assistants who will be available for employment by physicians to permit medical services to be given to persons not receiving them now and whose qualifications will assure that the health needs of patients are met properly.”

Needs and Benefits:

Part 94 of Title 10 of the New York Codes Rules and Regulations (10 NYCRR) outlines the provisions for registered physician assistants (RPAs) (to be known as “licensed physician assistants” or “LPAs”) and registered specialist assistants (RSAs), including scope of duties. Currently the regulation states that RPAs may write prescriptions for those controlled substances not classified as Schedule II controlled substances. Such prescriptions must be written on official New York State prescription forms. A change in the Public Health Law (PHL) now allows LPAs, in good faith and acting within his or her lawful scope of practice, and to the

extent assigned by his or her supervising physician, to prescribe controlled substances, (including Schedule II controlled substances) to patients under the care of such physician responsible for his or her supervision. PHL Section 3702(3). 10 NYCRR Section 94.2 must be revised to be consistent with that amendment to the PHL.

Also, in 10 NYCRR Part 94 LPAs and RSAs are referred to as “registered physician’s assistants” and “registered specialist’s assistants.” However, key statutory provisions use the terms physician assistant and specialist assistant, not the possessive terms physician’s assistant and specialist’s assistant. Furthermore, changes to the Education Law and Public Health Law provide for the licensing, instead of the registration, of physician assistants. Those statutory provisions are: Education Law Article 131-B, which authorizes the professions of “physician assistants and specialist assistants”; Article 37 of the Public Health Law, regarding special provisions related to licensed physician assistants and registered specialist assistants; and Education Law Section 6541, which provides for the licensing of physician assistants. The New York State Society of Physician Assistants (NYSPA) uses the title “physician assistant” rather than “physician’s assistant” and frequently requests that Department of Health regulations be amended to conform to the statutory authority in the Education Law for their profession. This regulation revises Part 94 to conform with the terms “physician assistant” and “specialist assistant” and to replace references to registered physician assistants with references to licensed physician assistants.

Additionally, 10 NYCRR Part 94.2(c) provides that “no physician may employ or supervise more than two registered physician’s assistants and two specialist’s assistants in his private practice.” A recent statutory amendment to Subdivision 3 of Section 6542 of the Education Law has increased this number from two to four. As such, this regulation revises Part 94 to conform with the increase from two to four.

Costs for the Implementation of and Continuing Compliance with these Regulations to the Regulated Entity:

The regulated parties will not be affected by this proposal as it will conform Department regulations to reflect current practice authorized by statute. This proposal will conform Department regulations to provisions in PHL Section 3702 (Special Provisions) regarding LPA prescribing of controlled substances and provisions in Education Law Section 6542 regarding the maximum amount of physician assistants a physician in private practice may employ or supervise.

Cost to State and Local Government:

There are no additional programs, services, duties or responsibilities imposed upon any county, city, village, school district, fire district or other special district by this proposal and no increased costs.

Cost to the Department of Health:

These regulatory changes will not increase costs to the Department. The proposed rule will update current regulatory provisions to reflect current practice authorized by statute.

Local Government Mandates:

There are no additional programs, services, duties or responsibilities imposed upon any county, city, village, school district, fire district or other special district by this proposal.

Paperwork:

No additional new paperwork will be required. This measure clarifies that every prescription issued by the physician assistant, whether or not for a controlled substance, shall be imprinted with, by stamping or typing, the name of both the physician assistant and the supervising physician.

Duplication:

This proposal overlaps, in that it is consistent with, the requirements regarding the manner in which all prescriptions must be issued in NYS specified in PHL Section 281, PHL Article 33 and 10 NYCRR Part 80.

Alternatives:

This proposal updates the Department’s regulations to reflect current practice and statutes. The State Education Department (SED) suggested replacing the phrase “scope of practice” as set forth in Section 94.2(b)(2) with the phrase “scope of competence” when referring to the supervising physician. The Department chose not to make that change since “scope of practice” mirrors the language in SED Law Section 6542(1), relating to performance of medical services.

Federal Requirements:

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

Compliance Schedule:

This proposal will go into effect upon a Notice of Adoption in the New York State Register.

#### **Regulatory Flexibility Analysis**

Effect of Rule:

There are approximately 10,210 LPAs and 91 RSAs in New York State impacted by this rule.

Compliance Requirements:

This proposal does not impose any new requirements. It updates current

provisions to reflect current practice and law and makes technical changes so the regulations refer to “licensed physician assistants and registered specialist assistants” rather than to “registered physician’s assistants and registered specialist’s assistants.”

**Professional Services:**

This proposal does not require any additional professional services.

**Compliance Costs:**

There are no additional costs required to comply with this measure.

**Economic and Technological Feasibility:**

This proposal is economically and technically feasible.

**Minimizing Adverse Impact:**

There will be no adverse impact to small businesses or local governments from this regulation.

**Small Business and Local Government Participation:**

Outreach to the affected parties is being conducted. Organizations representing the affected parties include the New York State Society of Physician Assistants (NYSPA), Medical Society of the State of New York (MSSNY), Greater New York Hospital Association (GNYHA), and the Healthcare Association of New York State (HANYS). NYSPA has requested that these changes be made. The Department has consulted with the Department of Education and this proposal has been reviewed by the New York State Department of Education as required pursuant to PHL Section 3702.

**Rural Area Flexibility Analysis**

Pursuant to section 202-bb of the State Administrative Procedure Act (SAPA), a rural area flexibility analysis is not required. These provisions apply uniformly throughout New York State, including all rural areas.

The proposed rule will not impose an adverse economic impact on rural facilities defined within PHL Articles 28, nor will it impose any additional reporting, record keeping or other compliance requirements on public or private entities in rural areas.

**Job Impact Statement**

A Job Impact Statement is not included in accordance with Section 201-a (2) of the State Administrative Procedure Act (SAPA), because it will not have a substantial adverse effect on jobs and employment opportunities.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

**Disclosure of Confidential Cancer Information**

**I.D. No.** HLT-08-14-00002-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 1.31 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 225(4) and 2402

**Subject:** Disclosure of Confidential Cancer Information.

**Purpose:** To allow more types of relevant research access to the Registry, expand use of confidential data to surveillance and evaluation.

**Text of proposed rule:** Pursuant to the authority vested in the Public Health and Health Planning Council and the Commissioner of Health by Subdivision 4 of Section 225, and by Section 2402 of the Public Health Law, the section heading and subdivision (a) of Section 1.31 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York, are hereby amended, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

1.31 Disclosure of confidential cancer information [for research purposes].

(a) The identity of any person contained in a report of cancer made pursuant to the provisions of Section 2401 of the Public Health Law, or cancer data collected for other specific research studies, shall not be disclosed except [to governmental or government-sponsored research projects]:

(1) for the purpose of scientific studies and research when the State Commissioner of Health determines that substantial knowledge may be gained by such disclosure leading toward the reduction of morbidity and mortality[.]; or

(2) for surveillance or evaluation activities that are government sponsored at the federal, state or Canadian province level, when the State Commissioner of Health determines that the proposed activity is of significant public health importance and that release of identifiable information is necessary for the proposed activity.

The recipient shall limit the use of such information to the specific [study or research] purpose for which such disclosure is made, shall not further disclose such information (except when the recipient is another cancer registry pursuant to laws applicable to such registry), and shall

satisfy the State Commissioner of Health that the confidentiality of [the] patient[’s] identity will be maintained.

**Text of proposed 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 authority for the promulgation of this regulation is contained in Public Health Law (“PHL”) Sections 225(4) and 2402. PHL 225(4) authorizes the Public Health and Health Planning Council (PHHPC) to establish, and from time to time, amend and repeal sanitary regulations, to be known as the sanitary code of the state of New York, subject to approval by the commissioner.

PHL 2402 specifies that “the reports of cancer cases made pursuant to the provisions of this article shall not be divulged or made public so as to disclose the identity of any person to whom they relate, by any person, except in so far as may be authorized in the sanitary code.”

**Legislative Objectives:**

To allow for the amendment of the State sanitary code in order to preserve the security of life or health or the preservation and improvement of public health in the state of New York. Also to provide for the confidential treatment of patient and medical data, specifically cancer patient identity, while recognizing the legitimacy of research.

**Needs and Benefits:**

The purpose of the proposed amendment to the existing regulation is to make it more consistent with current cancer surveillance, research, and evaluation needs as well as sponsorship practices: allowing greater access to the New York State Cancer Registry’s data and expanding use of confidential data for surveillance and evaluation activities while continuing to protect the privacy and security of any information that could be used to identify individual cancer patients. The proposed changes will bring the New York State Cancer Registry into conformance with standard cancer registry practices pertaining to use of confidential cancer information.

