RULE MAKING ACTIVITIES

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

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

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

Office of Children and Family Services

NOTICE OF ADOPTION

To Allow the Business Enterprise Program to Expand Opportunities for Employment of Blind and Visually Impaired Individuals

I.D. No. CFS-25-15-00004-A
Filing No. 809
Filing Date: 2015-09-21
Effective Date: 2015-10-07

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

Action taken: Amendment of sections 729.1, 729.2, 729.14, 729.18, 729.19 and 729.20 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20, 34 and 38; Unconsolidated Law, section 8714-a

Subject: To allow the Business Enterprise Program to expand opportunities for employment of blind and visually impaired individuals.

Purpose: To allow the Business Enterprise Program to expand opportunities for employment of blind and visually impaired individuals.

Substance of final rule: Amendment of 18 NYCRR Part 729

Section 729.1 of Title 18 is amended pursuant to Chapter 532 of the Laws of 2010 to include buildings which house an authority, agency or entity whose board of directors or executives are appointed by the Governor, or any airport located in the State of New York, as potential locations at which the Commission is authorized to establish a Business Enterprise Program vending facility.

Paragraph (b) of Section 729.2 is amended to include the reference to Chapter 532 of the Laws of 2010.

Paragraph (c) Section 729.2 is amended to reflect the name change of the Commission pursuant to Chapter 265 of the Laws of 2013.

Paragraph (e) of Section 729.2 is amended to expand the definition of "Instrumentality of the State" to include all authorities and airports located in the state of New York.

Paragraph (d) Section 729.14 is amended to expand protections against discrimination for vending facility employees.

Section 729.18 is amended to clarify the Commission's procedures to establish new locations for the operation of vending facilities. The section is retitled "Vending facility operating agreements with Licensees." Protections against discrimination for vending facility patrons are expanded. Paragraphs (a) through (c) of this section are deleted and moved to Section 729.19.

Section 729.19 is amended to eliminate the minimum population requirement in State buildings for the Commission to exercise its priority. Prior exemptions for the State University of New York, New York State Thruway Authority and the Department of Corrections and Community Supervision are also eliminated. Paragraphs (a) through (c) of 729.18 have been moved to this section for clarity, and other paragraphs in the existing regulations are reordered.

New paragraph 729.19(f) is added, to provide factors to be examined in determining if a particular location is feasible for the operation of a vending facility. Information the Commission will consider in determining if the location would be adverse to the interests of the state is also set forth.

Section 729.19 is further amended to require agencies, authorities and other entities covered by Chapter 532 of the Laws of 2010 to annually designate a contact to communicate with the Commission regarding Business Enterprise Program matters.

Section 729.20(b) is amended to condition a blind licensee's receipt of income from vending machines adjacent to the vending facility operated by that blind licensee upon the scope of the vending facility permit as well as whether the receipt of such income by the blind licensee would be adverse to the interests of the state.

Final rule as compared with last published rule: Nonsubstantial changes were made in sections 729.2(c), 729.14(d) and 729.19(a).

Text of rule and any required statements and analyses may be obtained from: Public Information Office, New York State Office of Children and Family Services, 52 Washington Street, Rensselaer, New York 12144, (518) 473-7793, email: info@ocfs.ny.gov

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

Changes made to the rule do not necessitate any changes to the previously published regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis and job impact statement.

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

The Office of Children and Family Services (OCFS) received written comments from one commentator on the proposed regulations regarding changes to Part 729 of Title 18 of the NYCRR, to implement the expansion of the Business Enterprise Program (BEP) priority, pursuant to Chapter 532 of the Laws of 2010. The commentator was a member of the Legislature.

Comment:

The commentator noted that the proposal included an expansion of protections against discrimination by the licensee in the provision of goods and services to the public, but did not expand protections against discrimination in selecting employees for vending facilities. It was suggested that the regulation at 18 NYCRR 729.14(d) be amended to include

the same protections against discrimination afforded to the general public as well on the basis of domestic violence victim status and predisposing genetic characteristics.

Response:

This section of regulation has not been revised since 2002, and thus predates the enactment of statutory changes to the Executive Law which added bases to protections against discrimination on the basis of domestic violence victim status and predisposing genetic characteristics. The regulations at 18 NYCRR 729.14(d) explicitly require licensees to comply with the New York State Human Rights Law in the selection of employees, therefore these additional bases are currently included. However, the regulations were revised in response to this comment with a non-substantive change to existing section 729.14(d).

Comment:

The commentator noted that the proposal does not amend the name of the Commission in accordance with Chapter 265 of the Laws of 2013, which revised the full name of the Commission to the "NYS Commission for the Blind."

Response:

These regulatory changes were initially drafted prior to the enactment of Chapter 265 of the Laws of 2013. However, the regulations were revised in response to this comment and a non-substantive change to existing section 729.2(c) was made in accordance with Chapter 265 of the Laws of 2013.

Additionally, in response to oral comments received, the regulations were revised and a non-substantive change to existing section 729.19(a) to clarify that the Commission's authority to establish vending facilities includes the ability to place vending machines at covered locations.

Department of Economic Development

EMERGENCY RULE MAKING

Empire Zones Reform

I.D. No. EDV-40-15-00001-E

Filing No. 797

Filing Date: 2015-09-16

Effective Date: 2015-09-16

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

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

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

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

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

Subject: Empire Zones reform.

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

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

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

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

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

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

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

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

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

7. The emergency rule provides a description of the elements to be included in a zone development plan and requires that the plan be resubmitted by the local zone administrative board as economic conditions change within the zone. Changes to the zone development plan must be approved by the Commissioner of Economic Development ("the Commissioner").

Also, the rule adds additional situations under which a business enterprise may be granted a shift resolution.

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

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

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

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

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

13. The emergency rule adds the following new justifications for decertification of firms: (a) the business enterprise, that has submitted at

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

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

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

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

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

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

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

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

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

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires December 14, 2015.

Text of rule and any required statements and analyses may be obtained from: Thomas P Regan, NYS Department of Economic Development, 625 Broadway, Albany NY 12245, (518) 292-5123, email: tregan@esd.ny.gov

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

LEGISLATIVE OBJECTIVES:

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

NEEDS AND BENEFITS:

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

COSTS:

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

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

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

LOCAL GOVERNMENT MANDATES:

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

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

PAPERWORK:

The emergency rule imposes new record-keeping requirements on businesses choosing to participate in the Empire Zones program. The emergency rule requires all businesses that participate in the program to estab-

lish and maintain complete and accurate books relating to their participation in the Empire Zones program for a period of six years.

DUPLICATION:

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

ALTERNATIVES:

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

FEDERAL STANDARDS:

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

COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

1. Effect of rule

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

2. Compliance requirements

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

3. Professional services

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

4. Compliance costs

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

5. Economic and technological feasibility

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

6. Minimizing adverse impact

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

7. Small business and local government participation

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

Education Department

EMERGENCY RULE MAKING

Special Education Itinerant Services (SEIS)

I.D. No. EDU-13-15-00030-E
Filing No. 806
Filing Date: 2015-09-21
Effective Date: 2015-09-28

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

Action taken: Amendment of section 200.9 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 305(1), (2), (20), 4003(1), (2), 4401(5), 4405(4) and 4410(10); L. 2014, ch. 56, part A, section 11

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

Specific reasons underlying the finding of necessity: The proposed amendment relates to modifications of the reimbursement methodology for preschool Special Education Itinerant Services (SEIS), and is necessary to conform the Commissioner's Regulations with § 11 of Part A of Chapter 56 of the Laws of 2014, which amended Education Law § 4410 to require that SEIS be reimbursed based on actual attendance. Consistent with § 11 of Part A of Chapter 56 of the Laws of 2014, section 200.9(f)(2)(ix)(d) is amended to require SEIS rates be paid for each unit of service delivered, not to exceed the recommendations for such services in the student's individualized education program (IEP). The proposed amendment would also allow flexibility in how the minimum billable units of service adjustment are applied.

After publication of a Notice of Proposed Rule Making in the State Register on April 1, 2015, the proposed amendment was substantially revised in response to public comment and adopted as an emergency rule at the June 15-16, 2015 Regents meeting, effective July 1, 2015. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on July 15, 2015.

The proposed amendment has now been adopted as a permanent rule at the September 16-17, 2015 Regents meeting. Pursuant to SAPA § 203(1), the earliest effective date of the permanent rule is October 7, 2015, the date a Notice of Adoption will be published in the State Register. However, the June emergency rule will expire on September 27, 2015, 90 days after its filing with the Department of State on June 30, 2015. Emergency action is therefore necessary for the preservation of the general welfare to ensure that the proposed amendment adopted by emergency action at the June 2015 Regents meeting and adopted as a permanent rule at the September 2015 Regents meeting, remains continuously in effect until the effective date of its permanent adoption.

Subject: Special Education Itinerant Services (SEIS).

Purpose: To revise the SEIS tuition reimbursement methodology to:

(1) provide that reimbursement is to be paid upon the actual provision of SEIS to the student, in conformity with chapter 56 of the Laws of 2014;

(2) allow flexibility in how the minimum billable units of service adjustment are applied; and

(3) clarify that consultation with a student's regular early childhood provider is expressly included as a potential function of a special education itinerant teacher.

Text of emergency rule: Subparagraph (ix) of paragraph (2) of subdivision (f) of section 200.9 of the Regulations of the Commissioner of Education is amended, effective September 28, 2015, as follows:

(ix) The tuition rate for programs for preschool students with disabilities receiving special education itinerant services pursuant to section 4410(1)(k) of the Education Law, shall be established using the reimbursement methodology as set forth in paragraph (1) of this subdivision and subparagraphs (i) through (viii) of this paragraph, with the following modifications:

(a) . . .

(b) . . .

(c) Rates for the certified special education teacher providing special education itinerant services shall be published as half hour rates and billing by providers to municipalities must be done in half hour blocks of time. Billable time includes time spent providing direct and/or indirect special education itinerant services as defined in section 200.16(i)(3)(ii) of

this Part in accordance with the student's individualized education program (IEP). The difference between the total number of hours employed in the special education itinerant teacher's standard work week minus the hours of direct and/or indirect special education itinerant service hours must be spent on required functions. Such functions include but are not limited to: coordination of service when both special education itinerant services and related services are provided to a student pursuant to section 4410(1)(j) of the Education Law; preparation for and attendance at committee on preschool special education meetings; conferencing with the student's parents; classroom observation; and/or travel for the express purposes of such functions as stated above. For the purpose of this subparagraph, parent conferencing may include parent education for the purpose of enabling parents to perform appropriate follow-up activities at home. Billable time shall not be less than 66 percent or more than 72 percent of any special education itinerant teacher's total employment hours*; provided that the approved reimbursement methodology, developed by the commissioner and approved by the Director of the Budget, may adjust this billable time threshold.* Providers shall maintain adequate records to document direct and/or indirect service hours provided as well as time spent on all other activities related to each student served.

(d) Special education itinerant service rates will be calculated so that reimbursable expenditures shall be divided by the product of the number of days in session for which the program operates times the number of direct and/or indirect special education itinerant service hours per day times two. In instances where the special education itinerant services are provided in a group session, i.e., two or more students with a disability within the same block of time, the half hour rate must be prorated to each student receiving services. Special education itinerant service rates shall be paid [on the basis of enrollment as defined in section 175.6(a)(1) and (2) of this Title for the period of enrollment as defined by the student's IEP] *based on the number of half hour units delivered, provided that the total number of units delivered shall not exceed the recommendations for such services in the student's IEP.*

(e) . . .

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-13-15-00030-P, Issue of April 1, 2015. The emergency rule will expire November 19, 2015.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department and charges the Department with the general management and supervision of public schools and the educational work of the State.

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

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

Education Law sections 4003 and 4405(4) authorize the Commissioner of Education to develop a tuition reimbursement methodology for child care institutions, approved private programs and special act school districts. The sections establish that reimbursement rates be effective July first through June thirtieth and subject to approval by the Director of the Budget.

Education Law section 4401(5) establishes the basis for calculating tuition rates.

Education Law section 4410(10) authorizes the Commissioner to annually determine tuition rates for approved special services or programs provided to preschool children in conformance with the methodology established pursuant to Education Law section 4405(4) and subject to the approval of the Director of the Budget.

Section 11 of Part A of Chapter 56 of the Laws of 2014 amended Education Law § 4410(10)(a)(i) to provide that, commencing with the 2015-16 school year, approved programs providing SEIS must be reimbursed based on the actual attendance of preschool children receiving SEIS services.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above authority and is necessary to conform the Commissioner's Regulations to Education Law § 4410(10)(a)(i), as amended by § 11 of Part A of Chapter 56 of the Laws of 2014.

3. NEEDS AND BENEFITS:

Currently, pursuant to Commissioner's Regulation section 200.9(f)(2)(ix)(d), SEIS rates are paid on the basis of enrollment as defined in section 175.6(a)(1) and (2). Chapter 56 of the Laws of 2014 amended Education Law § 4410(10)(a)(i) to provide that, commencing with the 2015-16 school year, approved programs providing SEIS must be reimbursed based on the actual attendance of preschool children receiving SEIS services. According to the legislative intent contained in the 2014-15 Executive Budget Briefing Book, this provision was recommended by the Executive in order to limit "payment to program operators only for services that are actually provided, incentivizing delivery of these mandated services to children."

In order to effectuate the statutory requirement that SEIS be reimbursed based on actual attendance, section 200.9(f)(2)(ix)(d) would be amended to require SEIS rates be paid for each unit of service delivered, not to exceed the recommendations for such services in the student's IEP.

Section 200.9(f)(2)(ix)(c) currently requires that that SEIS billable time may not be less than 66 percent or more than 72 percent of any special education itinerant teacher's total employment hours in order to ensure that a certain percentage of teacher time is spent directly providing instructional services to students. Data analysis and stakeholder discussions conducted as part of a preschool tuition reimbursement study issued by the Department in December 2014 demonstrated that there are certain circumstances in which meeting this billable time threshold may be difficult, for example depending on varying travel time that may be required in certain regions of the State.

In order to allow for individual factors to be considered when applying the billable time adjustment, section 200.9(f)(2)(ix)(c) would be amended to maintain the current 66 percent minimum and 72 maximum restrictions but to further provide that the approved tuition reimbursement methodology, developed by the Commissioner and approved by the Director of the Budget, may alter the billable time threshold.

4. COSTS:

a. Costs to State government: None.

b. Costs to local governments: None.

c. Costs to regulated parties: None.

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

The proposed amendment is necessary to implement § 11 of Part A of Chapter 56 of the Laws of 2014 and does not impose any additional costs on the State, local governments, private regulated parties or the State Education Department beyond those inherent in the statute. Consistent with § 11 of Part A of Chapter 56 of the Laws of 2014, which requires that SEIS be reimbursed based on actual attendance, section 200.9(f)(2)(ix)(d) would be amended to require SEIS rates be paid for each unit of service delivered, not to exceed the recommendations for such services in the student's individualized education program (IEP). The proposed amendment would also allow flexibility in how the minimum billable units of service adjustment are applied.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary in part to implement § 11 of Part A of Chapter 56 of the Laws of 2014 and does not impose any additional program, service, duty or responsibility upon local governments beyond those inherent in the statute. Consistent with § 11 of Part A of Chapter 56 of the Laws of 2014, which requires that SEIS be reimbursed based on actual attendance, section 200.9(f)(2)(ix)(d) would be amended to require SEIS rates be paid for each unit of service delivered, not to exceed the recommendations for such services in the student's individualized education program (IEP). The proposed amendment would also allow flexibility in how the minimum billable units of service adjustment are applied.

6. PAPERWORK:

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

7. DUPLICATION:

The proposed amendment is necessary in part to implement § 11 of Part A of Chapter 56 of the Laws of 2014 and will not duplicate, overlap or conflict with any other State or federal statute or regulation.

8. ALTERNATIVES:

There are no significant alternatives to the rule and none were considered. The proposed amendment is necessary to implement § 11 of Part A of Chapter 56 of the Laws of 2014. The proposed amendment would also allow flexibility in how the minimum billable units of service adjustment are applied.

9. FEDERAL STANDARDS:

The proposed amendment does not exceed any minimum standards of the federal government for the same or similar subject areas and is not required by federal law or regulations, but will ensure consistency with recent changes to State statute.

10. COMPLIANCE SCHEDULE:

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

ance with the proposed amendment by its effective date. The proposed amendment is necessary in part to implement § 11 of Part A of Chapter 56 of the Laws of 2014 and does not impose any additional compliance requirements or costs beyond those inherent in the statute. Consistent with § 11 of Part A of Chapter 56 of the Laws of 2014, which requires that SEIS be reimbursed based on actual attendance, section 200.9(f)(2)(ix)(d) would be amended to require SEIS rates be paid for each unit of service delivered, not to exceed the recommendations for such services in the student's individualized education program (IEP). The proposed amendment would also allow flexibility in how the minimum billable units of service adjustment are applied.

Regulatory Flexibility Analysis

1. EFFECT OF RULE:

The proposed amendment is applicable to approved providers of Special Education Itinerant Services (SEIS) to students with disabilities. Approved providers include public school districts, boards of cooperative educational services (BOCES), municipalities, Article 28 hospitals, and private agencies (for-profit or not-for-profit) approved by the Commissioner to provide SEIS. There are 334 approved SEIS programs. Of that number, 236 are private agencies, 73 are public school districts, 16 are BOCES, 6 are municipalities, 2 are Article 28 hospitals, 1 is a State-operated school (School for the Deaf). The Department does not keep data regarding the number of SEIS providers that are small businesses, but of the 213 SEIS providers that submitted financial reports for the 2012-13 year, 96 identified themselves as proprietary, partnership, or for-profit.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any additional compliance requirements. Currently, pursuant to Commissioner's Regulation section 200.9(f)(2)(ix)(d), SEIS rates are paid on the basis of enrollment as defined in section 175.6(a)(1) and (2). Chapter 56 of the Laws of 2014 amended Education Law § 4410(10)(a)(i) to provide that, commencing with the 2015-16 school year, approved programs providing SEIS must be reimbursed based on the actual attendance of preschool children receiving SEIS services. According to the legislative intent contained in the 2014-15 Executive Budget Briefing Book, this provision was recommended by the Executive in order to limit "payment to program operators only for services that are actually provided, incentivizing delivery of these mandated services to children."

In order to effectuate the statutory requirement that SEIS be reimbursed based on actual attendance, section 200.9(f)(2)(ix)(d) would be amended to require SEIS rates be paid for each unit of service delivered, not to exceed the recommendations for such services in the student's IEP.

Section 200.9(f)(2)(ix)(c) currently requires that that SEIS billable time may not be less than 66 percent or more than 72 percent of any special education itinerant teacher's total employment hours in order to ensure that a certain percentage of teacher time is spent directly providing instructional services to students. Data analysis and stakeholder discussions conducted as part of a preschool tuition reimbursement study issued by the Department in December 2014 demonstrated that there are certain circumstances in which meeting this billable time threshold may be difficult, for example depending on varying travel time that may be required in certain regions of the State.

In order to allow for individual factors to be considered when applying the billable time adjustment, section 200.9(f)(2)(ix)(c) would be amended to maintain the current 66 percent minimum and 72 maximum restrictions but to further provide that the approved tuition reimbursement methodology, developed by the Commissioner and approved by the Director of the Budget, may alter the billable time threshold.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

The proposed amendment is necessary to implement § 11 of Part A of Chapter 56 of the Laws of 2014 and does not impose any additional costs on the State, local governments, private regulated parties or the State Education Department beyond those inherent in the statute. Consistent with § 11 of Part A of Chapter 56 of the Laws of 2014, which requires that SEIS be reimbursed based on actual attendance, section 200.9(f)(2)(ix)(d) would be amended to require SEIS rates be paid for each unit of service delivered, not to exceed the recommendations for such services in the student's individualized education program (IEP). The proposed amendment would also allow flexibility in how the minimum billable units of service adjustment are applied.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement § 11 of Part A of Chapter 56 of the Laws of 2014 and does not impose any additional compliance requirements or costs. Consistent with § 11 of Part A of Chapter 56 of the Laws of 2014, which requires that SEIS be reimbursed based on actual attendance, section 200.9(f)(2)(ix)(d) would be amended to require SEIS rates be paid for each unit of service delivered, not to exceed the recommendations for such services in the student's individualized education program (IEP). The proposed amendment would also allow flexibility in how the minimum billable units of service adjustment are applied.

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.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all of the 334 approved providers of Special Education Itinerant Services (SEIS) 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 Department collects data with respect to the county where the provider is located. Of the 334 approved SEIS providers, 84 are located in a county will less than 200,000 inhabitants and 67 are located in a county that has a township with population densities of 150 persons or less per square mile.

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

The proposed amendment does not impose any additional compliance requirements on entities in rural areas. Currently, pursuant to Commissioner's Regulation section 200.9(f)(2)(ix)(d), SEIS rates are paid on the basis of enrollment as defined in section 175.6(a)(1) and (2). Chapter 56 of the Laws of 2014 amended Education Law § 4410(10)(a)(i) to provide that, commencing with the 2015-16 school year, approved programs providing SEIS must be reimbursed based on the actual attendance of preschool children receiving SEIS services. According to the legislative intent contained in the 2014-15 Executive Budget Briefing Book, this provision was recommended by the Executive in order to limit "payment to program operators only for services that are actually provided, incentivizing delivery of these mandated services to children."

In order to effectuate the statutory requirement that SEIS be reimbursed based on actual attendance, section 200.9(f)(2)(ix)(d) would be amended to require SEIS rates be paid for each unit of service delivered, not to exceed the recommendations for such services in the student's IEP.

Section 200.9(f)(2)(ix)(c) currently requires that that SEIS billable time may not be less than 66 percent or more than 72 percent of any special education itinerant teacher's total employment hours in order to ensure that a certain percentage of teacher time is spent directly providing instructional services to students. Data analysis and stakeholder discussions conducted as part of a preschool tuition reimbursement study issued by the Department in December 2014 demonstrated that there are certain circumstances in which meeting this billable time threshold may be difficult, for example depending on varying travel time that may be required in certain regions of the State.

In order to allow for individual factors to be considered when applying the billable time adjustment, section 200.9(f)(2)(ix)(c) would be amended to maintain the current 66 percent minimum and 72 maximum restrictions but to further provide that the approved tuition reimbursement methodology, developed by the Commissioner and approved by the Director of the Budget, may alter the billable time threshold.

3. COMPLIANCE COSTS:

The proposed amendment is necessary to implement § 11 of Part A of Chapter 56 of the Laws of 2014 and does not impose any additional costs on the State, local governments, private regulated parties or the State Education Department beyond those inherent in the statute. Consistent with § 11 of Part A of Chapter 56 of the Laws of 2014, which requires that SEIS be reimbursed based on actual attendance, section 200.9(f)(2)(ix)(d) would be amended to require SEIS rates be paid for each unit of service delivered, not to exceed the recommendations for such services in the student's individualized education program (IEP). The proposed amendment would also allow flexibility in how the minimum billable units of service adjustment are applied.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement § 11 of Part A of Chapter 56 of the Laws of 2014 and does not impose any additional compliance requirements or costs on entities in rural areas beyond those inherent in the statute. Consistent with § 11 of Part A of Chapter 56 of the Laws of 2014, which requires that SEIS be reimbursed based on actual attendance, section 200.9(f)(2)(ix)(d) would be amended to require SEIS rates be paid for each unit of service delivered, not to exceed the recommendations for such services in the student's individualized education program (IEP). The proposed amendment would also allow flexibility in how the minimum billable units of service adjustment are applied.

Because the statute and Regents policy upon which the proposed amendment is based applies to all SEIS providers in the State, it is not possible to establish differing compliance or reporting requirements or timetables or to exempt providers 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.

Job Impact Statement

The proposed amendment relates to modifications of the reimbursement methodology for preschool Special Education Itinerant Services (SEIS), and will not have an adverse impact on jobs or employment opportunities. The proposed amendment is necessary to conform the Commissioner's Regulations with § 11 of Part A of Chapter 56 of the Laws of 2014, which amended Education Law § 4410 to require that SEIS be reimbursed based on actual attendance. Consistent with the statute, the proposed amendment requires SEIS rates be paid for each unit of service delivered, not to exceed the recommendations for such services in the student's individualized education program (IEP). The revised proposed amendment would also allow flexibility in how the minimum billable units of service adjustment are applied. 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.

EMERGENCY RULE MAKING

Self-Administration of Certain Medications by Students

I.D. No. EDU-14-15-00003-E

Filing No. 816

Filing Date: 2015-09-21

Effective Date: 2015-09-28

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

Action taken: Addition of section 136.7 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 305(1), (2), 902-a(1), (2), 902-b(1), (2), 916-a(1), (2), 916-b(1), (2), 921(1) and (2); L. 2014, ch. 423

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

Specific reasons underlying the finding of necessity: The proposed rule is necessary to implement Education Law sections 916, 916-a, 916-b, 902-a, 902-b and 921, as added and amended by Chapter 423 of the Laws of 2014. The proposed rule sets forth standards for the self-administration by students of prescribed inhaled rescue medications and epinephrine auto-injectors, and standards for allowing students to carry and self-administer prescribed insulin, carry glucagon, and carry and use equipment and supplies necessary to check blood glucose and/or ketone levels, during the school day on school property and at a school function, including requirements for the written consent of the parent or person in parental relation and written permission (also referred to as an order) and an attestation from a duly authorized health care provider providing certain specified information including the expiration date of the order, name and dose of prescribed medication, times when medication is to be self-administered, and circumstances which may warrant the use of the medication. The proposed rule is also necessary to establish standards for the training of unlicensed school personnel to administer prescribed epinephrine auto-injectors and glucagon to specific students under specified conditions, consistent with Chapter 423 of the Laws of 2014, for those school districts and BOCES that choose to provide such training.