Much has changed in the cancer registration arena since the original regulation governing use of “confidential cancer information” was promulgated in 1979. The North American Association of Central Cancer Registries (NAACCR) was founded in 1987 through the joint efforts of the National Cancer Institute (NCI), the American College of Surgeons, the American Cancer Society, and the American Association of Cancer Institutes in response to the growing number of state cancer registries and the realization that the registry community needed to adopt consensus standards in order to maximize the usefulness of the data collected across all jurisdictions. In 1992, the U.S. Congress passed the Cancer Registries Amendment Act (PL 102-515) with the purpose of establishing a National Program of Cancer Registries (NPCR), administered through the Centers for Disease Control and Prevention (CDC) with a system of grants to states to support the operation of population-based statewide cancer registries. This federal legislation requires specific assurances that the funded states will “provide for the authorization under State law of the statewide cancer registry, including promulgation of regulations.” Among other provisions, the federal legislation specifically requires that State laws and regulations: a) address the protection of confidential cancer patient information (i.e., information that identifies or could lead to the identification of a cancer patient), with the specific exemption of disclosure to “other State cancer registries and local and State Health officials,” and b) provide for the disclosure of confidential cancer data for research.

Currently all 50 states and the District of Columbia have cancer registries. All registries receive funding support from the CDC or NCI or from both federal institutions. The NPCR is a significant source of funding for the NYS Cancer Registry.

Over this same time period, significant shifts have occurred in the research environment. In 1979, 78.0% of research funding (not limited to cancer research) to academic and/or non-profit institutions came from federal or other governmental funding sources; by 2010 that percentage had declined to 65.3% (source: National Science Foundation). While the proportion of federal funding for research has decreased, the number of research applications, including cancer-related applications, has greatly increased. In 1997, the National Institutes for Health (NIH) reviewed about 18,000 new applications and funded 24.7% of these. In 2012, nearly 46,000 new applications were reviewed by NIH but only 15.3% were funded (source: NIH Research Portfolio Online Reporting Tools). Many of the unfunded research proposals were of scientific merit and it is highly likely that some were subsequently funded by non-governmental sources.

Another significant shift in the cancer research environment was

brought about by the Food and Drug Administration Amendments Act of 2007 (FDAAA), which gives the FDA the authority to require drug companies to conduct post-marketing studies or clinical trials – known as post-marketing requirements (PMRs). For rare cancers, potential risk associated with drug use can only be assessed effectively through the participation of multiple state cancer registries. This avenue of research, typically conducted by consulting firms on behalf of and sponsored by pharmaceutical companies, is expected to expand over time.

The New York State Cancer Registry (NYSCR) has been receiving funding through the CDC-NPCR since 1996. Although the NYSCR is compliant with the federal Cancer Registries Amendment Act (PL 102-515), the current regulation governing “disclosure of confidential cancer information” does not specifically address public health practice and is unnecessarily restrictive to research.

Part 1 of the State Sanitary Code 1.31(a) shall be amended to remove the requirement that research be governmental or government sponsored. An evaluation of state policies regarding cancer research conducted recently by CDC found that all state cancer registries have provisions for the release of confidential cancer information for research. The evaluation also found that no other state restricts research based on funding source (i.e., government-sponsored).

The proposed change to the regulation will permit greater use of NYSCR data for research. Specifically it will allow:

- Research conducted by or funded through private foundations such as the American Cancer Society, Susan G. Komen for the Cure, Howard Hughes Medical Institute, and the Leukemia and Lymphoma Society, which are significant sources of cancer research funding.
- Research sponsored by academic institutions.
- The conduct of pilot studies or proof-of-concept studies, which typically are not funded, but are required for most federal grant applications.
- FDA-required post-marketing surveillance studies.

Part 1 of the State Sanitary Code 1.31(a) shall be further amended to allow the release of identifiable cancer data for surveillance or evaluation activities that are government sponsored at the federal, state, or provincial level, when the State Commissioner of Health determines that the proposed activity is of significant public health importance and that release of identifiable information is necessary for the proposed activity. The concept of government sponsorship in the context of cancer surveillance and evaluation is still appropriate. This addition to the regulation addresses significant public health activities that require access to identifiable cancer data that do not fall in the realm of research. Specific examples include:

- Inter-state data exchange. In order for state cancer registries to be complete, i.e., to capture cancer surveillance data on all of their residents, confidential information must be exchanged by state cancer registries (e.g., a Connecticut resident treated for cancer in New York and reported to the NYSCR must be reported to the Connecticut state cancer registry and vice-versa). Both NAACCR and CDC-NPCR program standards specify that, at a minimum, state cancer registries must have agreements in place with all bordering states. [Note: NY PHL section 2401 paragraph 8 states “The department shall, meet cancer registry goals established by a nationally recognized central cancer registry organization unless any such goal is contrary to any provision of law.”] Currently, the NYSCR has 22 inter-state reporting agreements in place. These agreements have been reviewed by the Department of Health’s legal counsel and signed by the Health Commissioner or his/her designee.
- Evaluation of an apparent cancer cluster tied to a potential environmental source, which may require the collection of additional information on specific cancer cases. These types of evaluations are frequently conducted by the Agency for Toxic Substances and Disease Registries (ATSDR). Similar evaluations in the context of occupational settings are conducted by the National Institute for Occupational Safety and Health (NIOSH).

The current specifications of Part 1 of the State Sanitary Code 1.31(a) regarding the limitation of the use of data for the specific purpose for which it was disclosed, the prohibition on disclosing the data further, and the requirement to ensure the confidentiality of the disclosed data shall be retained.

An exception to the “further disclosure” stipulation is the exchange of data with another state cancer registry; the confidentiality of that data shall be maintained pursuant to the laws applicable in that state. A review of state cancer registry policies regarding disclosure of confidential cancer data indicates that all states have laws and/or regulations in place to safeguard confidential cancer information. Additionally, all NPCR-funded state cancer registries are subject to the confidentiality provisions of the federal legislation. It is impractical for registries to treat data reported to them by another state cancer registry differently from data reported to them by in-state hospitals and physicians, since all the data become one population-based registry.

Although access to identifiable cancer data is being expanded, the Department of Health shall continue to apply a rigorous review process.

All requests for identifiable cancer data will undergo administrative review as well as review by the New York State Department of Health’s Institutional Review Board (IRB) to assure that the criteria of Part 1 of the State Sanitary Code 1.31(a) are met. Researchers must demonstrate that substantial knowledge leading to the reduction of morbidity or mortality may be gained; that they will only use the disclosed data for the specified purpose and will not re-disclose the data; and that they have procedures and safeguards in place to ensure the confidentiality of the disclosed data. In addition to submitting a formal application which describes how the researcher will meet the criteria stated above, the researcher is required to submit proof of human subject protection training and a copy of their own institution’s IRB approval of the proposed research.

#### Costs:

Other than a slight potential increase in research-funded employment, there is no cost to the state or increase in necessary state funds, and little significant change in operations. The amendment will not change any data reporting requirements; it will have no impact on regulated parties.

#### Local Government Mandates:

This rule imposes no mandates upon any county, city, town, village, school district, fire district, or other special district.

#### Paperwork:

The rule imposes no new reporting requirements, forms, or other paperwork upon regulated parties. All requestors will be required to submit the same “application for research use of personal identifiable information” currently in use for researchers with governmental funding seeking access to identifiable data. This application includes, but is not limited to: a summary of the study proposal and project activities, including all sources of funding for the project, the type of data for which access is requested, documentation of Institutional Review Board approval of the project for the Protection of Human Subjects (in the case of research), documentation of informed consent (when appropriate); a detailed plan for ensuring the confidentiality of requested data; a detailed plan for securing specific and secure use of requested data; past and anticipated future requests for the study in question; and a signed, notarized affidavit verifying the data will be used only as specifically authorized and kept confidential.

#### Duplication:

There are no relevant rules or other legal requirements of the Federal or State governments that duplicate, overlap, or conflict with this rule.

#### Alternatives:

None. The original intent of this regulation was to protect the privacy and identities of cancer patients by severely limiting access to identifying information, while still making case information available for study and analysis, promoting the understanding and lessening of the burden of cancer in New York State. In recent years, important studies have been undertaken outside the province of the government. An increasing number of recognized contributors exist in the private sector. The current regulation limits access to Registry data for these non-government entities that support research and make important contributions leading to the reduction of cancer morbidity and mortality, e.g., the American Cancer Society, the Robert Wood Johnson Foundation, and Susan G. Komen for the Cure. Additionally, the current regulations limit opportunities for exchange of information with other states, and with studies required by the FDA for Post-market Drug Safety Surveillance.

#### Federal Standards:

The rule does not exceed any minimum standards of the Federal government for the same or similar subject area. Rather, it brings us into closer alignment with federal requirements.

#### Compliance Schedule:

The amendment will take effect when the Notice of Adoption is published in the State Register.

#### Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis is not being submitted with this rule because it will not impose any adverse impact on small businesses and local governments. The rule amendment and underlying provisions impose no new reporting requirements, forms, or other paperwork upon county, city, town, village, school district, fire district, or other special district, but apply universally throughout this State. The rule does not impose dissimilar reporting, recordkeeping, or other compliance requirements on public or private entities.

All requestors will be required to submit the same “application for research use of personal identifiable information” currently in use for governmental entities seeking access to identifiable data, and the rule does not distinguish between parties of dissimilar types. This application includes, but is not limited to: a summary of the study proposal and project activities, including all sources of funding for the project, the type of data for which access is requested, documentation of Institutional Review Board approval of the project for the Protection of Human Subjects (in the case of research), documentation of informed consent (when appropriate); a detailed plan for ensuring the confidentiality of requested data; a detailed

plan for securing specific and secure use of requested data; past and anticipated future requests for the study in question; and a signed, notarized affidavit verifying the data will be used only as specifically authorized.

#### Cure Period:

Chapter 524 of the Laws of 2011 requires agencies to include a "cure period" or other opportunity for ameliorative action to prevent the imposition of penalties on the party or parties subject to enforcement when developing a regulation or explain in the Regulatory Flexibility Analysis why one was not included. This regulation creates no new penalty or sanction. Hence, a cure period is not necessary.

#### Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this rule because it will not impose any adverse impact on rural areas. The rule and underlying provisions of the law do not distinguish between regulated parties located in rural, suburban, or metropolitan areas of this New York State, but apply universally throughout this State. The rule does not impose dissimilar reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas.

All requestors will be required to submit the same "application for research use of personal identifiable information" currently in use for governmental entities seeking access to identifiable data, and the rule does not distinguish between parties located in different geographical areas. This application includes, but is not limited to: a summary of the study proposal and project activities, including all sources of funding for the project, the type of data for which access is requested, documentation of Institutional Review Board approval of the project for the Protection of Human Subjects (in the case of research), documentation of informed consent (when appropriate); a detailed plan for ensuring the confidentiality of requested data; a detailed plan for securing specific and secure use of requested data; past and anticipated future requests for the study in question; and a signed, notarized affidavit verifying the data will be used only as specifically authorized.

#### 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 a substantial adverse impact on jobs and employment opportunities. The staffing status quo will remain unchanged by amending this regulation, both within the New York State Cancer Registry, and outside of it.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Hearing Aids

I.D. No. HLT-08-14-00003-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 505.31(h) of Title 18 NYCRR.

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

**Subject:** Hearing Aids.

**Purpose:** To streamline electronic billing and establish maximum reimbursable amounts based on an average products cost for hearing aids.

**Text of proposed rule:** Subparagraph (iv) of paragraph (1) of subdivision (h) of section 505.31 is repealed and a new subparagraph (iv) is added to read as follows:

(iv) (a) *Payment for hearing aids must not exceed the lower of:*

(1) *the maximum reimbursable amount for the item, as shown in the fee schedule for hearing aid/audiology services and as determined by the Department based on the average cost of products representative of that item; or*

(2) *the usual and customary price charged to the general public for the same or similar items.*

(b) *When there is no maximum reimbursable amount listed in the fee schedule for hearing aid/audiology services, payment for hearing aids must not exceed the lower of:*

(1) *the acquisition cost, net of any discounts or rebates, supported by a copy of the invoice, which must include the brand, model, and serial number of the dispensed hearing aid; or*

(2) *the usual and customary price charged to the general public for the same or similar items.*

Subparagraph (v) of paragraph (1) of subdivision (h) of section 505.31 is amended to read as follows:

(v) *Reimbursement for dispensing and administrative fees, [as*

defined by regulations of the New York State Department of Health,] batteries, earmolds, and replacement parts is based on the fee schedule for hearing aid/audiology [supplies and] services. The fee schedule for hearing aid/audiology [supplies and] services is available [from the department] at the Medicaid fiscal agent's website. [and is also contained in the Medicaid Management Information System (MMIS) Provider Manual (Hearing Aid/Audiology Services). Copies of the manual may be obtained by writing Computer Sciences Corporation, Health and Administrative Services Division, 800 North Pearl St., Albany, NY 12204. Copies may also be obtained from the Department of Social Services, 40 North Pearl St., Albany, NY 12243. The manual is provided free of charge to every provider of hearing aid services and products at the time of enrollment in the MA program.]

**Text of proposed 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

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

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

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

#### Regulatory Impact Statement

##### Statutory Authority:

Social Services Law ("SSL") Section 363-a and Public Health Law Section 201(1)(v) provide that the Department is the public state agency responsible for supervising the administration of the State's medical assistance ("Medicaid") program and for adopting such regulations, not inconsistent with law, as may be necessary to implement the State's Medicaid program.

##### Legislative Objective:

Section 365-a of the SSL provides that, in addition to care, services, and supplies specifically listed in such section, Medicaid payment will be available for care, services, and supplies authorized in the regulations of the Department. Section 505.31 of the Department's regulations authorizes payment for hearing aids.

##### Needs and Benefits:

The Medicaid program provides payment for medically necessary audiology services, audiometric screening and hearing aid services, products and repairs to alleviate disability caused by the loss or impairment of hearing. The 24 hearing aid types covered, as represented by nationally developed procedure codes, include analog, digital, behind the ear, in the ear, programmable, monaural, and binaural. Hearing aids are either electronically prior authorized or manually prior approved by clinicians.

Current regulations state that reimbursement for hearing aids is made for the acquisition cost of a hearing aid and an administrative and dispensing fee. Providers submit claims on paper with the invoice supporting the acquisition cost of a hearing aid along with the brand name, the model number, the serial number, and any applicable discounts from the manufacturer. Claims are then manually priced by the Department. This can be time-consuming and delay payment to providers.

The proposed amendment provides for establishing a fee schedule setting forth maximum reimbursable amounts (MRAs) for hearing aids based on the average cost of products representative of each type of hearing aid. Since the national coding is specific to each type of hearing aid, and MRAs will be developed for each procedure code, appropriate levels of reimbursement will be established for different types of hearing aids. However, the proposed amendments will not limit the ability of providers to prescribe the appropriate type of hearing aid to address the medical needs of individual beneficiaries with hearing loss or impairment.

Those providers that choose to submit electronic claims for payment would be paid up to the MRA that the Department has established for the hearing aid. There would be no need for the provider to submit an invoice to the Department for manual pricing. Providers would still be able to submit paper claims for payment, should they so choose, and would be paid up to the MRA for the item. Again, there would be no need for providers that choose to submit paper claims also to submit invoices to the Department for items for which MRAs have been established.

##### COSTS:

Costs for the Implementation of, and Continuing Compliance with the Regulation to the Regulated Entity:

This amendment will not increase costs to the regulated parties. It will minimally reduce revenues to the extent providers are furnishing hearing aids beyond the maximum reimbursable amount to be set. The amendment will also reduce providers' need to submit paper claims and invoices and potentially increase the speed at which providers are paid for hearing aid claims. Various national studies have concluded that the change from paper to electronic claims can significantly decrease providers' administrative burden.

**Costs to State and Local Government:**

This amendment will not increase costs to the State or social services districts. Minor savings to Medicaid program costs will be achieved by establishing maximum reimbursable amounts. In addition, the Department will no longer need to manually price hearing aids for which MRAs have been established. Paper claims for such items would not need to be administratively reviewed. Because social services districts' share of Medicaid costs is statutorily capped, it is expected that the proposed regulations will have no effect on districts' Medicaid costs.

**Costs to the Department of Health:**

There will be no additional costs to the Department.

**Local Government Mandates:**

This amendment will not impose any program, service, duty, additional cost, or responsibility on any county, city, town, village, school district, fire district, or other special district.

**Paperwork:**

This amendment will not impose any additional paperwork for providers of hearing aids. In fact, it will decrease paperwork for hearing aid providers because they will no longer be required to submit invoices to support their claims for payment for hearing aids for which MRAs have been established.

**Duplication:**

There are no duplicative or conflicting rules identified.

**Alternatives:**

In order to facilitate electronic billing for hearing aids, which reduces providers' and State costs, the maximum reimbursable amount must be input into the electronic claims processing system for the claim to be priced automatically and paid. The alternative is to continue with the current manual process, which is time-consuming, burdensome to providers and was thus not considered.

Another alternative is to continue with the current reimbursement methodology. This alternative was not considered. The Department has established maximum reimbursable amounts for durable medical equipment and for orthopedic shoes. It is consistent also to establish maximum reimbursable amounts for hearing aids.

**Federal Standards:**

The proposed regulations do not exceed any minimum federal standards.

**Compliance Schedule:**

The proposed regulations do not impose any compliance requirements on social services districts. Providers of hearing aids will be able to comply with the proposed regulations when they become effective.

**Regulatory Flexibility Analysis**

**Effect on Small Businesses and Local Governments:**

This amendment affects the approximately 126 hearing aid providers enrolled in the Medicaid program that actively bill Medicaid for hearing aids. The amendment will establish maximum reimbursable amounts for hearing aids, which may reduce these providers' Medicaid revenue to the extent that they furnish hearing aids that exceed the MRA for that item. The amendment will also input the maximum reimbursable amount into the electronic claims processing system, reducing providers' need to submit paper claims and invoices.

The fifty-eight local social services districts share in the costs of services provided to eligible beneficiaries who receive Medicaid through their districts. The proposed regulations would not affect their costs.