Since publication of a Notice of Proposed Rule Making in the State Register on April 8, 2015, the proposed amendment was been substantially revised in response to public comment and adopted as an emergency action at the June 15-16, 2015 Regents meeting, effective July 1, 2015. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on July 15, 2015.

The proposed amendment has now been adopted as a permanent rule at the September 16-17, 2015 Regents meeting. Pursuant to SAPA section 203(1), the earliest effective date of the proposed rule is October 7, 2015, the date a Notice of Adoption will be published in the State Register. However, the June emergency rule will expire on September 27, 2015, 90 days after its filing with the Department of State on June 30, 2015. A lapse in the emergency rule could result in potential health hazards to the extent it would disrupt or inhibit the ability of students to self-administer prescribed inhaled rescue medications, prescribed insulin and glucagon during the school day on school property and at a school function, and disrupt or inhibit the ability of unlicensed school personnel to administer prescribed epinephrine auto-injectors and glucagon to specific students under specified conditions, consistent with Chapter 423 of the Laws of 2014.

Emergency action is therefore necessary for the preservation of the public health and general welfare to ensure that the amendment adopted by emergency action at the June 2015 Regents meeting and adopted as a permanent rule at the September 2015 Regents meeting, remains continuously in effect until the effective date of its permanent adoption.

Subject: Self-administration of certain medications by students.

Purpose: To establish standards for the self-administration by students of certain prescribed medications on school property and at school functions; and to establish standards for the training of unlicensed school personnel to administer prescribed epinephrine auto injectors and glucagon to specific students under specified conditions.

Substance of emergency rule: At their September 16-17, 2015 meeting, the Board of Regents took emergency action to readopt the emergency rule adopted at the June 15-16, 2015 Regents meeting in order to ensure the June emergency rule remains continuously in effect until the effective date of its adoption as a permanent rule (which also occurred at the September 16-17, 2015 Regents meeting). The following is a summary of the emergency rule.

Section 136.7(a) sets forth definitions of "inhaled rescue medications", "epinephrine auto-injector", "ketone test", "blood glucose test", "insulin", "glucagon", "duly authorized health care provider", "cumulative health record", "emergency action plan", "diabetes management plan", "school day", "school property", and "school function".

Section 136.7(b) sets forth standards for the self-administration by students of prescribed inhaled rescue medications during the school day on school property or at a school function, including requirements for:

(1) written consent from the parent or person in parental relation; and

(2) written permission (also referred to as an order) and an attestation from a duly authorized health care provider of the following:

(i) that the student has a diagnosis of asthma or other respiratory disease for which inhaled rescue medications are prescribed;

(ii) that the student has demonstrated that he/she can self-administer the prescribed medication effectively; and

(iii) the expiration date of the order, name and dose of prescribed medication, times when medication is to be self-administered, and circumstances which may warrant the use of the medication.

A record of the written consents shall be maintained in the student's cumulative health record.

Upon written request of a parent or person in parental relation, the school district or board of cooperative educational services (BOCES) shall allow the student to maintain an extra inhaled rescue medication in the care and custody of a licensed nurse, nurse practitioner, physician assistant, or physician employed by the district or BOCES.

Such medication provided by the parent or person in parental relation shall be made available to the student as needed in accordance with school policy and the written permission provided by the duly authorized health provider.

Each student who is permitted to self-administer medication should have an emergency action plan on file with the district or BOCES.

Section 136.7(c) sets forth standards for the self-administration by students of prescribed epinephrine auto-injectors during the school day on school property or at a school function, including requirements for:

(1) written consent of the parent or person in parental relation; and

(2) written permission (also referred to as an order) and an attestation from a duly authorized health care provider of the following:

(i) the student has a diagnosis of an allergy for which an epinephrine auto-injector is needed;

(ii) the student has demonstrated that he/she can self-administer the epinephrine auto-injector effectively; and

(iii) the expiration date of the order, name and dose of prescribed medication, times when medication is to be self-administered, and circumstances which may warrant the use of the medication.

A record of such written consents shall be maintained in the student's cumulative health record.

Upon written request of a parent or person in parental relation, the school district or board of cooperative educational services (BOCES) shall allow the student to maintain an extra epinephrine auto-injector in the care and custody of a licensed nurse, nurse practitioner, physician assistant, or physician employed by the district or BOCES.

Such epinephrine auto-injector provided by the parent or person in parental relation shall be made available to the student as needed in accor-

dance with school policy and the orders prescribed by the duly authorized health provider.

Each student who is permitted to self-administer an epinephrine auto-injector should have an emergency action plan on file with the district or BOCES.

Section 136.7(d) sets forth standards for allowing students to carry and self-administer prescribed insulin, carry glucagon, and carry and use equipment and supplies necessary to check blood glucose and/or ketone levels during the school day on school property or at a school function, including requirements for:

(1) written consent of the parent or person in parental relation; and

(2) written permission (also referred to as an order) and an attestation from a duly authorized health care provider of the following:

(i) that the student has a diagnosis of diabetes for which insulin and glucagon, and the use of equipment and supplies to check glucose and/or ketone levels are necessary;

(ii) that the student has demonstrated that he/she can self-administer the insulin effectively, can self-check glucose or ketone levels independently, and can independently follow prescribed treatment orders; and

(iii) the expiration date of the order, name of the prescribed insulin or glucagon, the type of insulin delivery system, the dose of insulin to be administered, the times when the insulin is to be self-administered, the dose of glucagon to be administered, and the circumstances which may warrant the administration of insulin or glucagon.

(iv) The written permission must also identify the prescribed blood glucose or ketone test, the times testing is to be done, and any circumstances which warrant testing.

A written diabetes management plan shall be provided. A record of the written consents shall be maintained in the student's cumulative health record.

Upon written request of a parent or person in parental relation, the school district or board of cooperative educational services (BOCES) shall allow the student to maintain extra insulin, insulin delivery system, glucagon, blood glucose meter and related supplies in the care and custody of a licensed nurse, nurse practitioner, physician assistant, or physician employed by the district or BOCES, and shall be readily accessible to such pupil.

Such insulin, insulin delivery system, glucagon, blood glucose meter and related supplies provided by the parent or person in parental relation shall be made available to the student as needed in accordance with school policy and the orders prescribed by the duly authorized health provider.

Students with diabetes may also carry food, oral glucose, or other similar substances necessary to treat hypoglycemia pursuant to district policy, provided such policy shall not unreasonably interfere with a student's ability to treat hypoglycemia.

A record of such written consents shall be maintained in the student's cumulative health record.

Each student who is permitted to self-administer and self-test should have an emergency action plan on file with the district or BOCES.

Licensed nurses, nurse practitioners, physician assistants, or physicians employed by school districts or BOCES are authorized to calculate prescribed insulin dosages, administer prescribe insulin, program the prescribed insulin pump, refill the reservoir in the insulin pump, change the infusion site, inject prescribed glucagon, teach an unlicensed person to administer glucagon, and perform other authorized services within their scope of practice to students diagnosed with diabetes and who are permitted to self-administer and self-test.

Section 136.7(f)(1) establishes standards for the training of unlicensed school personnel to administer prescribed epinephrine auto-injectors to a student. Such training must be provided and documented by an authorized licensed health professional and include, but not be limited to:

(i) identification of the specific allergen(s) of the student, review of each student's emergency action plan if available;

(ii) signs and symptoms of a severe allergic reaction warranting administration of epinephrine;

(iii) how to access emergency services per school policy;

(iv) steps for administering the prescribed epinephrine auto-injector;

(v) observation of the trainee suing an auto-injector training device;

(vi) steps for providing ongoing care while waiting for emergency services;

(vii) notification of appropriate school personnel; and

(viii) methods of safely storing, handling and disposing of auto-injectors.

Section 136.7(2) establishes standards for the training of unlicensed school personnel to administer prescribed glucagon to a student. Such training must be provided and documented by an authorized licensed health professional and include, but not be limited to:

(i) overview of diabetes and hypoglycemia per Department of Health approved webinar;

(ii) review of student's emergency action plan if available, including treatment of mild or moderate hypoglycemia;

(iii) signs and symptoms of a severe hypoglycemia warranting administration of glucagon;

(iv) how to access emergency services per school policy;

(v) steps for mixing and administering the prescribed glucagon;

(vi) observation of the trainee using a glucagon training device;

(vii) steps for providing ongoing care while waiting for emergency services;

(viii) notification of appropriate school personnel; and

(ix) methods of safely storing, handling, and disposing of glucagon and used needles and syringes.

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-14-15-00003-P, Issue of April 8, 2015. The emergency rule will expire November 19, 2015.

Text of rule and any required statements and analyses may be obtained from: Kirti Goswami, 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 207 empowers the Board of Regents and the Commissioner of Education to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the State Education Department by law.

Education Law section 305(1) and (2) provide the Commissioner, as chief executive officer of the State's education system, with general supervision over all schools and institutions subject to the Education Law, or any statute relating to education, and responsibility for executing all educational policies of the Regents.

Chapter 423 of the Laws of 2014 amended section 916 of the Education Law and added new sections 916-a, 916-b, 902-a, and 902-b, effective July 1, 2015, to establish standards for the self-administration by students of certain prescribed medications on school property and at school functions. Additionally, Chapter 423 of the Laws of 2014 added a new section 921 to authorize, but not obligate, boards of education or trustees of each school district and boards of cooperative educational services (BOCES) and nonpublic schools to have certain specified licensed professionals to train unlicensed school personnel to inject prescribed glucagon or epinephrine auto-injectors to specific students under specified conditions during the school day on school property or at school functions. Training must be provided by a physician or other duly authorized licensed health care professional in a competent manner and must be completed in a form and manner prescribed by the Commissioner in regulation.

2. LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above statutory authority and is necessary to implement Education Law sections 916, 916-a, 916-b, 902-a, 902-b and 921, as added and amended by by Chapter 423 of the Laws of 2014.

3. NEEDS AND BENEFITS:

The proposed rule is necessary to set forth standards for the self-administration by students of prescribed inhaled rescue medications and epinephrine auto-injectors, and standards for allowing students to carry and self-administer prescribed insulin, carry glucagon, and carry and use equipment and supplies necessary to check blood glucose and/or ketone levels, during the school day on school property and at a school function, including requirements for the written consent of the parent or person in parental relation and written permission (also referred to as an order) and an attestation from a duly authorized health care provider providing certain specified information including the expiration date of the order, name and dose of prescribed medication, times when medication is to be self-administered, and circumstances which may warrant the use of the medication.

The proposed rule is also necessary to establish standards for the training of unlicensed school personnel to administer prescribed epinephrine auto-injectors and glucagon to specific students under specified conditions, consistent with Chapter 423 of the Laws of 2014, for those school districts and BOCES that choose to provide such training.

4. COSTS:

(a) Costs to State: none.

(b) Costs to local governments: in general, the proposed rule does not impose any costs beyond those inherent in Chapter 423 of the Laws of 2014. Consistent with the statute, school districts, BOCES, and non-public schools may, but are not required to, provide training to unlicensed school personnel to inject prescribed glucagon or epinephrine auto-injectors to specific students under specified conditions during the school day on school property or at school functions. Furthermore, any costs associated with maintaining the written consents in the student's cumulative health record are anticipated to be minimal and capable of being absorbed using existing district staff and resources.

(c) Costs to private regulated parties: there may be costs associated with the written permission/order and attestation of the authorized health care provider, and documentation of training by such health professional, but these costs are expected to be minimal and capable of being absorbed using existing staff and resources.

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

5. LOCAL GOVERNMENT MANDATES:

The proposed rule does not impose any mandatory program, service, duty, or responsibility upon local government, including school districts or BOCES. Consistent with the statute, school districts, BOCES and nonpublic schools may, but are not required to, provide training to unlicensed school personnel to inject prescribed glucagon or epinephrine auto-injectors to specific students under specified conditions during the school day on school property or at school functions.

6. PAPERWORK:

A record of the written consents shall be maintained in the student's cumulative health record. Training of unlicensed school personnel under section 136.7(f) must be documented.

7. DUPLICATION:

The proposed rule does not duplicate any existing State or Federal requirements, and is necessary to implement Education Law sections 916, 916-a, 916-b, 902-a, 902-b and 921, as added and amended by by Chapter 423 of the Laws of 2014.

8. ALTERNATIVES:

The proposed rule is necessary to implement Education Law sections 916, 916-a, 916-b, 902-a, 902-b and 921, as added and amended by Chapter 423 of the Laws of 2014. There were no significant alternatives and none were considered.

9. FEDERAL STANDARDS:

There are no applicable Federal standards.

10. COMPLIANCE SCHEDULE:

It is anticipated that regulated parties can achieve compliance with the proposed rule by its effective date. Consistent with the statute, school districts, BOCES and non-public schools may, but are not required to, provide training to unlicensed school personnel to inject prescribed glucagon or epinephrine auto-injectors to specific students under specified conditions during the school day on school property or at school functions. The proposed rule also merely provides definitions and otherwise clarifies the circumstances regarding the proper self-administration by students of prescribed inhaled rescue medications and epinephrine auto-injectors, and the proper self-administration and self-testing by students with diabetes, during the school day on school property or at a school function.

Regulatory Flexibility Analysis

(a) Small businesses:

The purpose of the proposed rule is to establish standards for the self-administration by students of certain prescribed medications on school property and at school functions; and establish standards for the training of unlicensed school personnel to administer prescribed epinephrine auto injectors and glucagon to specific students under specified conditions, consistent with Chapter 423 of the Laws of 2015. The proposed rule does not impose any economic impact, or other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local governments:

1. EFFECT OF RULE:

The rule applies to each of the 695 school districts and 37 BOCES in the State.

2. COMPLIANCE REQUIREMENTS:

The proposed rule generally does not impose any compliance requirements upon local governments. Consistent with the statute, school districts and BOCES may, but are not required to, provide training to unlicensed school personnel to inject prescribed glucagon or epinephrine auto-injectors to specific students under specified conditions during the school day on school property or at school functions.

The proposed rule also merely provides definitions and otherwise clarifies the circumstances regarding the proper self-administration by students of prescribed inhaled rescue medications and epinephrine auto-injectors, and the proper self-administration and self-testing by students with diabetes, during the school day on school property or at a school function. A record of the written consents obtained pursuant to the proposed rule shall be maintained in the student's cumulative health record.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

In general, the proposed rule does not impose any costs beyond those inherent in Chapter 423 of the Laws of 2014. Consistent with the statute, school districts and BOCES may, but are not required to, provide training to unlicensed school personnel to inject prescribed glucagon or epinephrine auto-injectors to specific students under specified conditions during the school day on school property or at school functions. Furthermore, any costs associated with maintaining the written consents in the student's cumulative health record are anticipated to be minimal and capable of being absorbed using existing district staff and resources.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

Consistent with the statute, school districts and BOCES may, but are not required to, provide training to unlicensed school personnel to inject prescribed glucagon or epinephrine auto-injectors to specific students under specified conditions during the school day on school property or at school functions. The proposed rule also merely provides definitions and otherwise clarifies the circumstances regarding the proper self-administration by students of prescribed inhaled rescue medications and epinephrine auto-injectors, and the proper self-administration and self-testing by students with diabetes, during the school day on school property or at a school function. Any costs associated with maintaining the written consents in the student's cumulative health record are anticipated to be minimal and capable of being absorbed using existing district staff and resources.

7. LOCAL GOVERNMENT PARTICIPATION:

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

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 rule is necessary to implement the statutory requirements of Chapter 423 of the Laws of 2014, and, therefore, the substantive provisions of the proposed rule 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.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed rule applies to school districts, boards of cooperative educational services (BOCES), and nonpublic elementary and secondary schools, 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 rule generally does not impose any compliance requirements upon local governments. Consistent with the statute, school districts, BOCES and nonpublic schools may, but are not required to, provide training to unlicensed school personnel to inject prescribed glucagon or epinephrine auto-injectors to specific students under specified conditions during the school day on school property or at school functions.

The proposed rule also merely provides definitions and otherwise clarifies the circumstances regarding the proper self-administration by students of prescribed inhaled rescue medications and epinephrine auto-injectors, and the proper self-administration and self-testing by students with diabetes, during the school day on school property or at a school function. A record of the written consents obtained pursuant to the proposed rule shall be maintained in the student's cumulative health record.

The proposed rule does not require any additional professional services upon entities in rural areas.

3. COSTS:

In general, the proposed rule does not impose any costs beyond those inherent in Chapter 423 of the Laws of 2014. Consistent with the statute, school districts, BOCES and nonpublic schools may, but are not required to, provide training to unlicensed school personnel to inject prescribed glucagon or epinephrine auto-injectors to specific students under specified conditions during the school day on school property or at school functions. Furthermore, any costs associated with maintaining the written consents in the student's cumulative health record, or costs associated with the written permission/order and attestation of the authorized health care provider, and documentation of training by such health professional, are anticipated to be minimal and capable of being absorbed using existing district staff and resources.

4. MINIMIZING ADVERSE IMPACT:

Consistent with the statute, school districts, BOCES and nonpublic schools may, but are not required to, provide training to unlicensed school personnel to inject prescribed glucagon or epinephrine auto-injectors to specific students under specified conditions during the school day on school property or at school functions. The proposed rule also merely provides definitions and otherwise clarifies the circumstances regarding the proper self-administration by students of prescribed inhaled rescue medications and epinephrine auto-injectors, and the proper self-administration and self-testing by students with diabetes, during the school day on school property or at a school function. Any costs associated with maintaining the written consents in the student's cumulative health record, or costs associated with the written permission/order and attestation of the authorized health care provider, and documentation of training by such health professional, are anticipated to be minimal and capable of being absorbed using existing district staff and resources.

Because the Regents policy and statute upon which the proposed amendment is based applies to all school districts and BOCES in the State, 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:

The proposed amendment was submitted for review and comment to the Department's Rural Education Advisory Committee, which includes representatives of school districts 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 rule is necessary to implement the statutory requirements of Chapter 423 of the Laws of 2014, and, therefore, the substantive provisions of the proposed rule cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10 of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Job Impact Statement

The purpose of the proposed rule is to establish standards for the self-administration by students of certain prescribed medications on school property and at school functions; and to establish standards for the training of unlicensed school personnel to administer prescribed epinephrine auto injectors and glucagon to specific students under specified conditions, consistent with Chapter 423 of the Laws of 2015. 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.

Assessment of Public Comment

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on July 15, 2015, the State Education Department received the following comments:

1. COMMENT:

Schools should employ professionally prepared Registered Nurses, to conduct and supervise school health programs which address the variety of health problems experienced by school children. A formula based approach is recommended with minimum ratios of nurses to students depending on the needs of the student population as follows: 1:750 for students in the general population, 1:225 in student populations requiring professional school nursing services or interventions, 1:125 in student populations with complex health care needs.

DEPARTMENT RESPONSE:

The language in 136.7(b)(3)(i), (c)(3)(i), (d)(3)(i) reflects the language in the statute upon which the proposed rule is based [see Chapter 423 of the Laws of 2014; more specifically Education Law § § 916(1), 916-a(1), 916-b(1)]. While the Department agrees that best practice would encourage each school to provide a school nurse to address the needs of students with chronic health conditions, such best practice is not specifically required by Chapter 423 of the Laws of 2014 to be codified in regulation, and is more appropriately left to guidance. The Department may consider issuing guidance as to what is best practice.

2. COMMENT:

Only a licensed Registered Professional Nurse (RN) should have the authority to delegate the administration of medications in school to unlicensed personnel. Such individuals should only administer medications with appropriate and adequate training, supervision and a performance evaluation conducted by the RN.

DEPARTMENT RESPONSE:

The proposed rule is consistent with Chapter 423 of the Laws of 2014, which provides that boards of education or trustees of each school district and board of cooperative educational services (BOCES) and nonpublic schools are authorized, but not obligated, to permit licensed registered professional nurses, nurse practitioners, physician assistants, and physicians to train unlicensed school personnel to inject prescribed glucagon or epinephrine auto injectors in emergency situations, where an appropriately licensed health professional is not available, to pupils who have the written permission of a physician or other duly authorized health care provider along with written parental consent. It is the licensed health professional who provides the training and assesses whether the trained volunteer demonstrates sufficient proficiency in order to be permitted to administer the medication.

3. COMMENT:

The rule should include a requirement that each nurse, or person authorized to administer asthma medications in schools, receive training in airway management and the use of inhalers consistent with nationally recognized standards.

DEPARTMENT RESPONSE:

The language in 136.7(b)(3)(i), (c)(3)(i), (d)(3)(i) reflects the language in the statute upon which the proposed rule is based [see Chapter 423 of the Laws of 2014; more specifically Education Law § § 916(1), 916-a(1), 916-b(1)]. While the Department agrees that best practice would be to require training in airway management and use of inhalers, such best practice is not specifically required by Chapter 423 of the Laws of 2014 to be codified in regulation, and is more appropriately left to guidance. The Department will consider issuing guidance as to what is best practice.

4. COMMENT:

An RN must be available to immediately assess the student and institute further actions post emergency medication administration. In all cases where an emergency medication is administered further treatment and assessment should follow according to industry standards.

DEPARTMENT RESPONSE:

The proposed rule is consistent with Chapter 423 of the Laws of 2014, which provides that boards of education or trustees of each school district and board of cooperative educational services (BOCES) and nonpublic schools are authorized, but not obligated, to permit licensed registered professional nurses, nurse practitioners, physician assistants, and physicians to train unlicensed school personnel to inject prescribed glucagon or epinephrine auto injectors in emergency situations, where an appropriately licensed health professional is not available, to pupils who have the written permission of a physician or other duly authorized health care provider along with written parental consent. While the Department agrees that procedures for follow up care following emergency administration of medication should conform to industry standards, such best practice is not specifically required by Chapter 423 of the Laws of 2014. The Department will consider issuing guidance as to what is best practice in the context of follow-up care in a school setting.

EMERGENCY RULE MAKING

Administration of Opioid Related Overdose Treatment and Hepatitis C Tests by Registered Professional Nurses (RNs)

I.D. No. EDU-27-15-00007-E

Filing No. 808

Filing Date: 2015-09-21

Effective Date: 2015-09-21

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

Action taken: Amendment of section 64.7 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6504 (not subdivided), 6507(2)(a), 6527(6)(e), (f), 6902(1), 6909(4)(e) and (f); L. 2014, ch. 352; L. 2015, ch. 57, part V

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

Specific reasons underlying the finding of necessity: The proposed rule is necessary to implement amendments to the Education Law made by Part V of Chapter 57 of the Laws of 2015 to allow registered professional nurses to execute non-patient specific orders prescribed by a licensed physician or a certified nurse practitioner to administer urgent or emergency treatment of opioid related overdose or suspected opioid related overdose, in accordance with requirements established in the Regulations of the Commissioner of Education. These amendments to the Education

Law are part of a statewide initiative to address a major public health challenge in New York State - reducing opiate overdose deaths.

Since publication of the proposed rule in the State Register, a non-substantial revision has been made in order to clarify the text of the proposed regulation. In section 64.7(e)(3)(ii)(d), the words "to the extent possible" were added so that the revised language states that "the recipient of the treatment is transferred to a hospital for follow-up care to the extent possible".

The proposed amendment was adopted as an emergency rule at the June 15-16, 2015 meeting of the Board of Regents, effective August 11, 2015, and has now been adopted as a permanent rule at the September 16-17, 2015 Regents meeting. Pursuant to SAPA § 203(1), the earliest effective date of the permanent rule is October 7, 2015, the date a Notice of Adoption will be published in the State Register. However, the June emergency rule will expire on September 20, 2015, 90 days after its filing with the Department of State on June 23, 2015. Emergency action is therefore necessary for the preservation of the public health and general welfare to ensure that the proposed amendment adopted by emergency action at the June 2015 Regents meeting, as revised, remains continuously in effect until the effective date of its permanent adoption.

Subject: Administration of opioid related overdose treatment and hepatitis C tests by registered professional nurses (RNs).

Purpose: To implement part V of ch. 57 of the Laws of 2015 and ch. 352 of the Laws of 2014 regarding opioid related overdose treatment and hepatitis C tests.

Text of emergency rule: Section 64.7 of the Regulations of the Commissioner of Education is amended, effective September 21, 2015, as follows:

64.7 *Administration of* [I]*i*mmunizations, emergency treatment of anaphylaxis, purified protein derivative (PPD) mantoux tuberculin skin tests*,* [and] human immunodeficiency virus (HIV) tests*, opioid related overdose treatments and hepatitis C tests* pursuant to non-patient specific orders and protocols.