**Compliance Requirements:**

This amendment does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

**Professional Services:**

No new professional services are required as a result of this amendment.

**Compliance Costs:**

There are no direct costs of compliance with this amendment.

**Economic and Technological Feasibility:**

The amendment will simplify the manner in which hearing aid providers bill for services as it will decrease the need to submit paper claims and invoices. It will not affect the way the local districts contribute their local share of Medicaid expenses for hearing aids. Therefore, there should be no technological difficulties associated with compliance with the proposed regulation.

**Minimizing Adverse Impact:**

The Department will engage provider and beneficiary stakeholders in the establishment and ongoing maintenance of hearing aid maximum reimbursable amounts to ensure that access to medically necessary hearing aids will continue under the Medicaid program.

**Small Business and Local Government Participation:**

The establishment of MRAs for hearing aids is one of the initiatives proposed in Phase 3 of the Medicaid Redesign Team's efforts to reform the Medicaid program. The Department has posted on its website a work plan for this initiative (#6204) and other MRT initiatives. In addition, the Department will engage both the ordering and dispensing providers to provide information on the proposed changes and to assist as necessary with the transition to the new process.

**Cure Period:**

Chapter 524 of the Laws of 2011 requires agencies to include a "cure period" or other opportunity for ameliorative action to prevent the imposition of penalties on the party or parties subject to enforcement when developing a regulation or explain in the Regulatory Flexibility Analysis why one was not included. This regulation creates no penalty or sanction. Hence, a cure period is not necessary.

**Rural Area Flexibility Analysis**

**Types and Estimated Number of Rural Areas:**

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, include towns with population densities of 150 or fewer persons per square mile. The following 43 counties have a population less than 200,000:

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

The benefit limit on hearing aids will apply to approximately 126 hearing aid providers in New York State. These businesses are located in rural as well as suburban and metropolitan areas of the State.

**Compliance Requirements:**

No new reporting, recordkeeping or other compliance requirements and professional services are needed in a rural area to comply with the proposed rule.

**Compliance Costs:**

There are no direct costs associated with compliance.

**Minimizing Adverse Impact:**

The rule is not expected to have any adverse impact on public and private sector interests in rural areas.

**Opportunity for Rural Area Participation:**

The Department will engage both the ordering and dispensing providers to inform all of the proposed changes and assist as necessary with the transition to the new process.

**Job Impact Statement**

**Nature of Impact:**

This rule will result in a minimal reduction in the amount paid to providers of hearing aids. This decreased revenue will not likely have an adverse impact on jobs and employment opportunities within these businesses as they offer a variety of services to other insurers and insureds.

**Categories and Numbers Affected:**

This rule, which minimally decreases Medicaid revenue, will not likely affect employment opportunities within providers of hearing aids.

**Regions of Adverse Impact:**

This rule will affect all regions within the State and businesses out of New York State that are enrolled in the Medicaid Program to provide hearing aids.

**Minimizing Adverse Impact:**

This decreased revenue will not likely have an adverse impact on jobs and employment opportunities within these businesses as they offer a variety of services to other insurers and insureds.

**Self-Employment Opportunities:**

The rule is expected to have minimal impact on self-employment opportunities.

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

**Organ Transplant Provisions**

**I.D. No.** HLT-08-14-00013-P

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

**Proposed Action:** Amendment of sections 405.13 and 405.22; and addition of sections 405.30 and 405.31 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 2800 and 2803

**Subject:** Organ Transplant Provisions.

**Purpose:** To update and add new provisions regarding organ transplant.

**Substance of proposed rule (Full text is posted at the following State website: [www.health.ny.gov](http://www.health.ny.gov)):** This proposal amends Section 405.13, repeals Subdivisions (b) and (j) of Section 405.22 and adds Sections 405.30 and 405.31 to Part 405 (Hospitals – Minimum Standards) of Title 10 of the Official Code of Rules and Regulations of the State of New York (10 NYCRR), particularly as they relate to organ transplant and donor services. Hospitals as referred to in Part 405 are general hospitals.

Section 405.13 of Part 405 pertains to anesthesia services. This amendment specifies that hospitals providing living liver donor transplants must also comply with the provisions contained in the newly added Section 405.31, subdivision (o) paragraph (2). Section 405.31 sets forth the living donor transplantation services provisions. Subdivision (o) of Section 405.31 outlines the living adult donor to adult recipient liver transplantation services provisions and paragraph (2) proposes the anesthesia requirements within Section 405.31. Current regulations address only living liver transplantation. These regulations address all living donation, including kidney donation.

Section 405.22 currently contains the critical care and special care services provisions. This amendment repeals the organ transplant center and live liver transplantation services provisions contained within Section 405.22 in subdivisions (b) and (j) respectively.

Two new sections are created in this proposal. Section 405.30 sets forth the organ and vascularized composite allograft transplant services/programs provisions. Section 405.31, as stated above, sets forth the living donor transplantation services provisions.

The organ and vascularized composite allograft transplant services/programs provisions in Section 405.30 define the terms “living donor,” “organ,” “organ procurement organization (OPO),” “organ trafficking,” “patient,” “qualified mental health professional,” “qualified social worker,” “recipient,” “transplant center,” “transplant commercialism,” “transplant program,” “transplant services,” “transplant tourism,” “travel for transplant,” and “vascularized composite allograft.” This section specifies general requirements for hospitals that provide transplant services, and also outlines organization and staffing and quality assessment and performance improvement (QAPI) requirements.

Section 405.31 outlines the living donor transplantation services requirements. It specifies that hospitals performing living donor transplants shall comply with the requirements of this section, section 405.30 (see above) and with subdivision (a) of Section 405.22 of this Part. Section 405.22 subdivision (a) contains the general provisions of the critical care and special care services requirements. Section 405.31 also defines a donor advocate as a person or team responsible for ensuring that the rights and interests of the living donor and the prospective living donor are protected. It sets forth donor advocate responsibilities, donor advocate requirements, education of the donor requirements, informed consent provisions, disclosure requirements, risks, primary medical evaluation and psychosocial provisions, recipient criteria, donor management, imaging service, discharge planning and post-discharge requirements. This section contains the living adult donor to adult recipient liver transplantation services provisions and outlines the surgical team, anesthesia, postoperative care, and minimum medical and nursing staffing requirements.

**Text of proposed 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 authority for the promulgation of these regulations is contained in Public Health Law (PHL) Sections 2800, 2803(2) and 4351. PHL Article 28 (Hospitals), Section 2800 specifies that “Hospital and related services

including health-related service of the highest quality, efficiently provided and properly utilized at a reasonable cost, are of vital concern to the public health. In order to provide for the protection and promotion of the health of the inhabitants of the state, pursuant to section three of article seventeen of the constitution, the department of health shall have the central, comprehensive responsibility for the development and administration of the state’s policy with respect to hospital and related services, and all public and private institutions, whether state, county, municipal, incorporated or not incorporated, serving principally as facilities for the prevention, diagnosis or treatment of human disease, pain, injury, deformity or physical condition or for the rendering of health-related service shall be subject to the provisions of this article.”

PHL Section 2803(2) authorizes the Public Health and Health Planning Council (PHHPC) to adopt and amend rules and regulations, subject to the approval of the Commissioner, to implement the purposes and provisions of PHL Article 28, and to establish minimum standards governing the operation of health care facilities.

PHL Section 4351 sets forth duties of hospital administrators, organ procurement organizations and eye bank and tissue banks with respect to requests for consent to an anatomical gift.

**Legislative Objectives:**

The legislative objective of PHL Article 28 includes the protection of the health of the residents of the State by assuring the efficient provision and proper utilization of health services, of the highest quality at a reasonable cost. The legislative objective of PHL Article 43-A is to set forth the duties of hospital administrators, organ procurement organizations, eye banks and tissue banks regarding requests for consent to an anatomical gift.

**Needs and Benefits:**

Nationally approximately 116,000 individuals are waiting for organ(s) and approximately 10,000 of them are New Yorkers. While regulations concerning organ transplant were last revised in 2004 regarding live adult liver donors, other transplant provisions have not been revised, nor comprehensively examined in over 20 years. During that time period transplant has changed, most notably in the growth of living organ donor transplant as well as the potential for other organ transplants such as face, hands and arms. However, current regulations do not recognize these emerging areas and thus these services could be provided in a non-transplant center hospital. Neither the Department, nor the transplant community, thinks this is safe or appropriate for patients. In addition, federal Centers for Medicare and Medicaid Services (CMS) regulations issued in June of 2007, contradict some current state requirements.

The transplant community has expressed support for revising the regulations. The Department of Health has utilized the New York State Transplant Council (TC) in the comprehensive review of this proposal, along with the New York Center for Liver Transplant (NYCLT), who requested that the current regulations concerning the care of living liver donors be reexamined. New York State has worked closely with the transplant community to develop guidance on a variety of areas which have served as national and international models of transplant care. Most notable are the guidance documents on the care of living liver donors: New York State Committee on Quality Improvement in Living Liver Donation – A Report to: New York State Transplant Council and New York State Department of Health - December 2002 and living kidney donors New York State Transplant Council – New York State Committee on Quality Improvement in Living Kidney Donation – December 2007.

The Department of Health has determined that the transplant provisions currently contained in the Critical Care and Special Care Services provisions set forth in Section 405.22 should be deleted. In its place two new sections are proposed. Section 405.30 would contain Solid Organ and Vascularized Composite Transplant/Services provisions. Section 405.31 would contain the Living Donor Transplantation Services provisions. This latter section incorporates the existing living liver donor requirements and adds general requirements for all living donors consistent with existing federal CMS and United Network for Organ Sharing (UNOS) rules. Currently kidney and liver are the most common organs transplanted in NYS. These regulations are written to be flexible as transplant changes and other organs (e.g. living lungs) become more commonly transplanted. This rewrite also retains some of the added protections that were included in 2004 for living liver donors in recognition that liver donation carries more potential risk than kidney donation.

Costs for the Implementation of and Continuing Compliance with these Regulations to the Regulated Entity:

According to the transplant administrators on the New York State Transplant Council’s Regulation Workgroup, there will be a minimal cost to the affected parties related to the additional requirement that hospitals obtain an attestation from a potential living donor that such donor has not received anything of value in exchange for the donation, aside from reimbursement for expenses associated with the donation to the extent allowed by New York State and US federal law. The recipient must also at-

test in writing that he or she has not offered and is not aware of any offers of valuable consideration to the donor for their donation, except as allowed by New York State or US federal law. Any additional costs related to these regulations are offset by the elimination of the requirement that transplant centers track living donor outcomes for life. These regulations mirror and complement existing federal requirements so additional costs are not expected.

**Cost to State and Local Government:**

State transplant centers (State University of New York (SUNY) Downstate, SUNY Syracuse, SUNY Stony Brook) must abide by these provisions the same as any transplant center in New York State. There are no county transplant centers in New York State. There are no additional costs to state and local governments over and above the cost impacts as the private centers for the implementation and continued administration of this rule.

**Cost to the Department of Health:**

As stated above, there are no additional costs to state and local government over and above the cost impacts of the private centers to implement this regulation. Existing Health Department staff will be utilized to conduct surveillance of the regulated parties and monitor compliance with these provisions.

**Local Government Mandates:**

There are no additional programs, services, duties or responsibilities imposed by this rule upon any county, city, town, village, school district, fire district or any other special district.

**Paperwork:**

This measure will require a written attestation not already required from a potential living donor attesting that the donor has not received anything of value in exchange for the donation, aside from reimbursement for expenses associated with the donation to the extent allowed by New York State and US federal law. The recipient must also attest in writing that he or she has not offered and is not aware of any offers of valuable consideration to the donor for their donation, except as allowed by New York State or US federal law.

**Duplication:**

This regulation will not conflict with any state or federal rules. It clarifies federal requirements set forth in 42 CFR Part 482 for general hospitals providing transplant services and mirrors federal volume standards and living donor advocate requirements. This streamlines the process for transplant facilities.

**Alternative Approaches:**

There are no viable alternative approaches. The Department of Health could have left the regulation as is, but it is outdated and must be updated to reflect current practice to conform to federal standards, and to ensure that transplant centers achieve minimum volume requirements.

**Federal Requirements:**

The federal requirements for transplant services are set forth in 42 CFR Part 482. These provisions update the New York State standards to be in compliance with the federal standards and to also reflect current practice.

**Compliance Schedule:**

This proposal will go into effect upon a Notice of Adoption in the New York State Register.

**Regulatory Flexibility Analysis**

**Effect of Rule:**

Any general hospital designated as a transplant center pursuant to 10 NYCRR Section 709.7 will be required to comply with these provisions. There are no small businesses (defined as 100 employees or less), independently owned and operated, affected by this rule. Currently in New York State there are 15 hospitals that perform organ transplants.

**Compliance Requirements:**

In order to comply with these requirements, hospitals will need to develop an attestation form to meet the living donor travel tourism requirements.

**Professional Services:**

No additional professional services will be required pursuant to these provisions.

**Compliance Costs:**

These regulations mirror and complement existing federal requirements so additional costs are not expected due to these regulations.

**Economic and Technological Feasibility:**

This proposal is economically and technically feasible.

**Minimizing Adverse Impact:**

These provisions mirror and clarify the federal Centers for Medicare and Medicaid (CMS) requirements as set forth in 42 CFR Part 482. As a result, hospitals will not have to follow two different standards, especially in the area of volume requirements and long-term follow-up of living donors.

**Small Business and Local Government Participation:**

Outreach to the affected parties has been conducted. This proposal has been discussed and reviewed by the New York State Transplant Council,

the New York Center for Liver Transplant (NYCLT), the Healthcare Association of New York State (HANYNS) and the Greater New York Hospital Association (GNYHA), all of which represent various transplant centers. They were also given notice of this proposal by its inclusion on the agenda of the Codes and Regulations Committee of the Public Health and Health Planning Council (PHHPC). This agenda and the proposal will be posted on the Department's website. The public, including any affected party, is invited to comment during the Codes Regulations and Legislation Committee meeting.

**Cure Period:**

Chapter 524 of the Laws of 2011 requires agencies to include a "cure period" or other opportunity for ameliorative action to prevent the imposition of penalties on the party or parties subject to enforcement when developing a regulation or explain in the Regulatory Flexibility Analysis why one was not included. This regulation creates no new penalty or sanction. Hence, a cure period is not necessary.

**Rural Area Flexibility Analysis**

No Rural Area Flexibility Analysis is required pursuant to Section 202-bb(4)(a) of the State Administrative Procedure Act (SAPA). It is apparent, from the nature of the proposed amendment that it will not impose any adverse impact on rural areas as no transplant centers are located in rural areas, and it does not impose any new reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

**Job Impact Statement**

**Nature of Impact:**

This rule is not expected to have a significant impact on jobs. Any increase in jobs has occurred pursuant to the 2007 federal regulations. The intent of this proposal is to strengthen the Department's oversight to monitor a hospital's ability to appropriately care for transplant patients. It is also intended to firm up expectations of appropriately credentialed staff. This proposal is necessary to update the current provisions to reflect current practice. All transplant centers already have appropriate staff to meet these requirements.

**Categories and Numbers Affected:**

There are 15 transplant centers that perform various types of transplant.

**Regions of Adverse Impact:**

This rule is not expected to cause any regions in the State to have an adverse job impact.

**Minimizing Adverse Impact:**

These provisions mirror and clarify the federal Centers for Medicare and Medicaid (CMS) requirements as set forth in 42 CFR Part 482. As a result, hospitals will not have to follow two different standards, especially in the area of volume requirements and long-term follow-up of living donors.

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## Office of Mental Health

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

**Prevention of Influenza Transmission**

**I.D. No.** OMH-08-14-00014-P

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

**Proposed Action:** Addition of Part 509 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.07, 7.09 and 31.04

**Subject:** Prevention of Influenza Transmission.

**Purpose:** Require unvaccinated personnel to wear surgical masks in certain OMH-licensed or operated psychiatric centers during flu season.

**Text of proposed rule:** PART 509

*PREVENTION OF INFLUENZA TRANSMISSION*

*§ 509.1 Background and Intent.*

(a) *Influenza is an unpredictable disease that can cause serious illnesses, death, and healthcare disruption during any given year. Recent influenza seasons in New York State have been worse than those experienced a decade ago.*

(b) *In response to this increased public health threat, New York must take active steps to prevent and control transmission of seasonal influenza. The seriousness of the continuing influenza threat and the failure of the health care system to achieve acceptable vaccination rates through voluntary programs necessitate further action.*

(c) Although masks are not as effective as vaccination, evidence indicates that wearing a surgical or procedure mask will lessen transmission of influenza from patients experiencing respiratory symptoms. It is also known that persons incubating influenza may shed the influenza virus before they have noticeable symptoms of influenza. The Centers for Disease Control and Prevention (CDC) recommends that patients who may have an infectious respiratory illness wear a mask when not in isolation and that healthcare personnel wear a mask when in close contact with symptomatic patients. Further, the Infectious Disease Society of America recommends that healthcare personnel who are not vaccinated for influenza wear masks.

(d) Recently, the New York State Department of Health (DOH) adopted regulations at 10 NYCRR Section 2.59 to require all unvaccinated personnel in certain health settings to wear surgical or procedure masks during the time when the Commissioner of Health determines that influenza is prevalent. Specifically, the DOH regulations apply to general hospitals, nursing homes, diagnostic and treatment centers, certified home health agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care service agencies, limited licensed home care service agencies and hospices (licensed by DOH under Public Health Law, Articles 28, 36 and 40).

(e) It is critical for the Office of Mental Health to join in a statewide effort to reduce the morbidity and mortality of influenza, by combining efforts and pursuing a common path of prevention and intervention.

§ 509.2 Legal Base.

(a) Section 7.07 of the Mental Hygiene Law charges the Office of Mental Health with the responsibility for seeing that persons with mental illness are provided with care and treatment, and that such care, treatment and rehabilitation is of high quality and effectiveness.