(a) . . .
(b) . . .
(c) . . .
(d) . . .

(e) Opioid related overdose treatment.

(1) As used in this subdivision, opioid related overdose treatment shall include the administration of naloxone or another drug approved by the federal Food and Drug Administration to treat opioid related overdose.

(2) A registered professional nurse may administer opioid related overdose treatment for the urgent or emergency treatment of opioid related overdose or suspected opioid related overdose pursuant to a written non-patient specific order and protocol prescribed or ordered by a licensed physician or a certified nurse practitioner, provided that the requirements of this subdivision are met.

(3) Order and protocol.

(i) The non-patient specific order shall include, at a minimum, the following:

(a) the name, license number and signature of the licensed physician or certified nurse practitioner who orders or prescribes the non-patient specific order and protocol;

(b) the name, dose and route of administration of the drug to be administered to treat opioid related overdose;

(c) a protocol for administering the ordered opioid related overdose treatment or a specific reference to a separate written protocol for administering the ordered opioid related overdose treatment, which shall meet the requirements of subparagraph (ii) of this paragraph;

(d) the period of time that the order is effective, including the beginning and ending dates;

(e) a description of the group(s) of persons to be treated; and

(f) the name and license number of the registered professional nurse(s) authorized to execute the non-patient specific order and protocol to administer the opioid related overdose treatment; or the name of the entity that employs or contracts with registered professional nurses to execute the non-patient specific order and protocol, provided that the registered professional nurses execute the non-patient specific order and protocol only in the course of such employment or pursuant to such contract and provided further that the entity is legally authorized to employ or contract with registered professional nurses to provide nursing services.

(ii) The written protocol, incorporated into the order prescribed in subparagraph (i) of this paragraph, shall, at a minimum, include instructions for administering the opioid related overdose treatment and require the registered professional nurse to ensure that:

(a) each potential recipient is assessed, pursuant to criteria in the protocol, for conditions that would qualify or preclude him or her from receiving the ordered opioid related overdose treatment;

(b) consent to administer treatment is obtained, pursuant to criteria in the protocol, if the potential recipient is capable of providing it;

(c) the opioid related overdose treatment is documented, pursuant to criteria in the protocol, and includes the name and dose of drug administered, the date, time and location of the treatment, the recipient's name and the administering registered professional nurse's name and this medical documentation relating to opioid related overdose treatment is maintained in accordance with paragraph 29.2(a)(3) of this Title; and

(d) when opioid related overdose treatment is administered outside of a general hospital, the recipient of the treatment is transferred to a hospital for follow-up care to the extent possible along with documentation describing the opioid related overdose treatment that was administered, in accordance with criteria in the protocol.

(f) Hepatitis C tests.

(1) As used in this subdivision, hepatitis C tests mean one or more laboratory or point of care tests approved by the federal Food and Drug Administration to detect the presence of antibodies or antigens to hepatitis C or the hepatitis C virus.

(2) A registered professional nurse may administer hepatitis C tests pursuant to a written non-patient specific order and protocol prescribed or ordered by a licensed physician or a certified nurse practitioner, provided that the requirements of this subdivision are met.

(3) Order and protocol.

(i) The non-patient specific order shall include, at a minimum, the following:

(a) the name, license number and signature of the licensed physician or certified nurse practitioner who orders or prescribes the non-patient specific order and protocol;

(b) the name of the specific hepatitis C tests to be administered;

(c) a protocol for administering the ordered hepatitis C tests or a specific reference to a separate written protocol for administering the ordered hepatitis C tests, which shall meet the requirements of subparagraph (ii) of this paragraph;

(d) the period of time that the order is effective, including the beginning and ending dates;

(e) a description of the group(s) of persons to be tested; and

(f) the name and license number of the registered professional nurse(s) authorized to execute the non-patient specific order and protocol to administer the hepatitis C tests; or the name of the entity that employs or contracts with registered professional nurses to execute the non-patient specific order and protocol, provided that the registered professional nurses execute the non-patient specific order and protocol only in the course of such employment or pursuant to such contract and provided further that the entity is legally authorized to employ or contract with registered professional nurses to provide nursing services.

(ii) The written protocol, incorporated into the order prescribed in subparagraph (i) of this paragraph, shall, at a minimum, require the registered professional nurse(s) to ensure that:

(a) each potential recipient is assessed, pursuant to criteria in the protocol, for conditions that would qualify or preclude him or her from receiving the ordered hepatitis C tests;

(b) informed consent for administering the ordered hepatitis C tests or disclosing the hepatitis C test results to a third party (if applicable) has been obtained pursuant to the criteria in the protocol from the recipient, or when the recipient lacks capacity to consent, a person authorized pursuant to law to consent to health care for the recipient;

(c) confirmatory, positive hepatitis C test results are not disclosed to the test recipient or the recipient's authorized representative by the registered professional nurse without a patient specific order from a licensed physician, licensed physician assistant or certified nurse practitioner; and

(d) the administration of the ordered hepatitis C test(s) is documented in the recipient's medical record in accordance with criteria in the protocol and that documentation relating to the hepatitis C testing is maintained in accordance with section 29.2(a)(3) of this Title.

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-27-15-00007-EP, Issue of July 8, 2015. The emergency rule will expire November 19, 2015.

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

Paragraph (e) of subdivision (6) of 6527 of the Education Law, as added by Chapter 352 of the Laws of 2014, authorizes registered professional nurses to administer hepatitis C tests pursuant to a non-patient specific order and protocol prescribed by a licensed physician in accordance with regulations of the Commissioner of Education.

Paragraph (f) of subdivision (6) of 6527 of the Education Law, as added by Part V of Chapter 57 of the Laws of 2015, authorizes registered professional nurses to administer opioid related overdose treatment pursuant to a non-patient specific order and protocol prescribed by a licensed physician in accordance with regulations of the Commissioner of Education.

Subdivision (1) of section 6902 of the Education Law defines the practice of the profession of nursing for registered professional nurses.

Paragraph (e) of subdivision (4) of section 6909 of the Education Law, as added by Chapter 352 of the Laws of 2014, authorizes registered professional nurses to administer hepatitis C tests pursuant to a non-patient specific order and protocol prescribed by a certified nurse practitioner in accordance with regulations of the Commissioner of Education.

Paragraph (f) of subdivision (4) of 6909 of the Education Law, as added by Part V of Chapter 57 of the Laws of 2015, authorizes registered professional nurses to administer opioid related overdose treatment pursuant to a non-patient specific order and protocol prescribed by a certified nurse practitioner in accordance with regulations of the Commissioner of Education.

2. LEGISLATIVE OBJECTIVES:

Paragraph (e) of subdivision (6) of section 6527 and paragraph (e) of subdivision (4) of section 6909 of the Education Law were enacted to protect the public health in New York State by increasing access to hepatitis C testing and treatment. With the advent of new therapies that can stop the progression of hepatitis C or cure hepatitis C, New York State launched a campaign to identify persons with hepatitis C (through testing) and then refer such persons for hepatitis C treatment. Paragraph (e) of subdivision (6) of section 6527 of the Education Law authorizes registered professional nurses to administer hepatitis C tests pursuant to a non-patient specific order and protocol prescribed by a licensed physician in accordance with regulations of the Commissioner of Education. Paragraph (e) of subdivision (4) of section 6909 of the Education Law authorizes registered professional nurses to administer hepatitis C tests pursuant to a non-patient specific order and protocol prescribed by a certified nurse practitioner in accordance with regulations of the Commissioner of Education.

Paragraph (f) of subdivision (6) of section 6527 and paragraph (f) of subdivision (4) of section 6909 of the Education Law were enacted to protect the public health in New York State by increasing timely access to opioid related overdose treatment. These laws will increase the number of registered professional nurses who can provide lifesaving opioid related overdose treatment. This is particularly true for nurses who work in community settings such as schools, in home care or mental health clinics because they would be able to administer the opioid related overdose treatment when a prescriber or emergency services provider is not immediately available.

3. NEEDS AND BENEFITS:

The purpose of the proposed rule is to establish uniform requirements for registered professional nurses to meet when executing non-patient specific orders to administer hepatitis C tests and opioid related overdose treatment. Specifically, the proposed rule establishes the requirements for the types of information that should be included in these written non-patient specific orders and the requirements that should be included in the written protocols for a registered professional nurse to follow when administering hepatitis C tests and opioid related overdose treatment pursuant to a non-patient specific order prescribed by a licensed physician or a certified nurse practitioner. The proposed rule is needed to implement the requirements of paragraph (e) of subdivision (6) of section 6527 and paragraph (e) of subdivision (4) of section 6909 of the Education Law, as added by Chapter 352 of the Laws of 2014, and paragraph (f) of subdivision (6) of section 6527 and paragraph (f) of subdivision (4) of section 6909 of the Education Law, as added by Part V of Chapter 57 of the Laws of 2015.

4. COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Cost to private regulated parties: No mandatory costs.

(d) Cost to the regulatory agency: None.

5. LOCAL GOVERNMENT MANDATES:

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

6. PAPERWORK:

The proposed rule does not impose any paperwork mandates because it does not require any licensed physician or certified nurse practitioner to issue non-patient specific orders or protocols and does not specifically require registered professional nurses to administer opioid related overdose treatment or hepatitis C tests pursuant to a non-patient specific order and protocol. The proposed rule will not impose any reporting, recordkeeping or other requirements on licensed physicians and certified nurse practitioners; they choose to issue a non-patient specific order and protocol for registered professional nurses to administer opioid related overdose treatment or hepatitis C tests. If licensed physicians or certified nurse practitioners choose to issue such non-patient specific orders, the proposed rule requires them to, inter alia, issue these orders and related protocols in writing. The proposed rule also requires copies of the non-patient specific orders and protocols to be maintained in the patient's medical records. In addition, registered professional nurses must document that they administered the ordered hepatitis C tests or opioid related overdose treatments.

7. DUPLICATION:

There are no other state or federal requirements on the subject matter of this proposed rule. Therefore, the proposed rule does not duplicate other existing state or federal requirements, and is necessary to implement Part V of Chapter 57 of the Laws of 2015 and Chapter 352 of the Laws of 2014.

8. ALTERNATIVES:

The proposed rule is necessary to conform the Regulations of the Commissioner of Education to Part V of Chapter 57 of the Laws of 2015 and Chapter 352 of the Laws of 2014. There are no viable significant alternatives to the proposed rule and none were considered.

9. FEDERAL STANDARDS:

There are no relevant federal standards for authorizing registered professional nurses to execute non-patient specific orders to administer hepatitis C tests or opioid related overdose treatment as prescribed by a licensed physician or certified nurse practitioner. Since there are no applicable federal standards, the proposed rule does not exceed any minimum federal standards for the same or similar subject areas.

10. COMPLIANCE SCHEDULE:

The proposed rule is necessary to conform the Regulations of the Commissioner of Education to Part V of Chapter 57 of the Laws of 2015 and Chapter 352 of the Laws of 2014. The proposed rule will become effective on October 7, 2015. The proposed rule does not impose any compliance schedules on regulated parties or local governments.

Regulatory Flexibility Analysis

The purpose of the proposed rule is to implement Chapter 352 of the Laws of 2014 and Part V of Chapter 57 of the Laws of 2015, which authorize registered professional nurses to execute non-patient specific orders prescribed by a licensed physician or a certified nurse practitioner to administer hepatitis C tests and urgent or emergency treatment of opioid related overdose or suspected opioid related overdose, respectively. The proposed rule establishes the types of information that must be included in the written non-patient specific orders and the requirements that must be set forth in the written protocols, for the registered professional nurse to follow when administering hepatitis C tests or opioid related overdose treatment.

The proposed rule will not impose any reporting, recordkeeping, or other compliance requirements or costs, or have any adverse economic impact, on small businesses or local governments. Because it is evident from the nature of the proposed rule 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 will apply to all New York State registered professional nurses who administer hepatitis C tests or opioid related overdose treatments pursuant to a non-patient specific order and protocol, including registered professional nurses 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 miles or less. Of the approximately 285,000 registered professional nurses who are registered to practice in New York State, approximately 30,200 reported that their permanent address of record is in a rural county of New York State.

The proposed rule will also apply to all New York State certified nurse practitioners who issue non-patient specific orders and protocols to authorize registered professional nurses to administer hepatitis C tests or opioid related overdose treatments, including nurse practitioners 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 miles or less. Of the

approximately 20,000 certified nurse practitioners who are registered to practice in New York State, approximately 2,500 reported that their permanent address of record is in a rural county of New York State.

Additionally, the proposed rule will apply to all New York State licensed physicians who issue non-patient specific orders and protocols to authorize registered professional nurses to administer hepatitis C tests or opioid related overdose treatments, including licensed physicians 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 miles or less. Of the approximately 93,300 licensed physicians registered to practice in New York State, approximately 2,550 reported that their permanent address of record is in a rural county of New York State.

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

The proposed rule adds subdivisions (e) and (f) to section 64.7 of the Regulations of the Commissioner of Education, which implement Part V of Chapter 57 of the Laws of 2015 and Chapter 352 of the Laws of 2014, respectively. When Part V of Chapter 57 becomes effective on August 11, 2015 registered professional nurses will be authorized to administer opioid related overdose treatment pursuant to a non-patient specific order and protocol prescribed by a licensed physician or a certified nurse practitioner in accordance with regulations issued by the Commissioner of Education. Chapter 352 of the Laws of 2014, which became effective on December 15, 2014, authorizes registered professional nurses to administer hepatitis C tests pursuant to a non-patient specific order and protocol prescribed by a licensed physician or a certified nurse practitioner pursuant to regulations issued by the Commissioner of Education.

The proposed rule authorizes registered professional nurses to execute non-patient specific orders and protocols, ordered by a licensed physician or certified nurse practitioner, for administering hepatitis C tests and opioid related overdose treatment. It will not require any licensed physician or certified nurse practitioner to issue non-patient specific orders or protocols and does not specifically require registered professional nurses to administer opioid related overdose treatment or hepatitis C tests pursuant to a non-patient specific order and protocol. The proposed rule will not impose any reporting, recordkeeping or other compliance requirements, or professional services requirements, on health care providers in rural areas, unless a licensed physician or certified nurse practitioner issues a non-patient specific order and protocol for registered professional nurses to administer opioid related overdose treatment or hepatitis C tests. The proposed addition of subdivisions (e) and (f) to section 64.7 of the Regulations of the Commissioner of Education require licensed physicians and certified nurse practitioners to issue non-patient specific orders and protocols in writing. Copies of the non-patient specific orders and protocols must be maintained in the patient's medical records. In addition, registered professional nurses must document that they administered the ordered hepatitis C tests or opioid related overdose treatments.

3. COSTS:

The proposed rule will not impose any costs on any licensed physician, certified nurse practitioner, registered professional nurse, or other party. Neither subdivision (4) of section 6909 nor subdivision (6) of section 6527 of the Education Law impose any obligations on licensed physicians or certified nurse practitioners to issue non-patient specific orders and protocol for hepatitis C tests or opioid related overdose treatments.

4. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to conform the Regulations of the Commissioner of Education to Part V of Chapter 57 of the Laws of 2015 and Chapter 352 of the Laws of 2014. The statutory requirements do not make exceptions for individuals who live or work in rural areas. Thus, the Department has determined that the proposed rule's requirements should apply to all licensed physicians, certified nurse practitioners and registered professional nurses in New York State. Because of the nature of the proposed rule, alternative approaches for rural areas were not considered.

5. RURAL AREAS PARTICIPATION:

Comments on the proposed rule were solicited from statewide organizations representing all parties having an interest in the practice of certified nurse practitioners and registered professional nurses. These organizations included the State Board for Nursing and professional associations representing the nursing profession and nursing educators and the medical professions. These groups have members who live or work or provide nursing education 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 rule is necessary to implement Part V of Chapter 57 of the Laws of 2015 and Chapter 352 of the Laws of 2014, and therefore the substantive provisions of the proposed rule cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The State Education 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 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 rule implements Chapter 352 of the Laws of 2014 and Part V of Chapter 57 of the Laws of 2015, which authorize registered professional nurses to execute non-patient specific orders prescribed by a licensed physician or a certified nurse practitioner to administer hepatitis C tests and urgent or emergency treatment of opioid related overdose or suspected opioid related overdose, respectively. The proposed rule establishes criteria for authorizing registered professional nurses to administer hepatitis C tests and opioid related overdose treatment pursuant to written non-patient specific orders and written protocols prescribed by a licensed physician or a certified nurse practitioner.

The proposed rule implements specific statutory requirements and directives. Therefore, any impact on jobs and employment opportunities created by establishing criteria for authorizing registered professional nurses to administer hepatitis C tests and opioid related overdose treatment pursuant to a non-patient specific written order and written protocol prescribed by a licensed physician or a certified nurse practitioner is attributable to the statutory requirement, not the proposed rule, which simply establishes standards that conform with the requirements of the statutes.

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

Assessment of Public Comment

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the July 8, 2015 State Register, the State Education Department received the following comment:

COMMENT:

A hospital association indicated that hospitals may have difficulty complying with proposed 8 NYCRR § 64.7(e)(3)(ii)(d) because this regulatory provision would require written protocols for opioid related overdose treatment to include a provision ensuring that overdose treatment recipients will be transferred to a hospital for follow-up care, along with a record describing the overdose treatments administered. The association noted that hospitals receiving patients, who received opioid overdose treatments, have no way to ensure that appropriate pre-hospital assessments were performed correctly and that hospitals may not be aware of the protocol criteria used by emergency responders for the treatment of opioid overdose. The association urged the Department to clarify the specific requirements for hospital compliance with the regulation in order to ensure consistent interpretation of the regulation.

The hospital association also expressed support for the concept of the proposed regulation.

DEPARTMENT RESPONSE:

The Department notes that Education Law §§ 6527 and 6909 and the proposed regulation apply only to licensed physicians and nurses and do not directly impose legal obligations on hospitals or emergency services providers subject to Public Health Law Articles 28 and 30. The Department further notes that the regulatory provision in question, which requires that a treatment record be sent to the hospital with the recipient of the overdose treatment, is intended to assist hospital staff in providing appropriate emergency care to the patient/recipient.

EMERGENCY RULE MAKING

Foster Youth College Success Initiative

I.D. No. EDU-27-15-00010-E

Filing No. 811

Filing Date: 2015-09-21

Effective Date: 2015-09-21

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

Action taken: Addition of Subpart 152-3 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 210(not subdivided), 215(not subdivided), 305(1), (2), 6451(1-6) and 6456(1-7); L. 2015, ch. 56

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

Specific reasons underlying the finding of necessity: The proposed rule is necessary to implement Education Law section 6456, as added by Part X of Chapter 56 of the Laws of 2015, regarding the foster care youth initiative.

The proposed amendment was adopted by emergency action at the June 15-16, 2015 Regents meeting, effective July 1, 2015. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on July 8, 2015.

The proposed amendment has now been adopted as a permanent rule at the September 16-17, 2015 Regents meeting. Pursuant to SAPA § 203(1), the earliest effective date of the permanent rule is October 7, 2015, the date a Notice of Adoption will be published in the State Register. However, the June emergency rule will expire on September 21, 2015, 90 days after its filing with the Department of State on June, 23, 2015. Emergency action is therefore necessary for the preservation of the general welfare to ensure that the proposed amendment adopted by emergency action at the June 2015 Regents meeting and adopted as a permanent rule at the September 2015 Regents meeting, remains continuously in effect until the effective date of its permanent adoption.

Subject: Foster Youth College Success Initiative.

Purpose: To implement the Foster Youth College Success Initiative, as added by part X of chapter 56 of the Laws of 2015.

Text of emergency rule: 1. Subpart 152-3 of the Regulations of the Commissioner of Education is added, effective September 21, 2015, to read as follows:

Subpart 152-3

152-3 FOSTER YOUTH COLLEGE SUCCESS INITIATIVE.

§ 152-3.1. Purpose.

The purpose of the Foster Youth College Success Initiative is to provide funding, subject to an appropriation for such purpose, to support services to assist youth in foster care to apply for, enroll in, and succeed in college.

§ 152-3.2. Definition.

(a) For purposes of this section, foster youth shall mean students who have qualified as an orphan, foster child, or ward of the court for the purposes of federal student financial aid programs authorized by Title IV of the Higher Education Act of 1965, as amended.

§ 152-3.3. Applications.

(a) Eligible applicants. Institutions of the State University of New York ("SUNY"), City University of New York ("CUNY"), and degree-granting institutions in New York that are currently funded by the Arthur O. Eve Higher Education Opportunity Program pursuant to section 6451 of the Education Law for the purposes of providing additional services and expenses to expand opportunities for foster youth may apply for funding pursuant to this Section.

(b) Applications shall be submitted to the Commissioner, on forms prescribed by the Commissioner, for approval by October 1 of each year, and must set forth the need for such funds, including how the funds would be used and the exact number of foster youth that would be assisted with such funds.

(c) Applications from institutions of the State University of New York shall be coordinated through the SUNY System Administration and forwarded to the Department for review and approval by the Commissioner. Applications from institutions in the City University of New York system shall be coordinated through the CUNY Central Administration and forwarded to the Department for review and approval by the Commissioner. Other applications from eligible applicants as set forth in this section shall be submitted directly by the institution to the Department for review and approval by the Commissioner.

§ 152-3.4. Funding.

(a) Funds appropriated for the purposes of this initiative shall be awarded in equal amounts per foster youth to each institution whose application is approved by the Commissioner; pursuant to the sector distribution described in subdivision (b) of this section.

(b) Funds appropriated for the foster care youth initiative shall be allocated among the sectors as follows:

(1) 52% for institutions in the SUNY system;

(2) 30% for institutions in the CUNY system; and

(3) 18% for other degree-granting institutions in New York with current Arthur O. Eve higher education opportunity programs under this Part.

(c) Funds awarded under this Subpart shall be used for the following purposes to transition eligible students into postsecondary education:

(1) to provide additional services and fund expenses to expand opportunities for Foster Youth through existing postsecondary opportunity programs at the SUNY (Education Opportunity Program), CUNY (Search for Elevation, Education and Knowledge Program and College Discovery Program), and other not-for-profit degree granting higher education institutions which have higher education opportunity programs for foster youth;

(2) to provide necessary supplemental financial aid for foster youth, which may include the cost of tuition and fees, books, supplies, transportation, and other expenses determined by the Commissioner to be necessary for such foster youth to attend college;

(3) to conduct a summer college preparation program for foster youth who will be enrolled and attending as first time full time students at such institution awarded funding in an effort to prepare them to navigate on-campus systems, and provide preparation in reading, writing, and mathematics for foster youth who need it; or

(4) for advisement, tutoring and other academic assistance for Foster Youth who are or will be enrolled and attending such institution awarded funding.

(d) Funds awarded pursuant to this Subpart shall be used for the allowable costs, as determined by the Commissioner, of activities and services needed to support the purposes prescribed in subdivision (c) of this section, which may include, but shall not be limited to, costs of outreach to high schools and community based organizations that serve foster youth to advise potential students and provide information on this initiative.

(e) For the 2015 - 2016 academic year only, the amount of funds to be awarded to each institution under this initiative shall be based on the current number of eligible foster youth at such institution plus the number of eligible students recruited for, and enrolled in, an opportunity program at such institution.

(f) For the 2016 – 2017 academic year and thereafter, all funds under this initiative shall be based on the number of eligible foster youth recruited for and enrolled in the opportunity programs of such institutions for the current year of enrollment.

(g) No funds under this Subpart shall be used to support the regular academic programs of any institution participating in this program or, for programs which are incompatible with the Regents plan for the expansion and development of higher education in New York State.

§ 152-3.5. Reporting.

Each institution that receives funds under this Subpart shall file an annual report by August 31 of the calendar year succeeding the year of its successful application for funding using a form prescribed by the Department, and/or within 30 days of any request by the Department, providing any information or documentation as the Commissioner may request relating to this initiative.

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-27-15-00010-EP, Issue of July 8, 2015. The emergency rule will expire November 19, 2015.

Text of rule and any required statements and analyses may be obtained from: Kirti Goswami, New York State Education Department, 89 Washington Avenue, Albany, New York 12234, (518) 474-6400, email: kgoswami@nysed.gov

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

Education Law section 210 provides that the Regents may register domestic and foreign institutions in terms of New York standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries, and presented for entrance to schools, colleges and the professions in this State.

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

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

Education Law section 6451, relating to the Arthur O. Eve Higher Education Opportunity Program (HEOP), provides for State assistance and authorizes the Commissioner, for purposes of advancing the cause of educational opportunity in higher education, to contract with non-public institutions of higher education for the support of special for the screening, testing, counseling, tutoring of, and assistance to economically and educationally disadvantaged State residents who are graduates of an approved high school or who have attained a State high school equivalency diploma or equivalent, and who have potential for successful completion of a postsecondary program.