(b) Section 7.09 of the Mental Hygiene Law gives the Commissioner of the Office of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

(c) Section 31.04 of the Mental Hygiene Law grants the Commissioner of Mental Health the power and responsibility to adopt regulations to effectuate the provisions and purposes of article 31 of such law, including procedures for the issuance and amendment of operating certificates, and for setting standards of quality and adequacy of facilities.

§ 509.3 Definitions. For the purposes of this Part:

(a) Facility shall mean:

(1) a psychiatric center established pursuant to Section 7.17 of the Mental Hygiene Law; including all programs or services operated by, or under the auspices of, such psychiatric center;

(2) a hospital operated pursuant to Part 582 of this Title.

(b) Influenza season shall mean the period of time during which influenza is prevalent as determined by the Commissioner of Health.

(c) Personnel shall mean all persons employed or affiliated with a facility, as defined in this Section, whether paid or unpaid, including but not limited to employees, members of the medical, nursing, and other treatment staff, contract staff, students, and volunteers, who engage in activities such that if they were infected with influenza, they could potentially expose patients to the disease.

Section 509.4 Documentation Requirements.

(a) All facilities shall determine and document which persons qualify as "personnel" under this Part.

(b) All facilities shall document the influenza vaccination status of all personnel for the current influenza season in a secure file separate from their personnel history folder. Documentation of vaccination must include the name and address of the individual who ordered or administered the vaccine and the date of vaccination.

(c) During the influenza season, all facilities shall ensure that all personnel who have not been vaccinated against influenza for the current influenza season wear a surgical or procedure mask while in areas where patients may be present. Facilities shall supply such masks to personnel, free of charge.

(d) Upon the request of the Office, a facility must report the number and percentage of personnel that have been vaccinated against influenza for the current influenza season.

(e) All facilities shall develop and implement a policy and procedure to ensure compliance with the provisions of this Part. The policy and procedure shall include, but is not limited to, the identification of those areas where unvaccinated personnel must wear a mask pursuant to subdivision (c) of this Section.

(f) For those facilities that are required to comply with 10 NYCRR Section 2.59, compliance with such Section shall be deemed compliance with this Part.

**Text of proposed rule and any required statements and analyses may be obtained from:** Sue Watson, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: Sue.Watson@omh.ny.gov

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

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

**Regulatory Impact Statement**

1. Statutory Authority: Section 7.07 of the Mental Hygiene Law charges the Office of Mental Health with the responsibility for seeing that persons with mental illness are provided with care and treatment, and that such care, treatment and rehabilitation is of high quality and effectiveness.

Section 7.09 of the Mental Hygiene Law gives the Commissioner of the Office of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

Section 31.04 of the Mental Hygiene Law grants the Commissioner of Mental Health the power and responsibility to adopt regulations to effectuate the provisions and purposes of article 31 of such law, including procedures for the issuance and amendment of operating certificates, and for setting standards of quality and adequacy of facilities.

2. Legislative Objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs and charges OMH with the responsibility for ensuring that persons with mental illness receive high quality care and treatment. The proposed rule creates a new 14 NYCRR Part 509 to establish provisions designed to reduce the transmission of the influenza virus in inpatient psychiatric facilities operated or licensed by OMH. This rule furthers the legislative policy of providing high quality services to individuals with mental illness in a safe and secure environment.

3. Needs and Benefits: Influenza is an unpredictable disease that can cause serious illnesses, death, and healthcare disruption during any given year. Recent influenza seasons in New York State were worse than experienced in a decade, and serve as a reminder that influenza could have this devastating effect in any year. In response to this increased public health threat, New York must take active steps to prevent and control transmission of seasonal influenza. The seriousness of the continuing influenza threat and the failure of the health care system to achieve acceptable vaccination rates through voluntary programs necessitate further action.

The new 14 NYCRR Part 509 establishes provisions whereby all OMH-operated psychiatric centers (including all programs and services operated by, or under the auspices of such psychiatric centers) and Article 31 "free standing" psychiatric hospitals shall ensure that, during the influenza season, all personnel who have not been vaccinated against influenza for the current influenza season wear a surgical or procedure mask while in areas where patients may be present. Such masks shall be provided free of charge to personnel. Although masks are not as effective as vaccination, evidence indicates that wearing a surgical or procedure mask will lessen transmission of influenza from patients experiencing respiratory symptoms. It is also known that persons incubating influenza may shed the influenza virus before they have noticeable symptoms of influenza. The Centers for Disease Control and Prevention (CDC) recommends that patients who may have an infectious respiratory illness wear a mask when not in isolation and that healthcare personnel wear a mask when in close contact with symptomatic patients. Further, the Infectious Disease Society of America recommends that healthcare personnel who are not vaccinated for influenza wear masks.

Recently, the New York State Department of Health adopted regulations at 10 NYCRR Section 2.59 to require all unvaccinated personnel in certain health settings to wear surgical or procedure masks during the time when the Commissioner of Health determines that influenza is prevalent. Specifically, the DOH regulations apply to general hospitals, nursing homes, diagnostic and treatment centers, certified home health agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care service agencies, limited licensed home care service agencies and hospices (licensed by DOH under Public Health Law, Articles 28, 36 and 40).

It is critical for the Office of Mental Health to join in a statewide effort to reduce the morbidity and mortality of influenza, by combining efforts and pursuing a common path of prevention and intervention. On December 2, 2013, the Office of Mental Health issued an influenza health alert for all OMH-operated psychiatric centers and "free standing" licensed Article 31 psychiatric hospitals.

4. (a) Costs to Local Government: These regulatory amendments will not result in any additional costs to local government.

(b) Costs to State and Regulated Parties: Although it is impossible to quantify the exact cost of providing surgical or procedure masks for those personnel who have not been vaccinated, it is anticipated that this cost will

not be significant. The Department of Health estimates that on average, the price of a surgical or procedure mask varies between approximately 10 to 25 cents per mask, subject to the quantity ordered. This is a modest investment to protect the health and safety of patients and personnel, especially when compared to both the direct medical costs and indirect costs of personnel absenteeism, including personnel working less effectively or being unable to work. Therefore, the minimal cost of surgical or procedure masks is expected to be offset by the savings reflected in a reduction of influenza in personnel and the loss of productivity and available staff.

5. Local Government Mandates: These regulatory amendments will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts, except to the extent that the local governmental unit is a provider of services.

6. Paperwork: This rule will result in a minor increase in the paperwork requirements of all facilities covered by the regulation as they will have to determine and document which persons qualify as personnel under the new Part 509. Facilities must document the influenza vaccination status of all personnel for the current influenza season in a secure file separate from an individual's personnel history folder. Upon request of OMH, facilities must report the number and percentage of personnel that have been vaccinated against influenza for the current influenza season. Facilities must develop and implement a policy and procedure to ensure compliance with the provisions of this Part.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements. In instances where an inpatient program is required to comply with the Department of Health regulations found in 10 NYCRR Section 2.59, compliance with that section shall be deemed compliance with this Part.

8. Alternatives: One alternative to requiring a surgical or procedure mask for unvaccinated personnel would be to require all personnel to be vaccinated for influenza. While OMH strongly encourages all personnel be vaccinated, requiring unvaccinated staff to wear a surgical or procedure mask is the most effective and least burdensome way to immediately reduce the potential for transmission of influenza at this time. The only other alternative that was considered was inaction, but because of the seriousness of the influenza threat and the failure of the health care system to achieve acceptable vaccination rates through voluntary programs, that alternative was necessarily rejected.

9. Federal Standards: The regulatory amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance Schedule: These regulatory amendments will be effective immediately upon adoption.

#### **Regulatory Flexibility Analysis**

The provisions of the new 14 NYCRR Part 509 apply to OMH-operated psychiatric centers (including all programs and services operated by, or under the auspices of such psychiatric centers) and "free standing" psychiatric hospitals licensed under Article 31 of the Mental Hygiene Law. All of these hospitals employ more than 100 people; therefore, none of them qualify as a small business. The proposed rule creating a new 14 NYCRR Part 509 establishes provisions designed to reduce the transmission of the influenza virus by ensuring that, during the influenza season, all personnel who have not been vaccinated against influenza for the current influenza season wear a surgical or procedure mask while in areas where patients may be present. Costs to regulated parties are expected to be minimal and offset by the savings reflected in the reduction of influenza in personnel. As there will be no adverse economic impact on small business or local governments, a Regulatory Flexibility Analysis for Small Business and Local Governments has not been submitted with this notice.

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

1. Description of the types and estimation of the number of rural areas in which the rule will apply: In New York State, 43 counties have a population of less than 200,000: Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming and Yates. Additionally, 10 counties with certain townships have a population density of 150 persons or less per square mile: Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga, Orange, and Saratoga.

The rule establishes provisions designed to reduce the transmission of the influenza virus in OMH-operated psychiatric centers (including all programs and services operated by, or under the auspices of such psychiatric centers) and "free standing" Article 31 psychiatric hospitals by ensuring that, during the influenza season, all personnel who have not been vaccinated against influenza for the current influenza season wear a surgical

or procedure mask while in areas where patients may be present. Costs to regulated parties are expected to be minimal and offset by the savings reflected in the reduction of influenza in personnel. The geographic location of any given program (urban or rural) will not be a contributing factor to any additional costs to providers.

2. Reporting, recordkeeping and other compliance requirements and professional services: All facilities covered by the regulation will have to determine and document which persons qualify as personnel under the new Part 509. In addition, facilities must document the influenza vaccination status of all personnel for the current influenza season in a secure file separate from their personnel history folder. At the request of OMH, facilities must report the number and percentage of personnel that have been vaccinated against influenza for the current flu season. Facilities must develop and implement a policy and procedure to ensure compliance with the provisions of this Part. No additional professional services are required as a result of this regulation.

3. Compliance costs: There will be modest costs to providers, regardless of their geographic location, as a result of this regulation. The exact costs, while impossible to quantify, are not expected to be significant. The Department of Health has estimated that on average, the price of a surgical or procedure mask varies between approximately 10 to 25 cents per mask, subject to the quantity ordered. These costs are expected to be offset by the savings reflected in the reduction of influenza in personnel and the loss of productivity and available staff.

4. Minimizing adverse impact: The regulations could have required all personnel be vaccinated for influenza; however, OMH believes it to be less burdensome to require the use of surgical or procedure masks for personnel who have not been vaccinated. The requirement to wear a surgical mask does not impose any physical limitations on the individual wearing the mask, as it would if the regulation required the use of a respirator, which would provide a higher level of protection. In addition, the requirement that personnel who have not been vaccinated wear a mask is only in effect during influenza season as determined by the Commissioner of Health.

5. Participation of public and private interests in rural areas: OMH has released a health advisory notifying OMH-operated psychiatric centers and free standing Article 31 psychiatric hospitals that the agency is promulgating a regulation establishing provisions designed to reduce the transmission of the influenza virus. The health advisory was shared with union representatives. In accordance with statutory requirements, the rule was presented to the Behavioral Health Services Advisory Council for review and recommendation at their meeting on December 13, 2013. The Council voted to approve the proposal.

#### **Job Impact Statement**

A Job Impact Statement for these amendments is not being submitted with this rule making. The new 14 NYCRR Part 509 is being created to establish provisions designed to reduce the transmission of the influenza virus in OMH-operated psychiatric centers (including all programs and services operated by, or under the auspices of such psychiatric centers) and "free standing" Article 31 psychiatric hospitals. It is apparent from the nature and purpose of the rule that it will not have an impact on jobs and employment opportunities.

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## Public Service Commission

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

#### **Verizon New York Inc.'s Service Quality and Customer Trouble Report Rate (CTRR) Levels at Certain Central Office Entities**

**I.D. No.** PSC-08-14-00015-P

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

**Proposed Action:** The Commission is considering a "Targeted CTRR Remediation Plan" submitted by Verizon New York Inc. to improve service quality and network reliability at certain central office entities.

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

**Subject:** Verizon New York Inc.'s service quality and Customer Trouble Report Rate (CTRR) levels at certain central office entities.

**Purpose:** To improve Verizon New York Inc.'s service quality and the Customer Trouble Report Rate levels at certain central office entities.

**Substance of proposed rule:** The Commission is considering whether to

adopt, modify, or reject, in whole or in part, the proposal set forth by Verizon New York Inc. (Verizon or the company) for a "Targeted CTRR Remediation Plan" (CTRR Plan) dated January 31, 2014. The CTRR Plan presents proposed corrective measures to achieve improvement in service quality and network reliability. The objectives of the CTRR Plan are to improve CTRR levels at certain central office entities (COEs) by reducing the number and frequency of reported troubles at those COEs. The CTRR Plan addresses those objectives by developing a program of capital investment and proactive maintenance aimed at reducing the number of troubles experienced by customers served by those certain COEs. Verizon expects the CTRR Plan to improve service quality in the targeted COEs for all classes of business and residence customers. The Commission may take further action as required.

**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-C-0161SP1)

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

**Automated Meter Reading (AMR)**

**I.D. No.** PSC-08-14-00016-P

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

**Proposed Action:** The Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Niagara Mohawk Power Corporation d/b/a National Grid to make changes to its rates, charges, rules and regulations contained in PSC No. 219 — Gas.

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

**Subject:** Automated Meter Reading (AMR).

**Purpose:** To establish fees for residential customers who choose to opt out of using AMR meters.

**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 (the Company) to its gas tariff schedule P.S.C. No. 219 — Gas. The Company proposes to establish fees to allow residential gas customers to opt out of using Automated Meter Reading (AMR) meters by electing to have the Company (1) install/maintain a non-AMR meter (one that does not use a transmitter to remotely read the meter) at their premises and (2) manually read their meters through in-person, bi-monthly meter reads. The proposed filing has an effective date of June 1, 2014.

**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.

(14-M-0039SP2)

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

**Automated Meter Reading (AMR)**

**I.D. No.** PSC-08-14-00017-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 approve or reject, in whole or in part, a proposal filed by Niagara Mohawk Power Corporation d/b/a National Grid to make changes to its rates, charges, rules and regulations contained in PSC No. 220 — Electricity.

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

**Subject:** Automated Meter Reading (AMR).

**Purpose:** To establish fees for residential customers who choose to opt out of using AMR meters.

**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 (the Company) to its electric schedule P.S.C. No. 220 — Electricity. The Company proposes to establish fees to allow residential electric customers to opt out of using Automated Meter Reading (AMR) meters by electing to have the Company (1) install/maintain a non-AMR meter (one that does not use a transmitter to remotely read the meter) at their premises and (2) manually read their meters through in-person, bi-monthly meter reads. The proposed filing has an effective date of June 1, 2014.

**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.

(14-M-0039SP1)

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

**Transfer Franchises of UWWC into UWNR Such That UWNR Survives As the Merged Corporation Renamed "United Water Westchester, Inc."**

**I.D. No.** PSC-08-14-00018-P

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

**Proposed Action:** The Commission is considering a Joint Petition filed by United Water Westchester, Inc. (UWWC) and United Water New Rochelle, Inc. (UWNR) for approval to transfer franchises and merge the two companies.

**Statutory authority:** Public Service Law, sections 89-h and 108

**Subject:** Transfer franchises of UWWC into UWNR such that UWNR survives as the merged corporation renamed "United Water Westchester, Inc."

**Purpose:** To achieve operational and other synergy savings, flexibility and efficiency in the provision of water service.

**Substance of proposed rule:** The Commission is considering whether to adopt, modify, or reject, in whole or in part, the proposals set forth by United Water Westchester, Inc. (UWWC) and United Water New Rochelle, Inc. (UWNR) in a Verified Joint Petition dated January 10, 2014, seeking approval to transfer franchises and merge the two companies. In the petition, it is proposed that the franchises held by UWWC would be transferred to UWNR; that the books, records, and accounts of UWWC would become assets of UWNR; that all of UWWC's rights and obliga-

tions would be transferred to UWNR as its successor; and that the shares of stock in UWWC would be cancelled and cease to exist. UWNR would continue as the surviving corporation. At the time of the merger, UWNR, the surviving corporation, would be renamed "United Water Westchester, Inc".

*Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.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.

(14-W-0006SP1)

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

**Automated Meter Reading (AMR)**

**I.D. No.** PSC-08-14-00019-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 approve or reject, in whole or in part, a proposal filed by KeySpan Gas East Corporation d/b/a National Grid to make changes to its rates, charges, rules and regulations contained in PSC No. 1 — Gas.

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

*Subject:* Automated Meter Reading (AMR).

*Purpose:* To establish fees for residential customers who choose to opt out of using AMR meters.

*Substance of proposed rule:* The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by KeySpan Gas East Corporation d/b/a National Grid (the Company) to its gas tariff schedule P.S.C. No. 1 — Gas. The Company proposes to establish fees to allow residential gas customers to opt out of using Automated Meter Reading (AMR) meters by electing to have the Company (1) install/maintain a non-AMR meter (one that does not use a transmitter to remotely read the meter) at their premises and (2) manually read their meters through in-person, bi-monthly meter reads. The proposed filing has an effective date of June 1, 2014.

*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.

(14-M-0039SP3)

## Workers' Compensation Board

### NOTICE OF ADOPTION

#### Independent Medical Examinations

**I.D. No.** WCB-12-13-00004-A

**Filing No.** 129

**Filing Date:** 2014-02-11

**Effective Date:** 2014-02-26

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

*Action taken:* Amendment of section 300.2 of Title 12 NYCRR.

*Statutory authority:* Workers' Compensation Law, sections 117, 141 and 137

*Subject:* Independent Medical Examinations.

*Purpose:* Regulate the conduct and reporting of Independent Medical Examinations.

*Substance of final rule:* The proposed amendments to section 300.2 of 12 NYCRR modify the rules governing independent medical examinations (IME), independent medical examiners, IME entities and reports made without physical examination.