Education Law section 6456, as added by Part X of Chapter 56 of the Laws of 2015, establishes the Foster Youth College Success Initiative, and

directs the Commissioner to allocate funds, subject to an appropriation, for the purpose of providing support services to assist youth in foster care to apply for, enroll in, and succeed in college. The law provides for awards to public institutions, including institutions of the State University of New York (SUNY), and The City University of New York (CUNY), and requires the Commissioner to enter into contracts with degree-granting institutions currently funded by HEOP for the purpose of providing additional services and expenses to expand opportunities for foster youth.

LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above statutory authority and is necessary to implement the Foster Youth College Success Initiative, pursuant to Education Law section 6456, as added by Part X of Chapter 56 of the Laws of 2015.

NEEDS AND BENEFITS:

Chapter 56 of the Laws of 2015 added a new section 6456 to the Education Law requiring the Commissioner to allocate funds, subject to an appropriation, for the purpose of providing support services to assist youth in foster care to apply for, enroll in, and succeed in college. The new law defines foster youth to include students who have qualified as an orphan, foster child or ward of the court for the purposes of federal student financial aid programs authorized by Title IV of the Higher Education Act of 1965, as amended.

Pursuant to the new law, funding shall be used for the following purposes:

(a) providing additional services and covering expenses to expand opportunities through existing postsecondary opportunity programs at the SUNY, CUNY, and other degree-granting higher education institutions for foster youth, and

(b) providing necessary supplemental financial aid for foster youth, which may include: the cost of tuition and fees, books, supplies, transportation, and other expenses approved by the Commissioner for such foster youth to attend college, and

(c) summer college preparation programs to help foster youth transition to college, prepare them to navigate on-campus systems, and provide preparation in reading, writing, and mathematics for foster youth who need it, or providing advisement, tutoring and other academic assistance for foster youth.

The proposed regulation would allow expenditure of grant funds for costs needed to carry out those purposes, including but not limited to the costs of outreach to high schools and community based organizations that serve foster youth about this initiative.

COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Cost to private regulated parties. None.

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

The proposed rule is necessary to implement the Foster Youth College Success Initiative pursuant to Education Law section 6456, as added by Part X of Chapter 56 of the Laws of 2015, and will not impose any additional costs beyond those imposed by the statute. SUNY and CUNY Institutions, and degree-granting institutions in New York that are currently funded by the Arthur O. Eve Higher Education Opportunity Program pursuant to section 6451 of the Education Law for the purposes of providing additional services and expenses to expand opportunities for foster youth may, but are not required to, apply for funding under the Foster Youth College Success Initiative.

The 2015 – 2016 State budget appropriated $1.5 million for the Foster Youth College Success Initiative. Education Law section 6456 provides for awards to public institutions, including institutions of the State University of New York (SUNY), and The City University of New York (CUNY), and requires the Commissioner to enter into contracts with degree-granting institutions currently funded by the Arthur O. Eve Higher Education Opportunity Program (HEOP) for the purpose of providing additional services and expenses to expand opportunities for foster youth. The new law allocates funding to these three sectors as follows: 52% to SUNY institutions; 30% to CUNY institutions; and 18% percent to currently funded HEOP institutions. It further requires that funds be in equal amounts per individual foster youth to each institution that applies for funding allocated to by sector that is approved by the Commissioner. It also prohibits funds from being used to support the regular academic programs of any institution participating in this program and/or which are incompatible with the Regents plan for the expansion and development of higher education in New York State.

LOCAL GOVERNMENT MANDATES:

The proposed rule is necessary to implement the Foster Youth College Success Initiative pursuant to Education Law section 6456, as added by Part X of Chapter 56 of the Laws of 2015, and will not impose any program, service, duty or responsibility on school districts beyond those already imposed by State law or regulation. SUNY and CUNY Institutions, and degree-granting institutions in New York that are currently funded by the Arthur O. Eve Higher Education Opportunity Program pursuant to section 6451 of the Education Law for the purposes of providing additional services and expenses to expand opportunities for foster youth may, but are not required to, apply for funding under the Foster Youth College Success Initiative.

PAPERWORK:

Applications shall be submitted to the Commissioner, on forms prescribed by the Commissioner, for approval by October 1 of each year, and must set forth the need for such funds, including how the funds would be used and the exact number of foster youth that would be assisted with such funds.

Applications from institutions of the State University of New York shall be coordinated through the SUNY System Administration and forwarded to the Department for review and approval by the Commissioner. Applications from institutions in the City University of New York system shall be coordinated through the CUNY Central Administration and forwarded to the Department for review and approval by the Commissioner. Other applications from eligible applicants as set forth in this section shall be submitted directly by the institution to the Department for review and approval by the Commissioner.

Each institution that receives funds shall file an annual report by August 31 of the calendar year succeeding the year of its successful application for funding using a form prescribed by the Department, and/or within 30 days of any request by the Department, providing any information or documentation as the Commissioner may request relating to this initiative.

DUPLICATION:

The proposed rule is necessary to implement the Foster Youth College Success Initiative pursuant to Education Law section 6456, as added by Part X of Chapter 56 of the Laws of 2015, and does not duplicate existing State or federal requirements.

ALTERNATIVES:

The proposed rule is necessary to implement the Foster Youth College Success Initiative pursuant to Education Law section 6456, as added by Part X of Chapter 56 of the Laws of 2015. Consequently, the major provisions of the proposed rule are statutorily imposed, and there are no significant alternatives and none were considered.

FEDERAL STANDARDS:

There are no applicable Federal standards.

COMPLIANCE SCHEDULE:

The new law requires eligible institutions to file an application with the Commissioner by October 1st of each year. The application must demonstrate a need for such funding; including how the funds would be used and how many foster youth will be funded. It is anticipated that parties will be able to achieve compliance with the rule by its effective date.

Regulatory Flexibility Analysis

1. EFFECT OF RULE:

Institutions of the State University of New York ("SUNY"), City University of New York ("CUNY"), and degree-granting institutions in New York that are currently funded by the Arthur O. Eve Higher Education Opportunity Program pursuant to section 6451 of the Education Law for the purposes of providing additional services and expenses to expand opportunities for foster youth may, but are not required to, apply for funding under the Foster Youth College Success Initiative.

2. COMPLIANCE REQUIREMENTS:

The proposed rule is necessary to implement the Foster Youth College Success Initiative pursuant to Education Law section 6456, as added by Part XX of Chapter 56 of the Laws of 2015, and will not impose any program, service, duty or responsibility on school districts beyond those already imposed by State law or regulation. SUNY and CUNY Institutions, and degree-granting institutions in New York that are currently funded by the Arthur O. Eve Higher Education Opportunity Program pursuant to section 6451 of the Education Law for the purposes of providing additional services and expenses to expand opportunities for foster youth may, but are not required to, apply for funding under the Foster Youth College Success Initiative.

Applications shall be submitted to the Commissioner, on forms prescribed by the Commissioner, for approval by October 1 of each year, and must set forth the need for such funds, including how the funds would be used and the exact number of foster youth that would be assisted with such funds.

Applications from institutions of the State University of New York shall be coordinated through the SUNY System Administration and forwarded to the Department for review and approval by the Commissioner. Applications from institutions in the City University of New York system shall be coordinated through the CUNY Central Administration and forwarded to the Department for review and approval by the Commissioner. Other applications from eligible applicants as set forth in this section shall be submitted directly by the institution to the Department for review and approval by the Commissioner.

Funding shall be used for the following purposes:

(a) providing additional services and covering expenses to expand opportunities through existing postsecondary opportunity programs at the SUNY, CUNY, and other degree-granting higher education institutions for foster youth, and

(b) providing necessary supplemental financial aid for foster youth, which may include: the cost of tuition and fees, books, supplies, transportation, and other expenses approved by the Commissioner for such foster youth to attend college, and

(c) summer college preparation programs to help foster youth transition to college, prepare them to navigate on-campus systems, and provide preparation in reading, writing, and mathematics for foster youth who need it, or providing advisement, tutoring and other academic assistance for foster youth.

The proposed rule would allow expenditure of grant funds for costs needed to carry out those purposes, including but not limited to the costs of outreach to high schools and community based organizations that serve foster youth about this initiative.

Each institution that receives funds shall file an annual report by August 31 of the calendar year succeeding the year of its successful application for funding using a form prescribed by the Department, and/or within 30 days of any request by the Department, providing any information or documentation as the Commissioner may request relating to this initiative.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

The proposed rule is necessary to implement the Foster Youth College Success Initiative pursuant to Education Law section 6456, as added by Part XX of Chapter 56 of the Laws of 2015, and will not impose any additional costs beyond those imposed by the statute. SUNY and CUNY Institutions, and degree-granting institutions in New York that are currently funded by the Arthur O. Eve Higher Education Opportunity Program pursuant to section 6451 of the Education Law for the purposes of providing additional services and expenses to expand opportunities for foster youth may, but are not required to, apply for funding under the Foster Youth College Success Initiative.

The 2015 – 2016 State budget appropriated $1.5 million for the Foster Youth College Success Initiative. Education Law section 6456 provides for awards to public institutions, including institutions of the State University of New York (SUNY), and The City University of New York (CUNY), and requires the Commissioner to enter into contracts with degree-granting institutions currently funded by the Arthur O. Eve Higher Education Opportunity Program (HEOP) for the purpose of providing additional services and expenses to expand opportunities for foster youth. The new law allocates funding to these three sectors as follows: 52% to SUNY institutions; 30% to CUNY institutions; and 18% percent to currently funded HEOP institutions. It further requires that funds be in equal amounts per individual foster youth to each institution that applies for funding allocated to by sector that is approved by the Commissioner. It also prohibits funds from being used to support the regular academic programs of any institution participating in this program and/or which are incompatible with the Regents plan for the expansion and development of higher education in New York State.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement the Foster Youth College Success Initiative pursuant to Education Law section 6456, as added by Part XX of Chapter 56 of the Laws of 2015 and will not impose any additional costs or compliance requirements beyond those inherent in the statute. SUNY and CUNY Institutions, and degree-granting institutions in New York that are currently funded by the Arthur O. Eve Higher Education Opportunity Program pursuant to section 6451 of the Education Law for the purposes of providing additional services and expenses to expand opportunities for foster youth may, but are not required to, apply for funding under the Foster Youth College Success Initiative.

7. LOCAL GOVERNMENT PARTICIPATION:

The Department has submitted copies of the proposed amendment to SUNY and CUNY for comment.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

Institutions of the State University of New York ("SUNY"), City University of New York ("CUNY"), and degree-granting institutions in New York that are currently funded by the Arthur O. Eve Higher Education Opportunity Program pursuant to section 6451 of the Education Law for the purposes of providing additional services and expenses to expand opportunities for foster youth may, but are not required to, apply for funding under the Foster Youth College Success Initiative; including such institutions 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 rule is necessary to implement the Foster Youth College Success Initiative pursuant to Education Law section 6456, as added by Part X of Chapter 56 of the Laws of 2015, and will not impose any program, service, duty or responsibility on school districts beyond those already imposed by State law or regulation. SUNY and CUNY Institutions, and degree-granting institutions in New York that are currently funded by the Arthur O. Eve Higher Education Opportunity Program pursuant to section 6451 of the Education Law for the purposes of providing additional services and expenses to expand opportunities for foster youth may, but are not required to, apply for funding under the Foster Youth College Success Initiative.

Applications shall be submitted to the Commissioner, on forms prescribed by the Commissioner, for approval by October 1 of each year, and must set forth the need for such funds, including how the funds would be used and the exact number of foster youth that would be assisted with such funds.

Applications from institutions of the State University of New York shall be coordinated through the SUNY System Administration and forwarded to the Department for review and approval by the Commissioner. Applications from institutions in the City University of New York system shall be coordinated through the CUNY Central Administration and forwarded to the Department for review and approval by the Commissioner. Other applications from eligible applicants as set forth in this section shall be submitted directly by the institution to the Department for review and approval by the Commissioner.

Funding shall be used for the following purposes:

(a) providing additional services and covering expenses to expand opportunities through existing postsecondary opportunity programs at the SUNY, CUNY, and other degree-granting higher education institutions for foster youth, and

(b) providing necessary supplemental financial aid for foster youth, which may include: the cost of tuition and fees, books, supplies, transportation, and other expenses approved by the Commissioner for such foster youth to attend college, and

(c) summer college preparation programs to help foster youth transition to college, prepare them to navigate on-campus systems, and provide preparation in reading, writing, and mathematics for foster youth who need it, or providing advisement, tutoring and other academic assistance for foster youth.

The proposed rule would allow expenditure of grant funds for costs needed to carry out those purposes, including but not limited to the costs of outreach to high schools and community based organizations that serve foster youth about this initiative.

Each institution that receives funds shall file an annual report by August 31 of the calendar year succeeding the year of its successful application for funding using a form prescribed by the Department, and/or within 30 days of any request by the Department, providing any information or documentation as the Commissioner may request relating to this initiative.

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

3. COMPLIANCE COSTS:

The proposed rule is necessary to implement the Foster Youth College Success Initiative pursuant to Education Law section 6456, as added by Part X of Chapter 56 of the Laws of 2015, and will not impose any additional costs beyond those imposed by the statute. SUNY and CUNY Institutions, and degree-granting institutions in New York that are currently funded by the Arthur O. Eve Higher Education Opportunity Program pursuant to section 6451 of the Education Law for the purposes of providing additional services and expenses to expand opportunities for foster youth may, but are not required to, apply for funding under the Foster Youth College Success Initiative.

The 2015 – 2016 State budget appropriated $1.5 million for the Foster Youth College Success Initiative. Education Law section 6456 provides for awards to public institutions, including institutions of the State University of New York (SUNY), and The City University of New York (CUNY), and requires the Commissioner to enter into contracts with degree-granting institutions currently funded by the Arthur O. Eve Higher Education Opportunity Program (HEOP) for the purpose of providing additional services and expenses to expand opportunities for foster youth. The new law allocates funding to these three sectors as follows: 52% to SUNY institutions; 30% to CUNY institutions; and 18% percent to currently funded HEOP institutions. It further requires that funds be in equal amounts per individual foster youth to each institution that applies for funding allocated to by sector that is approved by the Commissioner. It also prohibits funds from being used to support the regular academic

programs of any institution participating in this program and/or which are incompatible with the Regents plan for the expansion and development of higher education in New York State.

4. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement the Foster Youth College Success Initiative pursuant to Education Law section 6456, as added by Part X of Chapter 56 of the Laws of 2015 and will not impose any additional costs or compliance requirements beyond those inherent in the statute. SUNY and CUNY Institutions, and degree-granting institutions in New York that are currently funded by the Arthur O. Eve Higher Education Opportunity Program pursuant to section 6451 of the Education Law for the purposes of providing additional services and expenses to expand opportunities for foster youth may, but are not required to, apply for funding under the Foster Youth College Success Initiative. Because the statute applies uniformly throughout the State, it is not possible to establish differing compliance or reporting requirements, timetables or exemptions to entities in rural areas.

5. RURAL AREA PARTICIPATION:

The proposed amendment was submitted for review and comment to the Department's Rural Education Advisory Committee, which includes representatives of entities in rural areas.

Job Impact Statement

The purpose of the proposed rule is to implement Education Law section 6456, as added by Part X of Chapter 56 of the Laws of 2015, regarding the foster care youth initiative. Chapter 56 of the Laws of 2015 added a new section 6456 to the Education Law which directs the Commissioner to allocate funds, subject to an appropriation, for the purpose of providing support services to assist youth in foster care to apply for, enroll in, and succeed in college. The law provides for awards to public institutions, including institutions of the State University of New York (SUNY), and The City University of New York (CUNY), and requires the Commissioner to enter into contracts with degree-granting institutions currently funded by the Arthur O. Eve Higher Education Opportunity Program (HEOP) for the purpose of providing additional services and expenses to expand opportunities for foster youth. Because it is evident from the nature of the proposed amendment 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.

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on July 8, 2015, the State Education Department (SED) received the following comments:

1. COMMENT:

The definition of foster care youth in section 152-3.2 of the Commissioner's regulations should be amended to include an additional subsection that states as follows: "Eligible foster youth, orphans or wards of the court should apply for services on, or before their 25th birthday".

DEPARTMENT RESPONSE:

The regulatory definition of foster care youth is consistent with the definition in Education Law § 6456(2). Therefore, the Department believes that no regulatory change is needed.

2. COMMENT:

The commenter requested that section 152-3.4 of the Commissioner's regulations be amended to allow housing to be included in what constitutes necessary supplemental financial aid for foster youth.

DEPARTMENT RESPONSE:

The Department believes and agrees that these funds may be for housing purposes. However, the Department believes that no regulatory change is needed because the regulation already provides that funds may be used for any other expenses determined by the Commissioner to be necessary for such foster youth to attend college, which could include housing expenses.

3. COMMENT:

One commenter has asked that section 152-3.5(a) of the proposed amended to require institutions to include specific enumerated information relating to number of youth who meet federal definition of foster youth, retention rates, comparisons of credit accumulation by cohort and the number of students surveyed to be in need of break and intersession housing.

DEPARTMENT RESPONSE:

The proposed amendment is broad and indicates that an institution must provide "any information or documentation as the Commissioner may request relating to this initiative in the annual report", which may include some of the information the commenter suggests. Therefore, the Department does not believe a regulatory amendment is needed. However, the Department is in the process of determining what information it believes should be required in the annual report and the requirements for the annual report will be posted on the Department's website.

4. COMMENT:

The commenter also requests clarification in the regulation to require any campus receiving this funding, to the extent possible, to designate a campus liaison who has knowledge about the needs and challenges of foster care youth.

DEPARTMENT RESPONSE:

While the Department agrees that a designated campus liaison that could serve as the point person responsible for guiding and coordinating the initiative across the campus would be helpful, the Department believes that funding on various campuses differs and that no regulatory change is needed. This is a local decision that needs to be made at each campus, based on where it believes resources can be allocated best.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Academic Intervention Services (AIS)

I.D. No. EDU-40-15-00004-EP

Filing No. 800

Filing Date: 2015-09-17

Effective Date: 2015-09-17

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

Proposed Action: Amendment of section 100.2(ee) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(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 would extend certain of the provisions in section 100.2(ee) of the Commissioner's Regulations through the 2015-2016 school year, in order to provide continued flexibility to school districts in the provision of Academic Intervention Services (AIS) for those students who performed below Level 3 on the grade 3-8 ELA and Math assessments but at or above cut scores established by the Regents.

Since the Board of Regents meets at monthly intervals, the earliest the proposed amendment could be adopted by regular (non-emergency) action, after publication of a Notice of Proposed Rule Making and expiration of the 45-day public comment period prescribed in State Administrative Procedure Act (SAPA) section 202, would be the December 14-15, 2015 Regents meeting. Furthermore, because SAPA section 203(1) provides that an adopted rule may not become effective until a Notice of Adoption is published in the State Register, the earliest the proposed amendment could become effective, if adopted at the December Regents meeting, is December 31, 2015. However, school districts need to know now what the modified requirements for AIS will be so that they may plan and timely implement AIS for the 2015-2016 school year.

Emergency action is necessary for the preservation of the general welfare to immediately establish modified requirements for the provision of Academic Intervention Services for the 2015-2016 school year and thereby ensure their timely implementation, for purposes of providing school districts with flexibility to address the change in student rates of proficiency on the 2014-2015 grades 3-8 assessments in English Language Arts and Mathematics, and ensuring that during the 2015-2016 school year districts continue to maintain on file a uniform process by which the district determines whether to offer AIS to students who scored at or above the specified cut scores but below Level 3 on grade 3-8 English Language Arts or Mathematics State assessments.

It is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the December 14-15, 2015 Regents meeting, which is the first scheduled Regents meeting after publication of the proposed rule in the State Register and expiration of the 45-day public comment period prescribed in the State Administrative Procedure Act for State agency rule makings.

Subject: Academic Intervention Services (AIS).

Purpose: To establish modified requirements for AIS during the 2015-2016 school year.

Text of emergency/proposed rule: Paragraph (2) of subdivision (ee) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective September 17, 2015, as follows:

(2) Requirements for providing academic intervention services in grade three to grade eight. Schools shall provide academic intervention services when students:

(i) score below:

(a) the State designated performance level on one or more of the State elementary assessments in English Language Arts, Mathematics or Science, provided that for the [2014-2015] *2015-2016* school year only, the following shall apply:

(1) those students scoring below a scale score specified in subclause (3) of this clause shall receive academic intervention instructional services; and

(2) those students scoring at or above a scale score specified in subclause (3) of this clause but below level 3/proficient shall not be required to receive academic intervention instructional and/or student support services unless the school district, in its discretion, deems it necessary. Each school district shall develop and maintain on file a uniform process by which the district determines whether to offer AIS during the [2014-2015] *2015-2016* school year to students who scored above a scale score specified in subclause (3) of this clause but below level 3/proficient on a grade 3-8 English Language Arts or Mathematics State assessment in [2013-2014] *2014-2015*, and shall no later than [November 1, 2014] *November 1, 2015* either post to its website or distribute to parents in writing a description of such process;

(3)

(b)

(ii) . . .

(iii) . . .

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 December 15, 2015.

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

Data, views or arguments may be submitted to: Charles A. Szuberla Jr., Deputy Commissioner P-12 Education, State Education Department, Office of P-12 Education, State Education Building 2M West, 89 Washington Avenue, Albany, NY 12234, (518) 474-5520, email: NYSEDP12@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 the laws of the State regarding education and the functions and duties conferred on the Department by law.

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.

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 education.

Education Law section 3204(3) provides for the courses of study in the public schools.

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 Board of Regents relating to academic intervention services (AIS).

3. NEEDS AND BENEFITS:

In 2013, the Regents adopted amendments to Commissioner's Regulations section 100.2(ee) [EDU-40-13-00005-EP, State Register October 2, 2013; EDU-40-13-00005-A, State Register December 31, 2013] that provided flexibility to districts in the provision of Academic Intervention Services (AIS) for the 2013-2014 school year, in recognition of the fact that the State assessments administered to New York students in Spring 2013 were the first that measured the progress of students in meeting the expectations of the Common Core Learning Standards (CCLS). A subsequent amendment in 2014 extended similar flexibility in the provision of AIS for the 2014-15 school year [EDU-39-14-00015-EP, State Register October 1, 2014; EDU-39-14-00015-A, State Register December 31, 2014].

Section 100.2(ee) of the Commissioner's Regulations requires school districts to provide Academic Intervention Services (AIS) to students who score below the State designated performance level on State assessments for English Language Arts and Mathematics and/or who are at risk of not achieving the State learning standards. These requirements have been in place for more than 20 years.

The State assessments for grades 3-8 in ELA and Mathematics have four designated performance levels:

Level 1: Students performing at this level are well below proficient in standards for their grade.

Level 2: Students performing at this level are partially proficient in standards for their grade.

Level 3: Students performing at this level are proficient in standards for their grade.

Level 4: Students performing at this level excel in standards for their grade.

In the past, all students who scored at Levels 1 and/or 2 on the grades 3-8 ELA or Math assessments had been eligible to receive AIS. In 2013, the State Education Department, for the first time, administered assessments in grades 3-8 that were based on the Common Core Learning Standards (CCLS) and aligned to college- and career-readiness standards. As a consequence, there was a significant decline in the percentage of students who scored at or above proficiency on the grades 3-8 ELA and Math assessments.

In September 2013, the Board of Regents adopted emergency regulations that were designed to ensure that districts would not be required to significantly increase the percentage of students to whom they would be required to provide AIS as a consequence of the implementation of the more rigorous CCLS standards. Pursuant to the regulations, the Department established cut scores for grades 3-8 ELA and Math that resulted in districts being required to provide AIS to approximately the same percentages of students in the 2013-14 school year as received AIS in the 2012-13 school year. This was analogous to the action taken by the Regents in July 2010 to address the raising of the cut scores on the 2010 Grades 3-8 English Language Arts and Mathematics assessments.

In the 2013-14 school year, under the approved Commissioner's Regulation § 100.2(ee), districts were required to establish a policy to determine what services, if any, to provide to students who scored above the transitional cut scores established by SED, but below proficiency levels on the 2013 assessments.

Specifically, section 100.2(ee) provided the following for the 2013-14 school year:

- Students who scored below the specified cut scores for Grades 3-8 English Language Arts and Mathematics must receive AIS;
- Students who scored at or above the specified cut scores, but below the 2013 Level 3/proficient cut scores, would not be required to receive AIS and/or student support services unless the school district deemed it necessary;
- Each school district must develop and maintain on file a uniform process by which the district determined whether to offer AIS to students who scored at or above the specified cut scores but below Level 3/proficient on grades 3-8 English Language Arts or Mathematics NYS assessments; and
- By November 1, 2013, each school was required to either post a description of this process to its website or distribute a written description of such process to parents.

In September 2014, the Regents took action to extend these provisions through the 2014-15 school year to continue flexibility in the provisions of AIS. The proposed amendment would extend the 2014-2015 amendment to the Commissioner's Regulations through the 2015-16 school year to continue flexibility in the provision of Academic Intervention Services.

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 extends to the 2015-2016 school year, the modified requirements for the provision of AIS previously implemented for the 2013-2014 and 2014-2015 school years. The proposed amendment will not impose any additional costs but instead will allow for continued flexibility and reduced costs to school districts in providing AIS.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon local governments but merely extends to the 2015-2016 school year, the modified requirements for the provision of AIS previously implemented for the 2013-2014 and 2014-2015 school years. The proposed amendment will not impose any additional compli-

ance requirements but instead will allow for continued flexibility to school districts in providing AIS.

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 regulations.

8. ALTERNATIVES:

There were no significant alternatives and none were considered. The proposed amendment is necessary to implement Regents policy to provide flexibility to school districts in providing AIS during the 2015-2016 school year.

9. FEDERAL STANDARDS:

There are no related federal standards.

10. COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment extends to the 2015-2016 school year the modified requirements for the provision of Academic Intervention Services (AIS) previously implemented for the 2013-2014 and 2015-2016 school years, to allow for continued flexibility to school districts in providing AIS.

The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no 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.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any additional compliance requirements upon local governments but merely extends to the 2015-2016 school year, the modified requirements for the provision of AIS previously implemented for the 2013-2014 and 2014-2015 school years. The proposed amendment will not impose any additional compliance requirements but instead will allow for continued flexibility to school districts in providing AIS.

3. PROFESSIONAL SERVICES:

The proposed amendment imposes no additional professional service requirements on school districts.

4. COMPLIANCE COSTS:

The proposed amendment extends to the 2015-2016 school year, the modified requirements for the provision of AIS previously implemented for the 2013-2014 and 2014-2015 school years. The proposed amendment will not impose any additional costs but instead will allow for flexibility and reduced costs to school districts in providing AIS.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any technological requirements or costs on school districts.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement Regents policy to provide flexibility to school districts in providing AIS during the 2015-2016 school year. The proposed amendment does not impose any additional compliance requirements or costs on local governments but merely extends to the 2015-2016 school year, the modified requirements for the provision of AIS previously implemented for the 2013-2014 and 2014-2015 school years, to allow for continued flexibility to school districts in providing AIS.

7. LOCAL GOVERNMENT PARTICIPATION:

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

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed rule applies to all school districts in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendment does not impose any additional compliance requirements upon rural areas but merely extends to the 2015-2016 school year, the modified requirements for the provision of AIS previously implemented for the 2013-2014 and 2014-2015 school years. The proposed amendment will continue to provide flexibility to school districts in providing AIS services.

The proposed amendment imposes no additional professional services requirements on school districts in rural areas.

3. COMPLIANCE COSTS:

The proposed amendment extends to the 2015-2016 school year, the modified requirements for the provision of AIS previously implemented for the 2013-2014 and 2014-2015 school years. The proposed amendment will not impose any additional costs but instead will allow for flexibility and reduced costs to school districts in providing AIS.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any additional compliance requirements or costs on local governments but merely extends to the 2015-2016 school year, the modified requirements for the provision of AIS previously implemented for the 2013-2014 and 2014-2015 school years. The proposed amendment will continue to provide flexibility to school districts in providing AIS services.

The proposed amendment is necessary to implement Regents policy to provide flexibility to school districts in providing AIS during the 2015-2016 school year. Because the Regents policy upon which the proposed amendment is based uniformly applies to all school districts throughout the State, it is not possible to establish differing compliance or reporting requirements or timetables or to exempt school districts 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.

Job Impact Statement

The proposed amendment extends to the 2015-2016 school year the modified requirements for the provision of Academic Intervention Services (AIS) previously implemented for the 2013-2014 and 2014-2015 school years, to allow for continued flexibility to school districts in providing AIS. The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no 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.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Administration of Vaccinations by Pharmacists, Including Immunizations to Prevent Tetanus, Diphtheria or Pertussis Disease

I.D. No. EDU-40-15-00005-EP

Filing No. 801

Filing Date: 2015-09-17

Effective Date: 2015-09-17

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

Proposed Action: Amendment of section 63.9 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2)(a), 6527(7), 6801(2), (4), 6802(22) and 6909(7); L. 2015, ch. 46

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 46 of the Laws of 2015, which amended Education Law sections 6527, 6801, 6802 and 6909, which include authorizing licensed pharmacists to administer immunizations to prevent tetanus, diphtheria or pertussis disease pursuant to a patient specific order or a non-patient specific order, and to administer immunizations to prevent acute herpes zoster (shingles) pursuant to a non-patient specific order in addition to their current immunization authority to administer immunizations to prevent acute herpes zoster pursuant to a patient specific order.

Because the Board of Regents meets at fixed intervals, the earliest the

proposed amendment can be presented for adoption on a non-emergency basis, after expiration of the required 45-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(1) and (5), would be the December 14-15, 2015 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed amendment, if adopted at the December meeting, would be December 30, 2015, the date a Notice of Adoption would be published in the State Register. However, the provisions of Chapter 46 of the Laws of 2015 became effective on June 30, 2015.

Emergency action is necessary for the preservation of the public health and general welfare in order to enable the State Education Department to immediately establish requirements to timely implement Chapter 46 of the Laws of 2015, so that licensed pharmacists can begin to administer these immunizations to individuals who need them.

It is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the December 14-15, 2015 meeting of the Board of Regents, after publication in the State Register and expiration of the 45-day comment period on proposed rule makings required by the State Administrative Procedure Act.

Subject: Administration of vaccinations by pharmacists, including immunizations to prevent tetanus, diphtheria or pertussis disease.

Purpose: To implement chapter 46 of the Laws of 2015 to authorize pharmacists to administer tetanus, diphtheria or pertussis vaccinations.

Text of emergency/proposed rule: 1. Paragraph (1) of subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education is amended, effective September 17, 2015, as follows:

(b) Immunizations.

(1) Pursuant to section 6801 of the Education Law, a pharmacist with a certificate of administration issued by the department pursuant to paragraph (3) of this subdivision shall be authorized to administer immunization agents prescribed in paragraph (2) of this subdivision to patients therein specified, provided that:

(i) . . .

(ii) with respect to non-patient specific orders:

(a) the immunization is prescribed or ordered by a licensed physician or a certified nurse practitioner with a practice site in the county *or adjoining county* in which the immunization is administered; [or] *and*

(b) [if the immunization is administered in a county with a population of 75,000 or less, the immunization shall be prescribed or ordered by a licensed physician or certified nurse practitioner with a practice site in the county in which the immunization is administered or in an adjoining county.] *if the commissioner of health determines that there is an outbreak of disease, or that there is the imminent threat of an outbreak of disease, then the commissioner of health may issue a non-patient specific regimen applicable statewide.*

2. Paragraph (2) of subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education is amended, effective September 17, 2015, as follows:

(2) Authorized immunization agents. A certified pharmacist who meets the requirements of this section shall be authorized to administer to patients 18 years of age or older,[:

(i)] immunizing agents to prevent influenza, pneumococcal*,* [disease or] *acute herpes zoster,* meningococcal, *tetanus, diphtheria or pertussis* disease, pursuant to a patient specific order or a non-patient specific order.[; and

(ii) immunizing agents to prevent acute herpes zoster, pursuant to a patient specific order.]

3. Paragraph (4) of subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education is amended, effective September 17, 2015, as follows:

(4) Standards, procedures and reporting requirements for the administration of immunization agents. Each certified pharmacist shall comply with the following requirements when administering an immunization agent pursuant to either a patient specific order or a non-patient specific order and protocol:

(i) . . .

(ii) . . .

(iii) a certified pharmacist shall inform each recipient, *or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization,* of potential side effects and adverse reactions, orally and in writing, prior to immunization *and shall administer the immunization or immunizations according to the most current recommendations by the advisory committee for immunization practices (ACIP), provided, however, that a pharmacist may administer any immunization authorized when specified by a patient specific prescription;*

(iv) . . .

(v) . . .

(vi) a certified pharmacist*, when administering an immunization in a pharmacy, shall provide for an area that provides for the patient's privacy, such area shall include a clearly visible posting of the most current "Recommended Adult Immunization Schedule" published by the advisory committee for immunization practices (ACIP) and the certified pharmacist* shall provide a copy of the appropriate vaccine information statement to the recipient, or the person legally responsible *for the recipient* when the patient is incapable of consenting to the immunization, before administering the immunization;

(vii) . . .

(viii) . . .

(ix) . . .

(x) . . .

(xi) each certified pharmacist shall provide information to recipients on the importance of having a primary health care practitioner, in a form or format developed by the Commissioner of Health[.]*;*

(xii) each certified pharmacist shall, prior to administering the immunization or immunizations, inform the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, of the total cost of the immunization or immunizations, subtracting any health insurance subsidization, if applicable. In the case where the immunization is not covered, the pharmacist shall inform the recipient, or other person legally responsible for the recipient when the patient is incapable of consenting to the immunization, that the immunization may be covered when administered by a primary care physician or health care practitioner; and

(xiii) Reporting of administration of immunizing agent.

(a) For administrations prior to December 27, 2015, when a licensed pharmacist administers an immunizing agent, he or she shall report such administration to the patient's attending primary health care practitioner or practitioners, if any, unless the patient is unable to communicate the identity of his or her primary health care practitioner.

(b) For administrations on or after December 27, 2015, when a licensed pharmacist administers an immunizing agent, he or she shall report such administration by electronic transmission or facsimile to the patient's attending primary health care practitioner or practitioners, if any, unless the patient is unable to communicate the identity of his or her primary health care practitioner, and, to the extent practicable, make himself or herself available to discuss the outcome of such immunization, including any adverse reactions, with the attending primary health care practitioner, or to the statewide immunization registry or the citywide immunization registry, as established pursuant to section 2168 of the Public Health Law.

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 December 15, 2015.

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

Data, views or arguments may be submitted to: Office of the Professions, Office of the Deputy Commissioner, State Education Department, State Education Building 2M, 89 Washington Ave., Albany, NY 12234, (518) 486-1765, email: opdepcom@nysed.gov

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

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 to promulgate regulations in administering the admission to the practice of the professions.

Subdivision (7) of section 6527 of the Education Law, as amended, by Chapter 46 of the Laws of 2015, authorizes physicians to prescribe and order a patient specific order or non-patient specific regimen to a licensed pharmacist for administering immunizations to prevent influenza, pneumococcal, acute herpes zoster (shingles), meningococcal, tetanus, diphtheria or pertussis disease and medications required for emergency treatment of anaphylaxis.

Subdivisions (2) and (4) of section 6801 of the Education Law, as amended, by Chapter 46 of the Laws of 2015, establishes requirements in relation to notifying a patient's attending primary care practitioners when the patient has received an immunization or immunization from a certified pharmacist, and establishes requirements for certified pharmacists to inform the patient prior to administering an immunization of the cost of

the immunization and that it may be covered when administered by a primary care physician or practitioner, to administer immunizations according to recommendations by the advisory committee for immunization practices (ACIP), and to provide an area for the patient's privacy which includes a clearly visible posting of the most current "Recommended Adult Immunization Schedule" published by ACIP.

Subdivision (22) of section 6802 of the Education Law, as amended by Chapter 46 of the Laws of 2015, adds immunizations to prevent tetanus, diphtheria or pertussis disease to the list of immunizations certified pharmacists may administer, adds acute herpes zoster (shingles) to the list of immunizations certified pharmacists may administer pursuant to a patient specific order or non-patient specific regimen, and adds authority to permit administration pursuant to orders by a physician or certified nurse practitioner in an adjoining county.

Subdivision (7) of section 6909 of the Education Law, as amended by Chapter 46 of the Laws of 2015, authorizes nurse practitioners to prescribe and order a patient specific order or non-patient specific regimen to a licensed pharmacist for administering immunizations to prevent influenza, pneumococcal, acute herpes zoster (shingles), meningococcal, tetanus, diphtheria or pertussis disease and medications required for emergency treatment of anaphylaxis.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the intent of the aforementioned statutes that the Department shall supervise the regulation of the practice of the professions for the benefit of the public. The proposed amendment will conform Regulations of the Commissioner of Education to Chapter 46 of the Laws of 2015, which includes authorizing certain qualified pharmacists to administer vaccinations to prevent tetanus, diphtheria or pertussis disease pursuant to patient-specific or non-patient specific orders, and to administer immunizations to prevent acute herpes zoster (shingles) pursuant to non-patient specific orders, in addition to their current authority to administer this vaccination pursuant to patient-specific orders.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to conform the Regulations of the Commissioner of Education to Chapter 46 of the Laws of 2015. Authorizing qualified pharmacists to administer immunizations to prevent tetanus, diphtheria or pertussis disease and extend their current authority to administer acute herpes zoster (shingles), will expand the availability of such immunizations, which will improve the public health in New York State.

The proposed amendment also includes a revision to allow physicians and nurse practitioners in adjoining counties to where a pharmacist is practicing to issue non-patient specific orders for immunizations, removes the requirement for patient-specific prescriptions for acute herpes zoster vaccinations, and clarifies what information pharmacists must provide to patients.

4. COSTS:

(a) Costs to State government: There are no additional costs to state government.

(b) Costs to local government: There are no additional costs to local government.

(c) Cost to private regulated parties: The proposed amendments will not increase costs, and may provide cost-savings to patients and the healthcare system. Therefore, there will be no additional costs to private regulated parties.

(d) Cost to regulating agency for implementation and continued administration of this rule: There are no additional costs to the regulating agency.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment relates solely to regulations governing the administration of immunizations to prevent influenza, pneumococcal disease, acute herpes zoster (shingles), meningococcal, and tetanus, diphtheria or pertussis disease, and does not impose any program, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed amendment imposes no new reporting or other paperwork requirements.

7. DUPLICATION:

The proposed amendment does not duplicate other existing state or federal requirements, and is necessary to implement Chapter 46 of the Laws of 2015.

8. ALTERNATIVES:

The proposed amendment is necessary to conform the Regulations of the Commissioner of Education to Chapter 46 of the Laws of 2015. There are no significant alternatives to the proposed amendments, and none were considered.

9. FEDERAL STANDARDS:

Since there are no applicable federal standards, the proposed amendment does not exceed any minimum federal standards for the same or similar subject areas.

10. COMPLIANCE SCHEDULE:

The proposed amendment is necessary to conform the Regulations of the Commissioner of Education to Chapter 46 of the Laws of 2015. The proposed amendment will become effective on September 17, 2015. It is anticipated that licensees certified to administer immunizations will be able to comply with the proposed amendments by the effective date.

Regulatory Flexibility Analysis

The proposed amendment to the Regulations of the Commissioner of Education authorizes pharmacists who are certified to administer immunizations against influenza, pneumococcal disease, acute herpes zoster (shingles), and meningococcal disease to also administer vaccinations to prevent tetanus, diphtheria or pertussis disease. The amendment clarifies that all such vaccinations may be administered pursuant to patient-specific prescriptions or pursuant to non-patient-specific prescriptions issued by a physician or nurse practitioner in the same county, or an adjoining county and stipulates that pharmacists post the most current "Recommended Adult Immunization Schedule". The amendment will not impose any new reporting, recordkeeping, or other compliance requirements, 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 amendment will apply to 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. Of the approximately 25,535 pharmacists registered by the State Education Department, approximately 3,025 pharmacists report that their permanent address of record is in a rural county.

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

The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law sections 6527, 6801, 6802 and 6909, as amended by Chapter 46 of the Laws of 2015. These provisions include authorizing certified pharmacists to administer immunizations to prevent tetanus, diphtheria or pertussis disease pursuant to a patient specific order or a non-patient specific order and to administer immunizations to prevent acute herpes zoster (shingles) pursuant to a non-patient specific order, in addition to their current immunization authority to administer immunizations to prevent acute herpes zoster pursuant to a patient specific order.

The proposed amendment to paragraph (1) of subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education amends the requirement that non-patient specific orders be issued by a physician or nurse practitioner practicing in the same county in which the immunization is administered to allow orders to be issued by a physician or nurse practitioner in an adjoining county as well. The proposed amendment also provides that if the Commissioner of Health determines that there is an outbreak of disease, or that there is the imminent threat of an outbreak of disease, then the Commissioner of Health may issue a non-patient specific order applicable statewide.

The proposed amendment to paragraph (2) of subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education authorizes certified pharmacists to administer immunizations to prevent tetanus, diphtheria or pertussis disease pursuant to a patient specific order or a non-patient specific order and to administer immunizations to prevent acute herpes zoster (shingles) pursuant to a non-patient specific order, in addition to their current immunization authority to administer immunizations to prevent acute herpes zoster pursuant to a patient specific order.

The proposed amendment to paragraph (4) of subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education establishes several compliance requirements for certified pharmacists who administer immunizations to prevent influenza, pneumococcal, acute herpes zoster (herpes), meningococcal, tetanus, diphtheria or pertussis disease. The proposed amendment to paragraph (4) of subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education requires a certified pharmacist to inform the person legally responsible for the recipient when the patient is incapable of consenting to the immunization or immunizations, of the potential side effects and adverse reactions, orally and in writing, prior to immunization. It also requires the certified pharmacist to administer the immunization or immunizations according to the most current recommendations by ACIP, provided, however, that a pharmacist may administer any immunization authorized when specified in a patient specific prescription. The proposed amendment further requires a certified pharmacist, when administering an immunization in a pharmacy, to provide for an area that provides for the patient's privacy, which includes

a clearly visible posting of the most current "Recommended Adult Immunization Schedule" published by ACIP. The proposed amendment further requires each certified pharmacist, prior to administering the immunization or immunizations, to inform the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, of the total cost of the immunization or immunizations, subtracting any health insurance, if applicable. It also requires each certified pharmacist, in the case where the immunization is not covered, to inform the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, that the immunization may be covered when administered by a primary care physician or health care practitioner.

3. COSTS:

The proposed amendment will not require any licensed pharmacists to administer immunizations to prevent influenza, pneumococcal, acute herpes zoster (herpes), meningococcal, tetanus, diphtheria or pertussis disease. With respect to licensed pharmacists seeking to administer the aforementioned immunizations, including those in rural areas, the proposed amendment does not impose any additional costs beyond those imposed required by statute. There may be minimal costs to the licensed pharmacists in complying with the compliance requirements in the proposed amendment to paragraph (4) of subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to conform the Commissioner's Regulations with Education Law sections 6527, 6801, 6802 and 6909, as amended by Chapter 46 of the Laws of 2015. Following discussions, including obtaining input from practicing professionals, the State Board of Pharmacy has considered the terms of the proposed amendment to Regulations of the Commissioner of Education and has recommended the change. Additionally, the measures have been shared with educational institutions, professional associations, and practitioners representing the profession of pharmacy. The amendment is supported by representatives of these sectors. The proposals make no exception for individuals who live in rural areas. The Department has determined that such requirements should apply to all pharmacists, no matter their geographic location, to ensure a uniform standard of practice across the State. Because of the nature of the proposed amendment, alternative approaches for rural areas were not considered.

5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from statewide organizations representing all parties having an interest in the practice of pharmacy. Included in this group were members of the State Board of Pharmacy, educational institutions and professional associations representing the pharmacy profession, such as the Pharmacists Society of the State of New York and the New York State Council of Health System Pharmacists. These groups, which have representation in rural areas, have been provided notice of the proposed rule making and opportunity to comment on the proposed amendment.

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 in Chapter 46 of the Laws of 2015 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 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 to the Regulations of the Commissioner of Education implements Chapter 46 of the Laws of 2015, which amended Education Law sections 6527, 6801, 6802 and 6909, to authorize pharmacists who are certified to administer immunizations to prevent influenza, pneumococcal disease, acute herpes zoster (shingles), and meningococcal disease, to also administer vaccinations to prevent tetanus, diphtheria or pertussis disease.

The proposed amendment to paragraph (1) of subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education amends the requirement that non- patient specific orders be issued by a physician or nurse practitioner practicing in the same county in which the immunization is administered to allow orders to be issued by a physician or nurse practitioner in an adjoining county as well. The proposed amendment also provides that if the Commissioner of Health determines that there is an outbreak of disease, or that there is the imminent threat of an outbreak of disease, then the Commissioner of Health may issue a non-patient specific order applicable statewide.

The proposed amendment to paragraph (2) of subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education authorizes certified pharmacists to administer immunizations to prevent tetanus, diphtheria or pertussis disease pursuant to a patient specific order or a non-patient specific order and to administer immunizations to prevent acute herpes zoster (shingles) pursuant to a non-patient specific order, in addition to their current immunization authority to administer immunizations to prevent acute herpes zoster pursuant to a patient specific order.

The proposed amendment to paragraph (4) of subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education requires a certified pharmacist to inform the person legally responsible for the recipient when the patient is incapable of consenting to the immunization or immunizations, of the potential side effects and adverse reactions, orally and in writing, prior to immunization. It also requires the certified pharmacist to administer the immunization or immunizations according to the most current recommendations by ACIP, provided, however, that a pharmacist may administer any immunization authorized when specified in a patient specific prescription. The proposed amendment further requires a certified pharmacist, when administering an immunization in a pharmacy, to provide for an area that provides for the patient's privacy, which includes a clearly visible posting of the most current "Recommended Adult Immunization Schedule" published by ACIP. The proposed amendment further requires each certified pharmacist, prior to administering the immunization or immunizations, to inform the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, of the total cost of the immunization or immunizations, subtracting any health insurance subsidization, if applicable. It also requires each certified pharmacist, in the case where the immunization is not covered, to inform the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, that the immunization may be covered when administered by a primary care physician or health care practitioner.

The proposed amendment to paragraphs (1), (2) and (4) of subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education implement specific statutory requirements and directives. Therefore, any impact on jobs or employment opportunities created by establishing the requirements for authorizing pharmacists who are certified to administer immunizations to prevent influenza, pneumococcal disease, acute herpes zoster (shingles), and meningococcal disease, to administer immunizations to prevent tetanus, diphtheria or pertussis disease is attributable to the statutory requirement, not the proposed amendment, which simply establishes standards to conform with the requirements of the statute.

The proposed amendment will not have a substantial adverse impact on jobs and employment opportunities. Because it is evident from the nature of the proposed 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.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Graduate-Level Teacher and Educational Leadership Programs

I.D. No. EDU-40-15-00009-EP
Filing No. 813
Filing Date: 2015-09-21
Effective Date: 2015-09-21

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

Proposed Action: Amendment of section 52.21 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 210(not subdivided), 210-a, 210-b, 305(1), (2), 3001(2), 3004(1), 3006(1)(b) and 3009(1)

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

Specific reasons underlying the finding of necessity: The proposed rule is necessary to implement Education Law sections 210-a and 210-b, as added by Subpart B of Part EE of Chapter 56 of the Laws of 2015, regarding admission requirements for graduate-level teacher and educational leadership programs and the suspension and deregistration of certain registered programs with certain passage rates on the certification examinations.

Since the Board of Regents meets at fixed intervals, the earliest the

proposed rule can be presented for regular (non-emergency) adoption, after expiration of the required 45-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), would be the December 2015 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the December meeting, would be December 30, 2015, the date a Notice of Adoption would be published in the State Register. However, Chapter 56 of the Laws of 2015 was signed by the Governor on April 13, 2015, and the provisions of section 2 of Subpart B became effective July 1, 2015 and the provisions of section 1 of Subpart A become effective for registered graduate-level teacher and educational leadership programs commencing instruction on or after July 1, 2016. Therefore, emergency action is necessary at the September 15-16, 2015 Regents meeting for the preservation of the general welfare in order to immediately establish standards for the admission requirements for graduate-level teacher and educational leadership programs and for the suspension and de-registration of graduate-level teacher and educational leadership programs and thus ensure the timely implementation of Education Law §§ 210-a and 210-b, as added by Subpart B of Part EE of Ch. 56 of the Laws of 2015.

Subject: Graduate-level teacher and educational leadership programs.

Purpose: To establish minimum admission standards for graduate level teacher and leader preparation programs and requirements for the suspension and/or deregistration of certain programs with completers who fail to achieve a minimum pass rate on certification examinations for three consecutive years.

Text of emergency/proposed rule: 1. A new clause (l) shall be added to (l) of subparagraph (i) of paragraph (2) of subdivision (b) of section 52.21 of the Regulations of the Commissioner of Education, effective September 21, 2015, to read as follows:

(l) Minimum Selection Criteria by Graduate-Level Teacher and Educational Leadership Programs Commencing Instruction on or after July 1, 2016.

(1) Institutions with registered graduate level teacher and educational leadership programs shall adopt rigorous selection criteria geared to predicting a candidate's academic success in its program. These rigorous selection criteria shall include, but not be limited to, a minimum score on the Graduate Record Examination or a substantially equivalent admission examination, as determined by the institution, and achievement of a cumulative grade point average of 3.0, or its equivalent, in the candidate's undergraduate program.

(2) Each program may exempt no more than 15 percent of any incoming class of students from such selection criteria described in this subclause based on such student's demonstration of potential to positively contribute to the teaching and/or educational leadership professions, as applicable. A program shall report to the Department the number of students admitted pursuant to such exemption and the selection criteria used for such exemptions.

2. Subclause (3) of clause (b) of subparagraph (iv) of paragraph (2) of subdivision (b) of section 52.21 of the Regulations of the Commissioner of Education shall be renumbered as subclause (4) and a new subclause (3) shall be added, effective September 21, 2015, to read as follows:

(3) Requirements for Suspension and/or Deregistration of Graduate-Level Teacher and Educational Leadership Program.