Paragraphs (1) and (2) of subdivision (b) of section 300.2 of 12 NYCRR are amended to clarify that a physician or provider who has examined the claimant for the sole purpose of a consultation or diagnostic examination or test is not an attending physician or provider within the meaning of the Workers' Compensation Law, and to clarify that a physician or provider who conducts a records review must be authorized by the Chair or the Workers' Compensation Board (Board).

Paragraph (6) of subdivision (b) of section 300.2 of Title 12 NYCRR is repealed and a new paragraph (6) is added to provide a definition for an IME entity.

Paragraphs (9) and (11) of subdivision (b) are amended. Paragraph (9) requires that when an authorized provider is not available for a records review, then a qualified provider must be selected. Paragraph (11) has been amended to clarify that a "substantive communication" for the purposes of determining whether a request for information must be filed with the Board does not include documents that are already part of the Board's file.

Paragraph (12) of subdivision (b) has been added to supply a definition for "Reports made without physical examination" or "Records review."

Paragraph (3) of subdivision (c) sets forth the procedures for retaining authorization privileges and removal of a provider from the list of authorized examiners.

Paragraph (1) of subdivision (d) is amended to provide that notice of an independent medical examination must be mailed to the Board on the same day it is mailed to the claimant, that an overnight delivery service may be used, and sets forth rules for use of an overnight delivery service.

Paragraph (3) of subdivision (d) is repealed and new paragraphs (3), (4), (5) and (6) are added. Paragraphs (4) and following are renumbered. Paragraph (3) of subdivision (d) requires that information, as that term is defined, that is supplied to an independent medical examiner must be part of the Board file. The information must be submitted to the Board no later than the day that information is first sent to an independent medical examiner or IME entity. Paragraph (4) of subdivision (d) sets forth the requirements for the contents and service of the report of independent medical examination. Paragraph (5) of subdivision (d) sets for the requirements for service of requests for information. Paragraph (6) of subdivision (d) sets forth the requirement for reports filed by an IME entity, as well as stating what services may be supplied by an IME entity.

Newly renumbered paragraphs (7), (8), (10), (12) and (14) of subdivision (d) of Title 12 NYCRR are amended. Paragraph (7) of subdivision (d) clarifies the process for videotaping an examination. Paragraph (8) of subdivision (d) addresses the limited patient-physician or provider relationship that exists between a claimant and the examiner. Paragraph (10) of subdivision (d) clarifies that the reasons for use of a qualified provider are also applicable to records reviews. Paragraph (12) of subdivision (d) is amended to require that an objection that a report does not substantially comply with Workers' Compensation Law section 137 or this section must be raised in a timely manner. Paragraph (14) states that a report must be filed within 10 business days of the examination and that a report is filed with the Board when it has been received by the Board.

Paragraph (1) of subdivision (e) is repealed and a new paragraph (1)

added that describes the mandatory registration process for IME entities. Mandatory registration must occur every three years. Paragraphs (2), (3), (4) and (5) of subdivision (e) have been amended. The changes are minor and include a requirement in Paragraph (3) that an IME entity comply fully with any investigation by the Chair. New paragraph (6) has been added to subdivision (e). It describes the basis and procedures for removal of a registered IME entity. New paragraph (7) provides for imposition of a \$10,000 penalty and revocation of an IME entity's registration when the Chair finds that an IME entity has materially altered an IME report or caused a material alteration.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 300.2(b)(9), (11), (d)(4)(iv) and (8).

**Revised rule making(s) were previously published in the State Register** on January 8, 2014.

**Text of rule and any required statements and analyses may be obtained from:** Heather MacMaster, Workers' Compensation Board, 328 State Street, Schenectady, NY 12305-2318, (518) 486-9564, email: regulations@wcb.ny.gov

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

A revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not required because the changes made to the last published rule do not necessitate revision to the previously published document. The changes to the text are not substantial, do not change the meaning of any provision and therefore do not change any statements in the document. Specifically, four minor changes were made to ensure internal consistency and consistency with other regulations.

**Assessment of Public Comment**

The 30-day public comment period with respect to revised Proposed Rule I.D. No. WCB121300004 commenced on January 8, 2014, and expired on February 7, 2014. The Chair and the Workers' Compensation Board (Board) accepted formal written public comments on the proposed rule through February 10, 2014.

The Chair and Board received written comments from the State Insurance Fund (SIF) and from Workplace Health Solutions, an IME entity (Workplace Health). Each comment is addressed below.

SIF commented that the Board should require that health care professionals who conduct records reviews to be authorized by the Board to conduct IMEs. The Board has not made any change to the regulation as the definition of records review requires that a health care professional conducting a records review be authorized as an IME examiner, authorized as a treating provider or "qualified" within the meaning of 12 NYCRR 300.2(b)(9).

SIF commented that the word "surgeon" should be removed from paragraph (9) of section 300.2 (b) since the word "physician" is also used and the word physician includes surgeons. This change is consistent with changes to paragraph (2) of section 300.2 (b). The Board has made this change.

SIF commented that to provide greater clarity, the language of paragraph (11) of section 300.2 (b) concerning requests for information should be amended to include "third party administrators." Third party administrators are defined under section 300.1 (10) as separate from insurance carriers. The Board has made this change.

SIF commented that paragraph (4) (i) of subdivision (d) which pertains to providing reports based on a review of records without an examination of the claimant should be changed to provide that such reports be "completed, filed and served" at least 3 business days prior to a scheduled hearing date, rather than simply "sent" at least 3 days prior to a hearing. Because a records review is not an IME, the Board has not accepted the suggestion to impose the same requirements as an IME report. The Board has, however, changed the language to provide that the records review should be "filed with the Board and submitted to all other parties or their representatives" at least three business days prior to the scheduled hearing.

SIF also suggested that the Board make a form change in conjunction with its amendment specifically stating that an IME provider may not refuse to conduct an IME because a claimant intends to videotape the examination. This suggestion will be forwarded to Board's the Business Process Reengineering project for consideration.

SIF also suggested changing the word "provider" to "physician" in paragraph (8) of subdivision (d) to make it consistent with paragraph (1) of subdivision (b). The Board has made this change.

Workplace Health commented that the IME provider would not be able to sign the IME-3 form if the medical reports are sent to the Board at the same time they are sent to the provider. Any medical records provided to the IME provider at the time the IME is scheduled and that were supplied to the Board at that time in accordance with paragraph (3) of subdivision (d) are not a request for information or a response to a request for

information. Accordingly, no IME-3 is required for submission of these records to the Board. Accordingly, the Board has made no change in response to this comment.

Workplace Health commented that when a claimant treats with more than one attending physician or practitioner, the requirement that a copy of the IME report be provided to all that have treated the claimant within the last six (6) months has the potential to be unduly burdensome on the IME entity based upon the potential volume of attending physicians or practitioners. Workplace Health suggests that the Board accept copies of reports being sent to all attending physician or practitioner that are listed in the Board file as "Interested Parties." The regulation requires that the IME report be submitted to all physicians or practitioners that have treated the claimant for the condition that is the subject of the IME. This list should be readily available to the insurance carrier, employer or third-party administrator requesting the IME based on a review of the medical records in the file, and supplied to the IME entity or the IME provider. The list of medical providers that are parties of interest in the Board file would not be appropriate as they are added due to a disputed medical bill and not because of the nature of the treatment. The Board has not made any changes in response to this comment.

Workplace Health commented that the regulation does not advise who is responsible for the distribution of a records review. As the regulation does not prescribe who should submit the records review, the arrangements for submission of the records review may be arranged by the parties seeking the records review or conducting the records review. The Board has not made any change in response to this comment.

Workplace Health commented that the regulation does not describe the notice required from the claimant when he or she intends to videotape the IME or the time frame for such notice. The Board has not made any change in response to this comment. Workers' Compensation Law section 137 permits the claimant to videotape the IME and requires that the IME provider give notice of his or her intent to videotape. The claimant is not required to give notice in advance.

Workplace Health commented that the changes to paragraph (12) of subdivision (d) are unclear as to whether the claimant may waive his or her entitlement to ten days notice of the scheduling of an IME. This paragraph, formerly paragraph (9) of subdivision (d), does not impact the claimant's ability to waive the time frame for notice. It has been amended solely to permit denial of an objection to an IME report when such objection is not raised in a timely manner. The Board has not made any change in response to this comment.

**CHANGES TO THE REGULATION:**

The Regulation that is being adopted contains the following changes from the revised proposed rule published in the January 8, 2014 State Register:

- In subdivision (b)(9), the word "surgeon" has been removed from the first sentence.
- In subdivision (b)(11), the first sentence has been changed. Specifically, "or insurance carrier" has been changed to "an insurance carrier or third-party administrator."
- In subdivision (d)(4)(iv), the requirement that records reviews be "sent" to the Board and all parties has been changed to require that records reviews be "filed" with the Board and "submitted" to all parties three business days before a hearing.
- In subdivision (d)(8), attending "provider" has been changed to "physician."