(i) The authority of a graduate-level teacher and educational leadership program to admit new students shall be suspended if, for three consecutive academic years, fewer than fifty percent of its students who have satisfactorily completed the program pass each examination that they have taken that is required for such student's first initial certification, or certification examinations associated with the program leading to a student's additional certification. The pass rate calculation shall include students who have taken one of the certification examinations and used a safety net pursuant to section 80-1.5(c) of this Title. Notwithstanding such suspension, the program shall be permitted to continue operations for the length of time it would take all currently admitted and/or enrolled students, if such students were to attend classes on a full-time basis, to complete the requirements for their degrees. Upon such suspension, the graduate program shall promptly notify each admitted and/or enrolled student of such suspension and in the case of students attending classes on a part-time basis, the institution shall notify these students that they will not be able to the complete the program. If, during this time period, the Commissioner determines that student and/or program performance has significantly improved, the Commissioner may reinstate the program's ability to admit new students. If the Commissioner does not affirmatively reinstate the program's authority to admit new students during such time period, the program shall be deregistered.

(a) For purposes of this subclause, students who have satisfactorily completed the graduate program shall mean students who have met each educational requirement of the program, without regard to whether such students have been awarded a degree, and excluding any requirement that the student pass each required certification examination for such student's first initial certificate, or each required certification examination for such student's school building leader certificate in order to complete the program.

(b) Following suspension of a program pursuant to the subclause, the institution may submit an appeal, on a form prescribed by the Commissioner, to the Commissioner within 30 days of such suspension. The Office of College and University Evaluation shall then have 10 days to submit a written reply to the Commissioner. The Commissioner shall then review the written papers submitted and issue a written decision on the appeal within 30 days of either the Office of College and University Evaluation' reply or if such office does not submit a reply, within 30 days of receipt of the appeal, whichever occurs later. However, a program that has had its ability to admit students suspended shall not admit new students while awaiting the Commissioner's decision on any appeal. An institution with a deregistered program shall not admit any new students in such program while awaiting the Commissioner's decision on its application for registration.

…

[(3)] *(4)* By January 15, 2000 and annually by January 15th thereafter, each institution with programs registered pursuant to this section shall provide the department with a list of all students who satisfactorily complete each of its teacher education programs in the preceding year, July 1st through June 30th.

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 December 19, 2015.

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

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

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 210 of the Education Law authorizes the Department to fix the value of degrees, diplomas and certificates issued by institutions of other states or countries as presented for entrance to schools, colleges and the professions of the state.

Sections 210-a of the Education Law, added by Chapter 56 of the Laws of 2015, requires all institutions with graduate level teacher and leader preparation programs registered by the Department to adopt rigorous selection criteria geared to predicting a candidate's academic success in its program.

Sections 210-b of the Education Law, added by Chapter 56 of the Laws of 2015 requires that, if fewer than 50 percent of the program completers in a graduate teacher or educational leadership program pass each examination required for certification for three consecutive academic years, the Department must suspend the program's authority to admit new students. This provision in the new law became effective July 1, 2015.

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

Subdivision (2) of section 305 of the Education Law authorizes the Commissioner of Education to have general supervision over all schools subject to the Education Law.

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

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

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

Paragraph (b) of Subdivision (1) of the Education Law provides that no part of school moneys apportioned to a district shall be applied to the payment of the salary of an unqualified teacher.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment will carry out the objectives of the above referenced statutes by requiring all institutions with graduate level teacher and leader preparation programs registered by the Department to adopt rigorous selection criteria geared to predicting a candidate's academic success in its program. The proposed amendment also implements Chapter 56 of the Laws of 2015 by requiring the Department to suspend a graduate level teacher or leader preparation program's authority to admit new students if, for three consecutive academic years, fewer than fifty percent of its students who have completed the program, pass each of the certification assessments required for their first initial certificate, and deregister the program if it does not significantly improve.

3. NEEDS AND BENEFITS:

Admission Requirements

The Department, consistent with the requirements of 210-a, will require registered programs with graduate level teacher and educational leader programs commencing instruction on or after July 1, 2016, to establish rigorous minimum selection criteria geared to predicting a candidate's academic success in the program. The law requires candidates who are seeking their first initial certificate admitted to such programs to have a minimum cumulative undergraduate grade point average of 3.0 or higher in the candidate's undergraduate program, and to have achieved a minimum score, to be set by the institution, on the Graduate Record Examination (GRE), or a substantially equivalent admission assessment. Pursuant to the law, each program is entitled to exempt up to fifteen percent of its incoming class from these admission requirements based on the exempted student's demonstrated "potential to positively contribute to the teacher profession" or for "other extenuating circumstances pursuant to the regulations of the commissioner. The Department has clarified this exemption to also extend to a student's ability to positively contribute to the educational leadership profession for students in a graduate-level educational leadership program. However, the Department did not list any other extenuating circumstances in the regulation because it believes that an exemption should only be permitted where a student is able to demonstrate the potential to positively contribute to the teaching and/or educational leadership profession and if a student cannot demonstrate such potential, an exemption should not be granted. Further, adding extenuating circumstances does not increase the percentage of students exempted from the admission criteria set forth in the statute.

Minimum Program Completer Certification Assessment Pass Rate, Suspension and Deregistration

Section 210-b requires that, if fewer than fifty percent of the program completers in a graduate teacher or leader preparation program pass each examination required for certification for three consecutive academic years, the Department must suspend the program's authority to admit new students. This provision in the new law became effective July 1, 2015. The law provides that the program shall be permitted to continue operations for the length of time it would take all students currently admitted and/or enrolled students to complete the program based on a full-time course schedule. If, during that time, the Commissioner determines that student and/or program performance has significantly improved, the Commissioner may reinstate the program's ability to admit new students. In making this determination, the statute instructs the Department to consider performance on each certification examination of the cohort of students completing an examination not more than five years before the end of the academic year in which the program is completed or not later than the September 30 following the end such academic year, where such academic year is defined as July 1 through June 30th, and shall consider only the highest score of individuals taking a test more than once. The Department will seek input from the field and, at a future date, recommend to the Board of Regents how it will define significant improvement.

A program that has been suspended would be permitted to continue operations for the length of time it would take all currently admitted and/or enrolled students, if such students were to attend classes on a full-time basis, to complete the requirements for their degrees. The institution would be required to notify all admitted and/or enrolled students of the suspension and, in the case of students attending classes on a part-time basis, the institution would be required to notify these students that they may not be able to the complete the program.

The program may also appeal the suspension during this time, in a manner and timeframe prescribed by the Commissioner. The law further provides authority to the Commissioner to affirmatively reinstate the program's ability to admit new students if: (i) student or program performance improves; or (ii) the Department's suspension is successfully overturned on appeal. If the program's ability to admit new students is not affirmatively reinstated by the Commissioner, the law requires the program to be deregistered.

Education Law § 210-b also authorizes the Commissioner to conduct expedited suspension and registration reviews for graduate programs pursuant to the Commissioner's regulations. The Department will be discussing this provision of the new law with stakeholders and the State Professional and Practices Board to determine what situations should trigger expedited reviews and will come back to the Board sometime this winter to discuss their recommendations.

4. COSTS:

(a) Cost to State government. The amendment will not impose any additional cost on State government, including the State Education Department.

(b) Cost to local government. The amendment does not impose additional costs upon local governments, including schools districts and BOCES.

(c) Cost to private regulated parties. The amendment will not impose additional costs on private regulated parties.

(d) Costs to the regulatory agency. As stated above in Costs to State Government, the amendment will not impose any additional costs on the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

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

6. PAPERWORK:

The proposed amendment will not increase reporting or recordkeeping requirements beyond existing requirements, except that the proposed amendment establishes an appeal process for institutions who choose to challenge the suspension of their program. Following suspension of a program, the institution may submit an appeal, on a form prescribed by the Commissioner, to the Commissioner within 30 days of such suspension. The Office of College and University Evaluation shall then have 10 days to submit a written reply to the Commissioner. The Commissioner shall then review the written papers submitted and issue a written decision on the appeal within 30 days of either the Office of College and University Evaluation' reply or if such office does not submit a reply, within 30 days of receipt of the appeal, whichever occurs later. However, a program that has had its ability to admit students suspended shall not admit new students while awaiting the Commissioner's decision on any appeal.

7. DUPLICATION:

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

8. ALTERNATIVES:

No alternatives were considered because the proposed amendment implements the statutory requirements in Education Law §§ 210-a and 210-b, as added by Chapter 56 of the Laws of 2015.

9. FEDERAL STANDARDS:

There are no Federal standards that deal with the subject matter of this amendment.

10. COMPLIANCE SCHEDULE:

Regulated parties must comply with the proposed amendment on its effective date. Because of the nature of the proposed amendment, no additional period of time is necessary to enable regulated parties to comply.

Regulatory Flexibility Analysis

The purpose of the proposed amendment is to implement Education Law §§ 210-a and 210-b, as added by Chapter 56 of the Laws of 2015, by requiring all institutions with graduate level teacher and leader preparation programs registered by the Department to adopt rigorous selection criteria geared to predicting a candidate's academic success in its program and to authorize the Department to suspend a graduate level teacher or leader preparation program's authority to admit new students if, for three consecutive academic years, fewer than fifty percent of its students who have completed the program, pass each of the certification assessments required for their first initial certificate, and deregister the program if it does not significantly improve. Since the proposed amendment has no impact on small businesses or local governments, no regulatory flexibility analysis for small businesses and local governments has been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment will affect teacher and leader graduate-level candidates in all parts of the State and institutions offering graduate level teacher and educational leader programs in all parts of this 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:

Admission Requirements

The Department, consistent with the requirements of 210-a, will require registered programs with graduate level teacher and educational leader programs commencing instruction on or after July 1, 2016, to establish rigorous minimum selection criteria geared to predicting a candidate's academic success in the program. The law requires candidates who are seeking their first initial certificate admitted to such programs to have a mini-

mum cumulative undergraduate grade point average of 3.0 or higher in the candidate's undergraduate program, and to have achieved a minimum score, to be set by the institution, on the Graduate Record Examination (GRE), or a substantially equivalent admission assessment. Pursuant to the law, each program is entitled to exempt up to fifteen percent of its incoming class from these admission requirements based on the exempted student's demonstrated "potential to positively contribute to the teacher profession" or for "other extenuating circumstances pursuant to the regulations of the commissioner. The Department has clarified this exemption to also extend to a student's ability to positively contribute to the educational leadership profession for students in a graduate-level educational leadership program. However, the Department did not list any other extenuating circumstances in the regulation because it believes that an exemption should only be permitted where a student is able to demonstrate the potential to positively contribute to the teaching and/or educational leadership profession and if a student cannot demonstrate such potential, an exemption should not be granted. Further, adding extenuating circumstances does not increase the percentage of students exempted from the admission criteria set forth in the statute.

Minimum Program Completer Certification Assessment Pass Rate, Suspension and Deregistration

Section 210-b requires that, if fewer than fifty percent of the program completers in a graduate teacher or leader preparation program pass each examination required for certification for three consecutive academic years, the Department must suspend the program's authority to admit new students. This provision in the new law became effective July 1, 2015. The law provides that the program shall be permitted to continue operations for the length of time it would take all students currently admitted and/or enrolled students to complete the program based on a full-time course schedule. If, during that time, the Commissioner determines that student and/or program performance has significantly improved, the Commissioner may reinstate the program's ability to admit new students. In making this determination, the statute instructs the Department to consider performance on each certification examination of the cohort of students completing an examination not more than five years before the end of the academic year in which the program is completed or not later than the September 30 following the end such academic year, where such academic year is defined as July 1 through June 30th, and shall consider only the highest score of individuals taking a test more than once. The Department will seek input from the field and, at a future date, recommend to the Board of Regents how it will define significant improvement.

A program that has been suspended would be permitted to continue operations for the length of time it would take all currently admitted and/or enrolled students, if such students were to attend classes on a full-time basis, to complete the requirements for their degrees. The institution would be required to notify all admitted and/or enrolled students of the suspension and, in the case of students attending classes on a part-time basis, the institution would be required to notify these students that they may not be able to the complete the program.

The program may also appeal the suspension during this time, in a manner and timeframe prescribed by the Commissioner. The law further provides authority to the Commissioner to affirmatively reinstate the program's ability to admit new students if: (i) student or program performance improves; or (ii) the Department's suspension is successfully overturned on appeal. If the program's ability to admit new students is not affirmatively reinstated by the Commissioner, the law requires the program to be deregistered.

Education Law § 210-b also authorizes the Commissioner to conduct expedited suspension and registration reviews for graduate programs pursuant to the Commissioner's regulations. The Department will be discussing this provision of the new law with stakeholders and the State Professional and Practices Board to determine what situations should trigger expedited reviews and will come back to the Board sometime this winter to discuss their recommendations.

3. COSTS:

There are no additional costs imposed by the proposed amendment.

4. MINIMIZING ADVERSE IMPACT:

Subpart B of Part EE of the Laws of 2015 does not make any exceptions for teacher/leader candidates or institutions in rural areas of the State, except pursuant to the law, each program is entitled to exempt up to fifteen percent of its incoming class from the admission requirements based on the exempted student's demonstrated "potential to positively contribute to the teacher profession" or for "other extenuating circumstances pursuant to the regulations of the commissioner". The Department has clarified this exemption to also extend to a student's ability to positively contribute to the educational leadership profession for students in a graduate-level educational leadership program. This exemption may apply to student's who meet this requirement, and who live or work in rural areas of this State.

5. RURAL AREA PARTICIPATION:

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

Job Impact Statement

The purpose of the proposed amendment is to conform regulations to the requirements of the new sections 210-a and 210-b to the Education Law, as added by Subpart B of Part EE of Chapter 56 of the Laws of 2015, to adopt rigorous admission requirements and to establish the requirements for the suspension and deregistration of graduate-level teacher and educational leader programs. The proposed rule does not impose any reporting, recordkeeping or other compliance requirements, and will not have an adverse economic impact, on small businesses or local governments. Because it is evident from the nature of the 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

Probationary Appointments and Tenured Teacher Hearings

I.D. No. EDU-27-15-00006-ERP

Filing No. 818

Filing Date: 2015-09-21

Effective Date: 2015-09-21

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

Action Taken: Amendment of section 30-1.3, Subparts 82-1 and 82-3 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 215(not subdivided), 305(1), (2), 2509(1), (2), 2573(1), (5), (6), 3001(2), 3004(1), 3009(1), 3012(1), (2), 3012-c(1-10), 3012-d(1-15), 3014(1), (2), 3020(3), (4), 3020-a(2) and 3020-b(1-6); L. 2015, ch. 56, part EE, Subparts D and G

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

Specific reasons underlying the finding of necessity: The proposed rule is necessary to conform the Commissioner's Regulations to changes in the Education Law enacted in Subparts D and G of Part EE of Chapter 56 of the Laws of 2015, relating to probationary appointments and tenured teacher hearings.

The proposed amendment was adopted by emergency action at the June 15-16, 2015 Regents meeting, effective July 1, 2015. The Department recommends that the proposed rule be amended to address public comment received. A Notice of Revised Rule Making will be published in the State Register on October 7, 2015. Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for regular (non-emergency) adoption, after expiration of the required 30-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), would be the November 16-17, 2015 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the November meeting, would be December 2, 2015, the date a Notice of Adoption would be published in the State Register.

The June emergency rule will expire on September 21, 2015, 90 days after its filing with the Department of State on June 23, 2015. Emergency action is therefore necessary for the preservation of the general welfare to ensure that the proposed amendment adopted by emergency action at the June 2015 Regents meeting and revised at the September 2015 Regents meeting, remains continuously in effect until the effective date of its permanent adoption in order to timely implement Subparts D and G of Part EE of Chapter 56 of the Laws of 2015, relating to probationary appointments and tenured teacher hearings.

Subject: Probationary Appointments and Tenured Teacher Hearings.

Purpose: To implement subparts D and G of part EE chapter 56 of the Laws of 2015.

Substance of emergency/revised rule: The Commissioner of Education proposes to amend section 30-1.3 and Subpart 82-1 and add a new Subpart 82-3 of the Commissioner's Regulations, relating to probationary appointments and tenure teacher hearings, to implement the requirements of Subparts D and G of Part EE of Chapter 56 of the Laws of 2015. The

proposed rule has been adopted as an emergency action at the June 2015 Regents meeting, effective June 23, 2015. The following is a summary of the substance of the proposed rule.

Section 30-1.3 is amended to provide that for appointments of classroom teachers and building principals made on or after July 1, 2015, the board resolution must reflect that, except to the extent required by the applicable provisions of Education Law §§ 2509, 2573, 3212 and 3014, in order to be granted tenure, the classroom teacher or building principal shall have received composite or overall annual professional performance review ratings pursuant to Education Law § 3012-c and/or 3012-d of either effective or highly effective in at least three (3) of the four (4) preceding years and if the classroom teacher or building principal receives an ineffective composite or overall rating in the final year of the probationary period he or she shall not be eligible for tenure at that time. For purposes of this subdivision, "classroom teacher" and "building principal" means a classroom teacher or building principal as such terms are defined in sections 30-2.2 and 30-3.2 of this Part.

The Title of Subpart 82-1 and section 82-1.1 are amended to provide that Subpart 82-1 applies to hearings on charges against tenured school employees pursuant to section 3020-a of the Education Law that are commenced by the filing of charges on or after August 25, 1994 and prior to July 1, 2015.

A new Subpart 82-3 is added, relating to hearings on charges against tenured school employees pursuant to section 3020-a of the Education Law that are commenced by the filing of charges on or after July 1, 2015.

Section 82-3.1, Application of this Subpart, provides that Subpart 80-3 applies to hearings on charges against tenured school employees pursuant to sections 3020-a and 3020-b of the Education Law that are commenced by the filing of charges on or after July 1, 2015.

Section 82-3.2, Definitions, provides definitions of terms used in Subpart 82-3, including "employee", "chief school administrator", "board", "clerk", "Commissioner", "association", "hearing officer", "communication", "Day", and "Party."

Section 82-3.3, Charges, establishes requirements and procedures for bringing charges.

Section 82-3.4, Request for a hearing, sets forth the requirements and procedures for requesting a hearing.

Section 82-3.5, Appointment of hearing officer in standard and expedited § 3020-a proceedings, sets forth requirements and procedures for appointment of a hearing officer from a list of qualified individuals, as specified in the regulation, who are selected by the American Arbitration Association to preside in standard and expedited § 3020-a proceedings.

Section 82-3.6, Appointment of hearing officer in expedited § 3020-b proceeding, establishes different procedures for the appointment of hearing officers for standard § 3020-a hearings and the four categories of expedited hearings.

Section 82-3.7, Pre-Hearing Conference, sets forth requirements and procedures for conducting pre-hearing conferences.

Section 82-3.8, General hearing procedures, establishes general hearing requirements and procedures including time deadlines for hearings, powers of hearing officers, parties rights, record of proceedings, public access to hearings, submission of memoranda of law, and requirements for issuing decisions.

Section 82-3.9, Special Hearing Procedures for expedited hearings, establishes special requirements and procedures for expedited § 3020-a proceedings (based on revocation of certification, or based on charges constituting physical or sexual abuse of a student), and for expedited § 3020-b hearings (relating to a removal proceeding for charges of incompetence based two consecutive ineffective composite or overall APPR ratings, or relating to a removal proceeding for charges of incompetence based three consecutive ineffective composite or overall APPR ratings).

Section 82-3.10, Probable Cause Hearing for Certain Suspensions without pay, provides for conduct of a probable cause hearing in instances where an employee is suspended without pay pending a determination in an expedited hearing based on charges of misconduct constituting physical or sexual abuse of a student. By statute, the hearing officers in such probable cause hearings must be appointed from a rotational list in a manner similar to the rotational selection process contained in Education Law § 4404, and the proposed amendment clarifies that this will be a rotational list of hearing officers who have agreed to serve under the terms and conditions set forth in Education Law § 3020-a(2)(c).

Section 82-3.11, Monitoring and enforcement of timelines, provides for the monitoring and investigation by the State Education Department of a hearing officer's compliance with the timelines prescribed in Education Law §§ 3020-a and 3020-b, and provides for the removal of hearing officers from the qualified list on grounds of a record of continued failure to commence and complete hearings within the time periods prescribed, and provides for reinstatement to the list, at the Commissioner's discretion and upon application made after one year.

Section 82-3.12, Reimbursable hearing expenses, sets forth requirements for compensation and reimbursement by the Commissioner of necessary travel expenses and other reasonable expenses of a hearing officer.

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 8, 2015, I.D. No. EDU-27-15-00006-EP. The emergency rule will expire November 19, 2015.

Emergency rule compared with proposed rule: Substantial revisions were made in sections 80-3.5(f), (g), 80-3.6(b)(1), (2), (6), 80-3.7(c)(2), (3) and 80-3.9(e)(2).

Text of rule and any required statements and analyses may be obtained from: Kirti Goswami, New York State Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 474-6400, email: legal@nysed.gov

Data, views or arguments may be submitted to: Peg Rivers, New York State Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 474-6400, email: privers2nysed.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 8, 2015, the following substantial revisions were made to the proposed rule:

One commenter indicated that the requirement for a TIP/PIP for charges relating to three ineffective ratings is inconsistent with the statute and has requested a technical amendment to remove this requirement for charges brought for three consecutive ineffective ratings. In an effort to conform the regulatory language with Chapter 56 of the Laws of 2015, the Department recommends that section 80-3.9(e)(2) of the regulations be amended to eliminate the requirement for a TIP/PIP for charges relating to three ineffective ratings.

Section 82-3.6(b) of the Commissioner's regulations is amended to require that the parties select the hearing officer within 7 calendar days, instead of 5 business days. That provides relief and is less burdensome for the Department to track than a 5 business day rule.

Section 82-3.5(f) of the Commissioner's regulation was revised to allow the selection of another hearing officer within either two business days from the first declination or failure to confirm or 15 days from the parties' receipt of the hearing officer list, whichever is later. For expedited hearings under Education Law § 3020-b, however, the 15 day period from Education Law § 3020-a does not apply, and the proposed regulation as revised instead requires that the parties select a hearing officer within 7 days. A similar change was made to proposed § 82-3.6(b)(1) to clarify that following a declination or failure to confirm, the parties may select another hearing officer within the 7 day period.

Section 82-3.7(c)(3)(ii) of the Commissioner's regulations is amended to conform to the literal language of Education Law § 3020-b(3)(c)(iii)(C) to clarify that the hearing officer shall consider requests for production of relevant and material evidence and information including witness statements, investigatory statements or notes, exculpatory evidence or any other evidence, including district or student records, "relevant and material to the employee's defense". This phrase was inadvertently omitted from the proposed regulation.

Section 82-3.7(c)(2) of the proposed regulations is amended to conform with Education Law § 3020-b(3)(c)(iv) to clarify that the five days' notice by statute applies to applications on motions to discuss, amend or consolidate, and on other preliminary matters.

Also, proposed § 82-3.5(h) and proposed § 82-3.6(b)(6) have been revised to clarify the procedures relating to replacement of a hearing officer. Under the revised regulations, when a hearing officer who has been appointed and such appointment has been confirmed but is unable to complete the hearing and needs to be replaced, the hearing officer must immediately notify the Commissioner. If the hearing officer is incapacitated and unable to provide such notice, upon learning of such incapacity, the parties are required to notify the Commissioner. The Commissioner then notifies the parties that they need to mutually select a new hearing officer within 2 business days of receipt of notice from the Commissioner, or the Commissioner will appoint a new hearing officer from the list.

The above revisions to the proposed rule do not require any revisions to the previously published Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on July 8, 2015, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The purpose of proposed rule is to implement the requirements of Subparts D and G of Part EE of Chapter 56 of the Laws of 2015, relating to probationary appointments and tenure teacher hearings. The above revisions to the proposed rule do not require any revisions 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 July 8, 2015, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The purpose of proposed rule is to implement the requirements of Subparts D and G of Part EE of Chapter 56 of the Laws of 2015, relating to probationary appointments and tenure teacher hearings. The above revisions to the proposed rule do not require any revisions 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 July 8, 2015, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The purpose of proposed rule is to implement the requirements of Subparts D and G of Part EE of Chapter 56 of the Laws of 2015, relating to probationary appointments and tenure teacher hearings. The revised proposed rule will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the revised proposed rule 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

Since publication of a Notice of Proposed Rule Making in the State Register on July 8, 2015, the State Education Department (SED) received the following comments:

1. COMMENT:

Because 3020-a(1) was not amended and 3020-b(1) does not authorize charges to be brought during the summer vacation period, the commenter, a teacher's collective bargaining representative, proposes that the regulations be clarified to reflect that no charges can be brought between the closing and opening of school.

DEPARTMENT RESPONSE:

The language in Education Law § 3020-a(1) requires that charges be filed during the period between the actual opening and closing of the school year for which the employed is normally required to serve. This language is not contained in Education Law § 3020-b(1), which otherwise repeats the language from § 3020-a(1) relating to the filing of charges. By omitting the limitation on the filing of charges during the period between the actual opening and closing of the school year, the regulation is conforming to the language of Education Law § 3020-b(1). Absent any evidence in the legislative history to the contrary, the Department concludes that this language was intentionally omitted from Education Law § 3020-b(1) and that the regulatory language allowing charges to be brought when school is not in session is consistent with Education Law § 3020-b.

2. COMMENT:

The emergency regulations provide that the unpaid suspension begins from the time of the employing board of education's decision to suspend without pay. The commenter, has proposed and continues to propose that the suspension without pay should commence upon the hearing officer's finding of probable cause and not before. The new law does not state that school districts can take the teacher off the payroll prior to the probable cause hearing. Under the New York City DOE/UFT contract, the teacher stays on the payroll until a probable cause determination is made.

DEPARTMENT RESPONSE:

Education Law § 3020-a(2)(c) specifically provides that, where charges of misconduct constituting physical or sexual abuse of a student are brought on or before July 1, 2015, the board of education may suspend the employee without pay pending an expedited hearing. It also requires the Commissioner to establish a process in regulations for a probable cause hearing before an impartial hearing officer within 10 days to determine whether the decision to suspend an employee without pay should be continued or reversed. The reference in the statute to the hearing officer determining at the probable cause hearing whether a suspension without pay should be continued, is a clear and unequivocal indicator that a board of education may suspend without pay prior to the hearing officer's determination of probable cause. The Department believes that regulation is consistent with the statutory language which authorizes the employee to be suspended without pay pending an expedited hearing. The fact that the language of Education Law § 3020-a(2)(c) differs from a collectively bargained alternative probable cause hearing process in this regard is not controlling. The plain language of the statute indicates that a board of education may suspend without pay in this instance unless and until a probable cause determination reversing the suspension is made.

3. COMMENT:

The emergency regulations provide that for all cases in which the parties select a hearing officer, if the hearing officer selected by the parties fails to respond within three days it will be treated as a declination, and the parties have two days to select another, and that if that second hearing officer declines or fails to confirm within three days, SED can select the hearing officer. The commenter proposes that this provision be modified to conform with SED's current practice of allowing two business days or fifteen days from receipt of the hearing officer list, whichever is later, for the parties to select another hearing officer if the first selection declines or fails to respond, before SED may make the selection.

DEPARTMENT RESPONSE:

The Department agrees that the parties in a regular or expedited hearing under Education Law § 3020-a should have the opportunity to select another hearing officer within the 15 day period set forth in statute, and did not intend to change that practice. Accordingly, we have amended proposed § 82-3.5(f) to allow the selection of another hearing officer within either two business days from the first declination or failure to confirm or 15 days from the parties' receipt of the hearing officer list, whichever is later. For expedited hearings under Education Law § 3020-b, however, the 15 day period from Education Law § 3020-a does not apply, and the proposed regulation as revised instead requires that the parties select a hearing officer within 7 days. A similar change has been made to proposed § 82-3.6(b)(1) to clarify that following a declination or failure to confirm, the parties may select another hearing officer within the 7 day period.

4. COMMENT:

For expedited cases based on two consecutive ineffective ratings under 3020-b, the commenter believes that five-day period for initial selection of a hearing officer i is unrealistic and proposes that it be changed to five business days.

DEPARTMENT RESPONSE:

The Department is not persuaded that a five day period is unrealistic, but has agreed to amend proposed § 82-3.6(b)(1) and (2) to give the parties seven calendar days. This provides equivalent relief to five business days and is easier for the Department to track administratively. The Department believes that seven calendar days provides a sufficient amount of time to make a selection and that it is the appropriate amount of time for these types of expedited hearings, where a decision needs to be made in 90 days from when the employee requested a hearing. Moreover, under § 25-a of the General Construction Law, if a deadline falls on a weekend or holiday, the actual deadline can be pushed to the next succeeding business day, so the actual period available to the parties can be longer.

5. COMMENT:

The emergency regulations provide if a hearing officer needs to be replaced after he or she has agreed to serve, the parties have two business days to select another or the Department will make the selection. The commenter states that this is not authorized by either 3020-a or 3020-b.

DEPARTMENT RESPONSE:

The Department disagrees with this comment. Education Law 3020-a(3)(i)(A) and (B) provides the Commissioner with the power to establish necessary rules and procedures for the conduct of hearings under that section, and to enforce timelines in regulations to ensure that the duration of a tenured teacher removal proceeding is conducted within the statutory timelines. Education Law § 3020-a(3)(b)(iii) explicitly gives the Commissioner the authority to appoint a hearing officer from the list if the parties fail to agree on an arbitrator or fail to notify the Commissioner of the selection within 15 days of the parties receipt of the list. It is true that the statute doesn't specifically address what happens when the selected hearing officer needs to be replaced after he or she has agreed to serve, but it is also true that the clear intent is for the parties to complete the submission of evidence in 125 days after the filing of the charges (see, Education Law § 3020-a[c][vii]), thus the need for very tightly controlled timelines. A hearing officer may need to be replaced at any point in the hearing, making it imperative that a replacement be appointed expeditiously. We believe that the Commissioner has the authority to adopt a regulation, proposed § 82-3.5(h), that provides an expedited procedure for selection of a new hearing officer to replace a previously appointed hearing officer in order to assure that the hearing is not unduly delayed, and will be conducted within the statutory timeline.

Similarly, Education Law § 3020-b(3)(c)(i) provides the Commissioner with the power to establish necessary rules and procedures for the conduct of hearings in expedited removal proceedings under that section, and to establish timelines in regulations to ensure that the duration of a tenured teacher removal proceeding will be within the statutory timeline. As with § 3020-a hearings, Education Law § 3020-b(3)(a) explicitly gives the Commissioner the authority to appoint a hearing officer from the list if the parties fail to agree on an arbitrator or fail to notify the Commissioner of their selection. We believe that the Commissioner is fully authorized to adopt regulations to ensure that the expedited hearings will be completed within the 90 day period by requiring in § 82-3.6(b)(6) that the parties must mutually select a new hearing officer within 2 business days, or the Commissioner will appoint a new hearing officer from the list.

However, both proposed § 82-3.5(h) and proposed § 82-3.6(b)(6) have been revised to clarify that a hearing officer who previously has been appointed but cannot complete the hearing must immediately notify the Commissioner, and if the hearing officer is incapacitated and unable to provide such notice, the parties shall provide the notice upon learning of his/her incapacity. The regulation is further revised to provide that the Commissioner shall notify the parties when a hearing officer needs to be replaced, and the parties must mutually select a new hearing officer within 2 business days of receipt of notice from the Commissioner, or the Commissioner will appoint a new hearing officer from the list. This establishes a fixed point in time from which the two business days will be measured.

6. COMMENT:

One commenter expressed concern that the regulations go beyond what the statute allows by allowing hearing officers to entertain motions by the employer for additional discovery of the employee's case including issuance of subpoenas, bills of particular, witness statements and investigatory materials. The commenter suggested that the regulations be limited to prehearing disclosure of the teacher's witnesses and evidence that the teacher will offer at the hearing, the only material authorized by the statute.

DEPARTMENT RESPONSE:

The Department has revised 82-3.7(c)(3)(ii) to conform to the literal language of Education Law § 3020-b (3)(c)(iii)(C), to clarify that a schedule shall be set at the prehearing conference for the full and fair disclosure of witnesses and evidence for both witnesses, including but not limited to bills of particular and requests for production of relevant and material evidence and information including witness statements, investigatory statements or notes, exculpatory evidence or any other evidence, including district or student records, "relevant and material to the employee's defense". This phrase was inadvertently omitted from the proposed regulation.

7. COMMENT:

One commenter expressed concern that the language on pre-hearing motions, includes a provision for five days' notice for motions to discuss, amend or consolidate, but omits such provision for other preliminary matters, which is required by the statute.

DEPARTMENT RESPONSE:

The Department agrees and section 82-3.7(c)(2) has been amended to conform with Education Law § 3020-b(3)(c)(iv) by clarifying that the five days' notice by statute applies to applications on other preliminary matters.

8. COMMENT:

The regulations provide that the seven hour hearing day must exclude any time taken for meal breaks. The commenter requests that this should be deleted as unnecessary absent evidence that such breaks are excessive in length under current regulations.

DEPARTMENT RESPONSE:

The Department believes that this policy is reasonable and that pursuant to Education Law § 3020-a and 3020-b, hearing officers should only be reimbursed for their actual service and that this is consistent with customary employment practice.

9. COMMENT:

Education Law § 3020-b(2)(d) requires that any charges brought for two ineffective ratings shall allege that the employing board has developed and substantially implemented a teacher improvement plan (TIP)/principal improvement plan (PIP) for the employee following the first evaluation in which the employee was rated ineffective, and the immediately preceding evaluation if the employee was rated developing. However, the regulations contain this requirement for charges brought for two or three consecutive ineffective ratings (82-3.9[d][2]; 82-3.9[e][2]). One commenter indicated that this is inconsistent with the statute and has requested a technical amendment to remove this requirement for charges brought for three consecutive ineffective ratings.

DEPARTMENT RESPONSE:

In an effort to conform the regulatory language with the statute, this requirement has been eliminated from § 82-3.9(e)(2) of the proposed regulations.

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

School Receivership

I.D. No. EDU-27-15-00008-ERP
Filing No. 804
Filing Date: 2015-09-21
Effective Date: 2015-09-21

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

Action Taken: Amendment of section 100.19 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 211-f(15), 215 (not subdivided), 305(1), (2), (20), 308 (not subdivided) and 309 (not subdivided); L. 2015, ch. 56, subpart H, part EE

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

Specific reasons underlying the finding of necessity: The purpose of the proposed rulemaking is to implement section 211-f of Education Law, as added by Subpart H of Part EE of Chapter 56 of the Laws of 2015, pertaining to school receivership. Section 211-f designates current Priority Schools that have been in the most severe accountability status since the 2006-07 school year as "Persistently Failing Schools" and vests the superintendent of the district with the powers of an independent receiver. The superintendent is given an initial one-year period to use the enhanced authority of a receiver to make demonstrable improvement in student performance at the "Persistently Failing School" or the Commissioner will direct that the school board appoint an independent receiver and submit the appointment for approval by the Commissioner. Failing Schools, schools that have been Priority Schools since the 2012-13 school year, will be given two years under a "superintendent receiver" (i.e., the superintendent of schools of the school district vested with the powers a receiver would have under section 211-f) to improve student performance. Should the school fail to make demonstrable progress in two years then the district will be required to appoint an independent receiver and submit the appointment for approval by the Commissioner. Independent Receivers are appointed for up to three school years and serve under contract with the Commissioner.

The proposed rulemaking adds a new section 100.19 to align the Commissioner's Regulations with Education Law 211-f, and addresses the Regents Reform Agenda and New York State's updated accountability system. Adoption of the proposed amendment is necessary to ensure seamless implementation of the provisions of Education Law § 211-f, and will provide school districts with additional powers to impact improvement in academic achievement for students in the lowest performing schools.

The proposed amendment was adopted by emergency action at the June 15-16, 2015 Regents meeting, effective July 1, 2015. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on July 8, 2015. Since publication of the Notice, the proposed amendment has been substantially revised in response to public comment, as set forth in the Revised Regulatory Impact Statement submitted herewith. Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for regular (non-emergency) adoption, after expiration of the required 30-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(4-a), would be the November 16-17, 2015 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the November meeting, would be December 2, 2015, the date a Notice of Adoption would be published in the State Register. However, the June emergency rule will expire on September 21, 2015, 90 days after its filing with the Department of State on June 23, 2015.

Therefore, emergency action is necessary at the September 2015 Regents meeting for the preservation of the general welfare in order to immediately adopt revisions to the proposed amendment in response to public comment, and to otherwise ensure that emergency rule adopted at the June 2015 Regents meeting, as revised, remains continuously in effect until the effective date of its adoption as a permanent rule.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the November 16-17, 2015 Regents meeting, which is the first scheduled meeting after expiration of the 30-day public comment period prescribed in the State Administrative Procedure Act for State agency revised rule makings.

Subject: School receivership.

Purpose: To implement Education Law section 211-f, as added by part EE, subpart H of ch. 56 of the Laws of 2015.

Substance of emergency/revised rule: The Commissioner of Education proposes to add a new section 100.19 of the Commissioner's Regulations. The proposed rule was originally adopted as an emergency action at the June 2015 Regents meeting, effective June 23, 2015. The proposed rule was subsequently revised and adopted as an emergency action at the September 2015 Regents meeting, effective September 21, 2015. The following is a summary of the substantive provisions of the emergency revised rule.

Section 100.19(a), Definitions, provides the definitions used in the section, including the definitions of Failing School (Struggling School), Persistently Failing School (Persistently Struggling School), Priority School, School District in Good Standing, School District Superintendent Receiver, Independent Receiver, School District, Community School, Board of Education, Department-approved Intervention Model, School Intervention Plan, School Receiver, Diagnostic Tool for School and District Effectiveness, Consultation and Cooperation, Consultation, Consulting and Day.

§ 100.19(b), Designation of Schools as Failing and Persistently Failing, explains the process by which the Commissioner shall designate schools as Struggling or Persistently Struggling and clarifies that school districts will have the opportunity to present data and relevant information concerning extenuating or extraordinary circumstances faced by the school that should cause it not to be identified as a Struggling or a Persistently Struggling School.

§ 100.19(c), Public Notice and Hearing and Community Engagement, details the process and timeline for notifying parents and the community regarding the Struggling or Persistently Struggling designation, the establishment of a Community Engagement Team, and the role of the Community Engagement Team in the development of recommendations for the identified school. The regulations would require at least one public meeting or hearing annually regarding the status of the school and annual notification to parents of the school's designation and its implications. The regulations also detail the process by which the hearing shall be conducted and notifications made. Additionally, the subdivision specifies that the district superintendent receiver is required to develop a community engagement plan for approval by the Commissioner.

§ 100.19(d), School District Receivership, specifies that the superintendent shall be vested with the powers of the receiver for Persistently Struggling Schools for the 2015-16 school year and with the powers of the receiver for Struggling Schools for the 2015-16 and 2016-17 school years, provided that there is a Department approved intervention model or comprehensive education plan in place for these school years that includes rigorous performance metrics. The school district superintendent receiver shall provide quarterly written reports regarding implementation of the department-approved intervention model or school comprehensive education plan, and such reports, together with a plain-language summary thereof, shall be made publicly available. At the end of the 2015-16 school year, the Commissioner will review (in consultation and collaboration with the district) the performance of the Persistently Struggling School to determine whether the school can continue under the superintendent receivership or whether the district must appoint an independent receiver for the school. Similarly, the Department will review the performance of Struggling Schools after two years to determine whether the schools can continue under the superintendent receivership or whether the district must appoint an independent receiver for the school.

§ 100.19(e), Appointment of an Independent Receiver, details the timeline and process for appointment of an independent receiver for Persistently Struggling and Struggling Schools and the process by which the Commissioner approves and contracts with the independent receiver. The section also details the power of the Commissioner to appoint an independent receiver if the district fails within sixty days to appoint an independent receiver that meets the Commissioner's approval. The subdivision clarifies that districts may appoint independent receivers from a department approved list or provide evidence of qualifications of a receiver not on the approved list. Additionally, the subdivision specifies what happens when the Commissioner must appoint an interim receiver.

§ 100.19(f), School Intervention Plan, describes the timeline and process by which the independent receiver will submit to the Commissioner for approval a school intervention plan and the specific components of that plan, including the metrics that will be used to evaluate plan implementation. Each approved school intervention plan must be submitted within six months of the independent receiver's appointment and this approval is authorized for a period of no more than three years. Each approved school intervention plan must be based on input from stakeholders delineated in the subdivision and a stakeholder engagement plan must be provided to the Commissioner within ten days of the independent receiver entering into a contract with the Commissioner. The school intervention plan must also be based upon recent diagnostic reviews and student achievement data. The independent receiver must provide quarterly reports, and plain-language summaries thereof, regarding the progress of implementing the school intervention plan to the local board of education, the Board of Regents, and the Commissioner. In order to provide additional direction to school districts, the regulations further delineate that in converting a school to a community school, the receiver must follow a particular process and meet minimum program requirements. The subdivision further clarifies that if the independent receiver cannot create an approvable plan, the Commissioner may appoint a new independent receiver.

§ 100.19(g), Powers and Duties of a Receiver, delineates the powers and duties of a school receiver, and the powers and duties that an independent receiver has in developing and implementing a school intervention plan. The independent receiver is required to convert the school to a community school and to submit an approvable school intervention plan to the Commissioner. The receiver (both the superintendent receiver and the independent receiver) have powers that may be exercised in the areas of school program and curriculum development; staffing, including replacement of teachers and administrators; school budget; expansion of the school day or year; professional development for staff; conversion of the school to a charter school; and requesting changes to the collective bargaining agreement at the identified school in areas that impact implementation of the school intervention plan. This section also describes the power of the receiver (both the superintendent and the independent receiver) to supersede decisions, policies, or local school district regulations that the receiver, in his/her sole judgment, believes impedes implementation of the school intervention plan.

Under the provisions of this subdivision, the receiver must notify the board of education, superintendent, and principal when the receiver is superseding their authority. The receiver must provide a reason for the supersession and an opportunity for the supersession to be appealed, all within a timeline prescribed in the regulations. This subdivision also delineates a similar process by which the receiver reviews and makes changes to the school budget and supersedes employment decisions regarding staff employed in schools operating under receivership.

§ 100.19(h), Annual Evaluation of Schools with an Appointed Independent Receiver, describes how the Commissioner, in collaboration and consultation with the district, will conduct an annual evaluation of each school to determine whether the school is meeting the performance goals and progressing in implementation of the school intervention plan. As a result of this evaluation, the Commissioner may allow the receiver to continue with the approved plan or require the receiver to modify the school intervention plan.

§ 100.19(i), Expiration of School Intervention Plan, describes the process by which the Commissioner evaluates the progress of the school under the receiver's school intervention plan after a three year period. Based on the results of the evaluation, the Commissioner may renew the plan with the independent receiver for not more than three years; terminate the independent receiver and appoint a new receiver; or determine that the school has improved sufficiently to be removed from Failing or Persistently Failing status.

§ 100.19(j), Phase-out and Closure of Failing and Persistently Failing School, states that nothing in these regulations shall prohibit the Commissioner from directing a school district to phase out or close a school, the Board of Regents from revoking the registration of a school, or a district from closing or phasing out a school with the approval of the Commissioner.

§ 100.19(k), regarding the Commissioner's evaluation of a school receivership program, requires the school receiver to provide any reports or other information requested by the Commissioner, in such form and format and according to such timeline as may be prescribed by the Commissioner, in order for the Commissioner to conduct an evaluation of the school receivership program.

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 8, 2015, I.D. No. EDU-27-15-00008-EP. The emergency rule will expire November 19, 2015.

Emergency rule compared with proposed rule: Substantial revisions were made in section 100.19(a)(2) and (g)(5).

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

Data, views or arguments may be submitted to: Charles Szuberla, Acting 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@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 8, 2015, the proposed rule has been substantially revised as follows:

Section 100.19(a)(2), regarding the definition of a Persistently Struggling School, has been revised to provide clarity and ensure consistency with Education Law § 211-f(1)(b).

Section 100.19(g)(5)(iii) has been revised to conform to Education Law § 211-f(8), by providing that collective bargaining shall be completed (instead of commenced) no later than 30 days following receipt of a written request from the school receiver.

The above revisions do not require any changes to the previously published Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on July 8, 2015, the proposed rule has been substantially revised as described in the Statement Concerning the Regulatory Impact Statement filed herewith.

The revisions do 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 July 8, 2015, the proposed rule has been substantially revised as described in the Statement Concerning the Regulatory Impact Statement filed herewith.

The revisions do 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 July 8, 2015, the proposed rule has been substantially revised as described in the Statement Concerning the Regulatory Impact Statement filed herewith.

The revised proposed rule relates to public school and school district accountability and is necessary to implement and otherwise conform the Commissioner's Regulations to Education Law section 211-f, as added by Part EE, Subpart H of Ch. 56 of the Laws of 2015, by establishing criteria for the appointment of receivers to assist low performing schools to make demonstrable improvement in student performance. The statute designates current Priority Schools that have been in the most severe accountability status since the 2006-07 school year as "Persistently Failing Schools" (identified in the proposed regulation as "Persistently Struggling Schools") and identifies schools that have been identified as Priority since the 2012-13 school year as "Failing Schools" (identified in the proposed regulation as "Struggling Schools") and vests the superintendent of the district with the powers of an independent receiver.

The revised proposed rule applies to public schools that are Struggling or Persistently Struggling and placed into receivership and will not have a substantial adverse impact on jobs or employment opportunities. In accordance with Education Law section 211-f(7)(b) and (c), a school receiver may abolish the positions of all members of the teaching and administrative and supervisory staff assigned to the Struggling or Persistently Struggling School and terminate the employment of any principal assigned to such a school and require staff members to reapply for their positions in the school if they so choose. Although the school receiver may choose not to rehire a maximum of fifty percent of the former staff, it is anticipated that those staff members will be replaced by other individuals and will not cause a net loss in positions at the school.

Furthermore, an apportionment of $75 million in State funds will be available to Persistently Struggling Schools for the implementation of the Receivership process during the 2015-16 and 2016-17 school years. Since school districts are expected to use a portion of this allocation to implement strategies that may require hiring of new staff for these schools, this will result in a net gain of jobs. It is also possible that to meet the requirements of school receivership in Struggling Schools, which are not eligible for the $75 million grant, districts may choose to hire additional staff to implement the provisions of receivership.

Assessment of Public Comment

The following is a summary of public comment received by the State Education Department (SED) since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on July 8, 2015:

1. COMMENT:

No defined methodology for determining annual goals to establish demonstrable improvement under § 100.19(d)(2).

DEPARTMENT RESPONSE:

Under regulations Commissioner creates methodology, allowing schools to submit locally-developed metrics for approval. SED sets targets for each metric to ensure schools make progress towards removal from Struggling/Persistently Struggling School status.

2. COMMENT:

Districts must ensure sufficient resources/services in improvement plan.

DEPARTMENT RESPONSE:

Intervention plan must ensure adequate resources for implementation. Receiver responsible to implement plan and for school to make progress showing demonstrable improvement. Implementation one factor among many Commissioner considers.

3. COMMENT:

Revise § 100.19(g)(4) to state at least 50% of those whose positions are abolished must be rehired.

DEPARTMENT RESPONSE:

§ 211-f clear regarding 50% limitation; no need to restate in regulation. § 100.19(g)(4) ensures independent receiver (IR) has ability to re-staff (with Commissioner's permission), even if superintendent receiver (SR) did so previously. To receive permission, IR conducts needs assessment/shows re-staffing will have direct/positive impact on student achievement.

4. COMMENT:

Regarding shared staff between buildings, clarify affected teacher's employment continues and seniority rights retained.

DEPARTMENT RESPONSE:

SED's Frequently Asked Questions (FAQ) clarifies shared teacher continues to be employed and retains whatever tenure/seniority/other rights he/she may have, other than right to be assigned to work in struggling/persistently struggling school. Since employment/collective bargaining agreements vary, impractical to address in regulations.

5. COMMENT:

What happens if staff not rehired, where new priority school list is released mid-year and school building removed? Revise to specify teachers regain their seniority rights since school building no longer covered by § 211-f.

DEPARTMENT RESPONSE:

Neither statute nor regulation addresses seniority rights of teachers who are not rehired. Would requires additional legislation.

6. COMMENT:

Ensure IRs have experience/knowledge regarding community school development/management.

DEPARTMENT RESPONSE:

§ 100.19(e)(5)(v) requires IRs have demonstrated ability to successfully convert to community school.

7. COMMENT:

School intervention plans (SIPs) must include appropriate professional development (PD) plans, to ensure PD is job-embedded and educators provided support throughout school year.

DEPARTMENT RESPONSE:

Receivers must have SED-approved SIPs. School Comprehensive Education plan, School Improvement Grant plan, and School Innovation Fund plan already require schools to conduct needs assessments for professional development. SED reviews plans, ensuring professional development is job-imbedded/comprehensive/coordinated and provided throughout school year.

8. COMMENT:

Revise to indicate Commissioner may appoint only interim IR.

DEPARTMENT RESPONSE:

§ 211-f silent on interim receivers. Commissioner should have flexibility to appoint IR or Interim IR, depending on facts/circumstances.

9. COMMENT:

No authority requiring school remain under IR after removal from priority status/ struggling designation. Revise § 100.19(d)(6)(i) to provide management/operation reverts to district.

DEPARTMENT RESPONSE:

Under § 211-f(13), if school removed during implementation of SIP, Commissioner doesn't determine next steps for school until after plan expiration, and school remains under IR's authority until expiration.

10. COMMENT:

Statute doesn't authorize SED to revoke approval of intervention model/comprehensive education plan and move school into independent receivership. Revise § 100.19(d)(7) to provide SED notify school district/SR of SED concerns, and process for addressing deficiencies.

DEPARTMENT RESPONSE:

§ 211-(f)(1)(c) states at end of one-year/two-years for persistently struggling schools/struggling schools respectively, SED conducts performance review with district, based on performance metrics in school's model or plan, to determine whether school is removed from status, remains under SR, or is placed under IR. SR must provide quarterly reports regarding progress in implementing plan, which SED uses to help identify/troubleshoot deficiencies. SED uses performance review of demonstrable improvement metrics conducted in cooperation with SR to determine whether IR appointment necessary.

11. COMMENT:

Consistent with § 211-f(8), revise § 100.19(g)(5)(iii) to provide collective bargaining be completed no later than 30-days following receipt of receiver's written request.

DEPARTMENT RESPONSE:

Regulation revised accordingly.

12. COMMENT:

Revise § 100.19(e)(5) to allow waiver request for exceptionally qualified persons/entities with substantially similar training/background/experience.

DEPARTMENT RESPONSE:

Regulation includes minimum qualifications to ensure those appointed have necessary skills to plan/implement drastic turnaround. SED will issue request for qualifications (RFQ), expanding upon minimum qualifications. Individuals/entities meeting minimum qualifications/RFQ will be considered qualified.

13. COMMENT:

Require expedited process for appeals initiated by school board to challenge receiver's supersession determinations.

DEPARTMENT RESPONSE:

Ed.L. § 310 provides appropriate process for appeal, including interim relief provision.

14. COMMENT:

Revise § 100.19(e)(4)(ii) to provide defense/indemnification exception where school board initiates proceedings for receiver exceeding authority.

DEPARTMENT RESPONSE:

Inappropriate to provide exception in regulation. Indemnification statutorily governed and law already provides exception where individual acts beyond authority.

15. COMMENT:

Two-year $75 million State grant limited to persistently struggling schools. Revise regulation to provide SED give onsite technical support to struggling schools.

DEPARTMENT RESPONSE:

Revision unnecessary. SED already has authority to provide technical support.

16. COMMENT:

Revise § 100.19(g) to delete "duties." § 211-f(1)(c)(i) merely gives SR "all powers" of IR.

DEPARTMENT RESPONSE:

Although "duties" referenced, § 100.19(g) makes clear that SR's powers/duties subject to "any restrictions or limitations" in Ed.L. § 211-f and that SR not required to create/implement SIP/convert school into community school (as required of IR).

17. COMMENT:

Excessive time constraints imposed on SR, who is given three-months to prepare comprehensive educational plan.

DEPARTMENT RESPONSE:

Superintendent may use an entire school year to create school comprehensive education plan, which is required for all identified schools, and must be submitted to SED annually, prior to start of school year. To receive provisional plan approval, and ability to assume receiver powers, superintendent only needs to submit already-created plan. Once approved, SR can work with Community Engagement Team (CET) to revise plan and submit amendments as necessary.

18. COMMENT:

Receivers/school districts may not timely receive data/information to meet obligations.

DEPARTMENT RESPONSE:

Timeline consistent with timelines for parental notification in Priority/Focus identified schools. Districts that haven't received information regarding removal of status shall inform parents school is still identified. If school removed, district can inform parents at that time. SED committed to providing timely information.

19. COMMENT:

Defense/indemnification requirement is unfunded mandate. Revise to provide "in no case may any act of the receiver modify, conflict with or violate existing contractual obligations of the districts."

DEPARTMENT RESPONSE:

§ 211-f(2)(c) requires indemnification; not possible to address mandate concerns in regulations. To extent limitations sought on indemnification, inappropriate for regulations because indemnification generally statutory. Proposed language overbroad; could conflict with receiver's statutory powers.

20. COMMENT:

Regulation unclear about "open line," and could impose considerable expense.

DEPARTMENT RESPONSE:

"Open line" provision in § 211-f(2)(c). No express reference in regulations. § 100.19(e)(4)(i) provides Commissioner contracts with IR, and compensation and receiver's reasonable/necessary costs paid under § 211-f. Guidance may be issued.

21. COMMENT:

Revise § 100.19(c)(1)(iii)(a) to add "commonly spoken," clarifying translators not needed for every language/dialect.

DEPARTMENT RESPONSE:

Guidance may be issued.

22. COMMENT:

§ 100.19(g)(8)(v), giving IR final word on whether proposed budget unduly impacts other schools, not authorized by § 211-f. Require receiver to immediately appeal budget disagreements to Commissioner. Add clause to § 100.19(g)(8)(vii) specifying: "unless unduly impacting the budgets of other schools."

DEPARTMENT RESPONSE:

§ 211-f states receiver's authority to modify budget to conform to SIP provided modifications is limited in scope/effect to struggling/persistently struggling schools and cannot unduly impact other schools. Consistent with § 211-f, § 100.19(g)(8)(ii) describes process by which receiver notifies school board of specific modifications, rationale for modifications, explanation of way(s) in which modifications are limited in scope and effect to school(s) designated as struggling/persistently struggling and/or under receivership, and how such modifications "will not unduly impact other schools in the district" (emphasis added). § 310 appeals process sufficient.

23. COMMENT:

Revise § 100.19(e)(4)(iv), making IR ex-officio non-voting member of board entitled to attend all meetings, to add "except executive sessions not related to the school under receivership."

DEPARTMENT RESPONSE:

§ 100.19(e)(4)(iv) reflects language in § 211-f(2)(c).

24. COMMENT:

Revise § 100.19(b)(3) to provide Commissioner may consider budgetary constraints as outside factor.

DEPARTMENT RESPONSE:

§ 100.19(b)(3) allows districts to present additional data/information regarding extenuating/extraordinary circumstances for Commissioner's consideration.

25. COMMENT:

Delete "schools" in § 100.19(a)(2) to avoid implication provision constitutes separate category of persistently failing schools.

DEPARTMENT RESPONSE:

"Persistently failing [struggling] schools" definition in § 100.19(a)(2) revised to conform to § 211-f(1)(b).

26. COMMENT:

Revise § 100.19(f)(3) to provide SIP shall "ensure that the plan addresses school leadership and capacity, school leadership practices and decisions, curriculum development and support, teacher practices and decisions, student social and emotional development health, and family and community engagement."

DEPARTMENT RESPONSE:

§ 211-f(4)(iii) lists tenets of the Diagnostic Tool For School and District Effectiveness (DTSDE). Regulation doesn't list DTSDE tenets, but requires plan address tenets.

27. COMMENT:

How/when will SIP be implemented when IR's plan is finalized mid-year?

DEPARTMENT RESPONSE:

Inappropriate to address in regulation; address in guidance.

28. COMMENT:

Statute restricts receiver to individuals/not-for-profit organizations. Revise regulation to clarify restriction continues to apply upon conversion into charter school under Ed.L. Article 56, which appears to allow operation by for-profit entities.

DEPARTMENT RESPONSE:

Comment misinterprets statute. IR, who may only be an individual/non-profit entity, can order conversion into charter school, but is not responsible for operating charter school. If converted, charter school board of trustees decides whether to have school operated by a charter management organization (CMO), and if so whether CMO will be for-profit/non-profit, pursuant to charter school law.

29. COMMENT:

Mid-year changes disruptive. Any major changes should happen at beginning of year. Since receivership decisions not official until after beginning of school year, receiver should not be appointed until following school year.

DEPARTMENT RESPONSE:

Upon appointment/approval, IR must create SIP in six-months. In creating plan, receiver may need to use powers of receiver to review school budget, create agreement with collective bargaining units, begin re-staffing process for the next school year, etc. While plan may not be fully implemented until school year after appointment, process of appointing receiver should begin when Commissioner determines school has not made demonstrable improvement.

30. COMMENT:

Require SRs who choose to convert to community school to follow same process applicable to IRs. Require consultation with stakeholders and use of DTSDE for accountability and to ensure continuity.

DEPARTMENT RESPONSE:

SR choosing community school conversion and use of allotted allocation for that purpose must describe how school will be converted and resources to support conversion. Will issue guidance regarding community school conversion.

Process for SR consultation with stakeholders is same as for IR under § 100.19(f)(1). Both must create consultation plan, solicit/respond to CET recommendations, and work with CET to review school's progress in implementing plan. SR, as a result of requirements within SCEP, SIG, and SIF, shall utilize and respond to DTSDE findings to create plan that meets specific/unique needs of school.

31. COMMENT:

CET must follow shared decision making in § 100.11(b). Revise regulation to specify what constitutes balanced membership for equal representation of parents, teachers, and administrators, and provide modified § 310 appeals process for CET members to appeal receiver's decision, specific to school-based planning.

DEPARTMENT RESPONSE:

Under § 100.11, each district creates/submits shared-decision plan for SED approval, based on needs and circumstances of district and created in collaboration with stakeholder groups. § 100.19 specifies district uses method of stakeholder selection from § 100.11 plan. Nothing in regulation prevents district from increasing number of representatives of each stakeholder group. Separate appeals process not required by § 211-f. § 310 appeals process sufficient.

32. COMMENT:

Regulations require abolition of positions "result in improved student performance," and require needs assessment by receiver, examination of professional staff development, and expected impact/potential disruption of abolition on educational program. Revise regulation to ensure oversight to ensure these standards are met.

DEPARTMENT RESPONSE:

Current regulations ensure all parties able to raise concerns by requiring receiver to provide rationale for decision to abolish staff positions; respond to request to reconsider abolition prior to final decision; and provide Commissioner with electronic copies of correspondence regarding abolition. Stakeholders may appeal receiver's decision under § 310.

33. COMMENT:

Revise to specify funding be used to supplement/not supplant.

DEPARTMENT RESPONSE:

§ 100.19(f)(5)(viii) states receiver, in creating SIP, must submit budget that includes description of how any funds provided through transformation allocation will not be used to fund, in whole or in part, existing programs and services. Provision substantively same as supplement/not supplant.

NOTICE OF ADOPTION

Special Education Itinerant Services (SEIS)

I.D. No. EDU-13-15-00030-A
Filing No. 805
Filing Date: 2015-09-21
Effective Date: 2015-10-07

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

Action taken: Amendment of section 200.9 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 305(1), (2), (20), 4003(1), (2), 4401(5), 4405(4) and 4410(10); L. 2014, ch. 56, part A, section 11

Subject: Special Education Itinerant Services (SEIS).

Purpose: To revise the SEIS tuition reimbursement methodology to:

(1) provide that reimbursement is to be paid upon the actual provision of SEIS to the student, in conformity with chapter 56 of the Laws of 2014;

(2) allow flexibility in how the minimum billable units of service adjustment are applied; and

(3) clarify that consultation with a student's regular early childhood provider is expressly included as a potential function of a special education itinerant teacher.

Text or summary was published in the April 1, 2015 issue of the Register, I.D. No. EDU-13-15-00030-P.

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

Revised rule making(s) were previously published in the State Register on July 15, 2015.

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

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is 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

Self-Administration of Certain Medications by Students

I.D. No. EDU-14-15-00003-A
Filing No. 815
Filing Date: 2015-09-21
Effective Date: 2015-10-07

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

Action taken: Addition of section 136.7 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 305(1), (2), 902-a(1), (2), 902-b(1), (2), 916-a(1), (2), 916-b(1), (2), 921(1) and (2); L. 2014, ch. 423

Subject: Self-administration of certain medications by students.

Purpose: To establish standards for the self-administration by students of certain prescribed medications on school property and at school functions; and to establish standards for the training of unlicensed school personnel to administer prescribed epinephrine auto injectors and glucagon to specific students under specified conditions.

Text or summary was published in the April 8, 2015 issue of the Register, I.D. No. EDU-14-15-00003-P.

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

Revised rule making(s) were previously published in the State Register on July 15, 2015.

Text of rule and any required statements and analyses may be obtained from: Kirti Goswami, 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 2020, which is the 4th or 5th year after the year in which this rule is being adopted. This review period, justification for proposing same, and invitation for public comment thereon, were contained in a RFA, RAFA or JIS.

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

Assessment of Public Comment

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on July 15, 2015, the State Education Department received the following comments:

1. COMMENT:

Schools should employ professionally prepared Registered Nurses, to conduct and supervise school health programs which address the variety of health problems experienced by school children. A formula based approach is recommended with minimum ratios of nurses to students depending on the needs of the student population as follows: 1:750 for students in the general population, 1:225 in student populations requiring professional school nursing services or interventions, 1:125 in student populations with complex health care needs.

DEPARTMENT RESPONSE:

The language in 136.7(b)(3)(i), (c)(3)(i), (d)(3)(i) reflects the language in the statute upon which the proposed rule is based [see Chapter 423 of the Laws of 2014; more specifically Education Law §§ 916(1), 916-a(1), 916-b(1)]. While the Department agrees that best practice would encourage each school to provide a school nurse to address the needs of students with chronic health conditions, such best practice is not specifically required by Chapter 423 of the Laws of 2014 to be codified in regulation, and is more appropriately left to guidance. The Department may consider issuing guidance as to what is best practice.

2. COMMENT:

Only a licensed Registered Professional Nurse (RN) should have the authority to delegate the administration of medications in school to unlicensed personnel. Such individuals should only administer medications with appropriate and adequate training, supervision and a performance evaluation conducted by the RN.

DEPARTMENT RESPONSE:

The proposed rule is consistent with Chapter 423 of the Laws of 2014, which provides that boards of education or trustees of each school district and board of cooperative educational services (BOCES) and nonpublic schools are authorized, but not obligated, to permit licensed registered professional nurses, nurse practitioners, physician assistants, and physicians to train unlicensed school personnel to inject prescribed glucagon or epinephrine auto injectors in emergency situations, where an appropriately licensed health professional is not available, to pupils who have the writ-

ten permission of a physician or other duly authorized health care provider along with written parental consent. It is the licensed health professional who provides the training and assesses whether the trained volunteer demonstrates sufficient proficiency in order to be permitted to administer the medication.

3. COMMENT:

The rule should include a requirement that each nurse, or person authorized to administer asthma medications in schools, receive training in airway management and the use of inhalers consistent with nationally recognized standards.

DEPARTMENT RESPONSE:

The language in 136.7(b)(3)(i), (c)(3)(i), (d)(3)(i) reflects the language in the statute upon which the proposed rule is based [see Chapter 423 of the Laws of 2014; more specifically Education Law §§ 916(1), 916-a(1), 916-b(1)]. While the Department agrees that best practice would be to require training in airway management and use of inhalers, such best practice is not specifically required by Chapter 423 of the Laws of 2014 to be codified in regulation, and is more appropriately left to guidance. The Department will consider issuing guidance as to what is best practice.

4. COMMENT:

An RN must be available to immediately assess the student and institute further actions post emergency medication administration. In all cases where an emergency medication is administered further treatment and assessment should follow according to industry standards.

DEPARTMENT RESPONSE:

The proposed rule is consistent with Chapter 423 of the Laws of 2014, which provides that boards of education or trustees of each school district and board of cooperative educational services (BOCES) and nonpublic schools are authorized, but not obligated, to permit licensed registered professional nurses, nurse practitioners, physician assistants, and physicians to train unlicensed school personnel to inject prescribed glucagon or epinephrine auto injectors in emergency situations, where an appropriately licensed health professional is not available, to pupils who have the written permission of a physician or other duly authorized health care provider along with written parental consent. While the Department agrees that procedures for follow up care following emergency administration of medication should conform to industry standards, such best practice is not specifically required by Chapter 423 of the Laws of 2014. The Department will consider issuing guidance as to what is best practice in the context of follow-up care in a school setting.

NOTICE OF ADOPTION

Teacher Certification Requirements

I.D. No. EDU-22-15-00012-A
Filing No. 810
Filing Date: 2015-09-21
Effective Date: 2015-10-07

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

Action taken: Amendment of sections 52.21, 80-1.5, 80-3.3, 80-3.4 and 80-5.13; addition of section 80-1.5(c) to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 305(1), (2), 3001(2), 3004(1), 3006(1)(b) and 3009(1)

Subject: Teacher certification requirements.

Purpose: To provide a safety net for candidates who take the new teacher certification examinations (ALST, EAS, and the redeveloped CSTs) and to extend the time validity of the existing edTPA safety net.

Text or summary was published in the June 3, 2015 issue of the Register, I.D. No. EDU-22-15-00012-EP.

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

Text of rule and any required statements and analyses may be obtained from: Kirti Goswami, New York State Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 474-6400, email: kgoswami@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.

NOTICE OF ADOPTION

Doctor of Occupational Therapy (O.T.D.) Degree

I.D. No. EDU-26-15-00012-A
Filing No. 819
Filing Date: 2015-09-21
Effective Date: 2015-10-07

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

Action taken: Amendment of section 3.47(d)(2); and addition of section 3.50(b)(37) to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 210(not subdivided), 214(not subdivided), 215(not subdivided), 218(1), 224(4), 305(1) and (2)

Subject: Doctor of Occupational Therapy (O.T.D.) degree.

Purpose: To authorize the conferral in New York State of the degree of Doctor of Occupational Therapy (O.T.D.).

Text or summary was published in the July 1, 2015 issue of the Register, I.D. No. EDU-26-15-00012-P.

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

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

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the July 1, 2015 State Register, the State Education Department received the following comments:

1. COMMENT:

Five occupational therapists (OTs) expressed support for the addition of the Doctor of Occupational Therapy (O.T.D.) degree in New York (NY). These OTs emphasized the growing role OTs have within healthcare, which has resulted in the need for additional training to produce a stronger more qualified pool of therapists. The O.T.D. degree will allow for more specialized training, advanced clinical expertise, provide leadership in efficacy studies necessary to develop evidence-based practice, more community-based practice to meet the changing needs in urban and rural settings and will assist in developing strong leaders for consultative roles and expanded managerial roles.

The addition of this degree will also assist in providing more qualified faculty for OT programs and, hopefully, result in an expansion in the capacity and numbers of OTs and their scope of practice.

DEPARTMENT RESPONSE:

The Department appreciates the supportive comment as it works to both protect the public and provide greater access to OT services to New Yorkers. However, it should be noted that any expansion of OTs' scope of practice would require an amendment to the Education Law.

2. COMMENT:

A Western New York OT expressed opposition to the O.T.D. degree by claiming that there is no need for it in NY, that the national OT accreditation council has determined that there is no reason to pursue a mandatory O.T.D. degree, and that permitting NY higher education (HE) institutions to offer it will contribute to unnecessary degree inflation/escalation in this State because if one institution begins to offer this degree it will place artificial market pressure on other institutions to follow suit, which does not serve the needs of New Yorkers because it will result in students being "cattle-herded" into doctoral programs, which will in turn result in increased educational costs for such students, increased salary costs for their prospective employers and increased costs for consumers of OT services.

The commenter asserts that New Yorkers have used distance learning to obtain this degree. Thus, permitting NY institutions to offer it will do little or nothing to the overall access to educational opportunities, which are plentiful elsewhere.

This commenter further quotes the following August 2015 statement on the entry-level degree for the OT and OTA:

The Accreditation Council for Occupational Therapy Education (ACOTE®) has determined that the entry-level-degree requirement for the occupational therapist will remain at both the master's and the doctoral degree. The Council's decision is based on a comprehensive review of

available literature, specific reports, and extensive commentary from stakeholders. The overarching justifications for the Council's decision are: (1) limited outcomes differentiate master's and doctorally prepared graduates; (2) the academic infrastructure of many institutions is not sufficient to meet the occupational therapy doctorate standards, especially with respect to faculty resources and institutional support; (3) the readiness and capability of institutions to deliver quality fieldwork and experiential components of the program is constrained; and (4) retaining two entry levels allows for flexibility of the profession to assess and address the changing health care needs of individuals and populations.

DEPARTMENT RESPONSE:

The Department disagrees that the addition of the O.T.D. degree is unnecessary and will not serve the needs of New Yorkers. The O.T.D. degree is recognized by ACOTE® and is an authorized degree in 26 states, which include California, Connecticut, Florida, Georgia, Massachusetts, Pennsylvania and Virginia. HE institutions offering O.T.D. degree programs include, but are not limited to, Boston University, Washington University in St. Louis, University of Southern California, University of Illinois, and Tufts University.

Contrary to the commenter's statements, the O.T.D. degree will not be mandatory for licensure purposes in NY. Unless and until the Education Law is amended to allow for a licensure-qualifying doctoral degree in the future, the O.T.D. degree will only be considered a post-licensure professional credential.

Additionally, the ACOTE® statement the commenter quotes does not specifically address the issue of mandating an O.T.D. degree as an entry level degree requirement for OTs, it merely states that ACOTE® has determined that the entry-level-degree requirement for OTs will remain at both the master's and the doctoral degree and then states its reasoning for this determination.

Since the O.T.D. degree is not currently offered by any NY HE institutions, NYS students seeking it must enroll in out of state institutions in order to earn the degree, which results in some of them establishing their practices and careers in other states, instead of in NY. This could adversely affect the ability of some New Yorkers to obtain needed OT services.

Additionally, adding the O.T.D. degree will benefit NY students by affording them the opportunity to obtain it in their own state. It will also provide greater opportunities for NY students to undertake research and become more competent practitioners, which will ultimately help New Yorkers as the profession benefits from the higher level of education and research.

3. COMMENT:

A commenter, who has family members who are consumers of OT services and was a consumer of such services himself, supports the O.T.D. degree because it is already offered in other states and he believes that OT continues to advance and provide valuable services.

DEPARTMENT RESPONSE:

The Department appreciates the supportive comment as it works to both protect the public and provide greater access to OT services to New Yorkers.

4. COMMENT:

Four physical therapy (PT) faculty members expressed support for the O.T.D. degree based on the authority for NY HE institutions to award the doctorate in physical therapy (DPT) degree granted in 1995, and the positive impact on that profession. Moving to the doctoral level allowed for the expansion of essential knowledge, advanced clinical decision-making skills, and an emphasis on evidence-based practice. Adding the O.T.D. degree will also advance clinical knowledge, rehabilitation research and public health.

DEPARTMENT RESPONSE:

The Department appreciates the supportive comment as it works to both protect the public and provide greater access to OT services to New Yorkers.

5. COMMENT:

Eight OT faculty members expressed support for the O.T.D. degree because it will allow students and practitioners to develop advanced clinical expertise, pursue research and inter-professional collaboration, expand their role in community based practice, provide the means for specializations/re-specializations, develop critical management skills, and apply evidence from research to therapy practice.

The commenters also explained that, currently, students seeking an O.T.D. degree are forced to attend out of state programs, which are missed opportunities for NY institutions. This also forces students to utilize the distance learning format to attend O.T.D. programs. With NYS institutions offering O.T.D. programs students will have more cohesive and easy access to education.

Also, with the increased degrees for most healthcare professionals, such as PTs and Nurse Practitioners, moving to the doctoral level will add to the credibility of the profession and allow it to remain competitive with other professions.

DEPARTMENT RESPONSE:

The Department appreciates the supportive comment as it works to both protect the public and provide greater access to OT services to New Yorkers.

6. COMMENT:

Three college faculty members expressed support for the O.T.D. degree because it will allow for an emphasis on inter-professional collaboration and provide an opportunity to establish best practice standards in education, research and evidence-based practice, as well as allow for formal educational recognition of this expanded expertise. This degree has become the standard credential for post-professional training.

DEPARTMENT RESPONSE:

The Department appreciates the supportive comment as it works to both protect the public and provide greater access to OT services to New Yorkers.

7. COMMENT:

Four OT program students expressed support for the O.T.D. by emphasizing the importance of advancing clinical expertise, applying evidence from research to therapy practice, community-based practice to meet the changing needs in urban settings, providing leadership in efficacy studies necessary to develop evidence-based practice resources and allowing for more qualified faculty members.

The commenters also discussed the increased demand for qualified OTs due to the retiring OT workforce and overall increased demand for OT services.

DEPARTMENT RESPONSE:

The Department appreciates the supportive comment as it works to both protect the public and provide greater access to OT services to New Yorkers.

8. COMMENT:

Four college administrators expressed support for the O.T.D. degree because it is essential to development of the profession and the expansion of the role of OT services. With this proposed degree, OTs will be able to assume expanded supervisory, management and/or consultation roles. OTs will also be able to advance evidence based clinical practice, focus on community based practice to meet changing needs in urban and rural settings and develop inter-professional collaboration. This new degree will also allow for the recruitment of more qualified faculty members.

The commenters also explained that NY is behind most states by not offering the O.T.D. degree. With this degree, NY HE institutions can attract more students and students will be able to attend in-state programs. The commenters also wish to see the degree become a professional doctorate, as well as a post-professional doctorate.

DEPARTMENT RESPONSE:

The Department appreciates the supportive comment as it works to both protect the public and provide greater access to OT services to New Yorkers. However, it should be noted that unless and until the Education Law is amended to allow a licensure-qualifying doctoral degree, the O.T.D. degree will only be considered a post-licensure professional credential.

9. COMMENT:

The New York State Occupational Therapy Association (NYSOTA) expressed support for the O.T.D. degree proposal by highlighting its benefits to the profession and the public including the staffing of more qualified faculty for OT programs, providing leadership in efficacy studies necessary for developing the profession's evidence-based practice resources, and advancing the quality of services delivered to the public.

DEPARTMENT RESPONSE:

The Department appreciates the supportive comment as it works to both protect the public and provide greater access to OT services to New Yorkers.

10. COMMENT:

The American Occupational Therapy Association (AOTA) expressed its support for the O.T.D. degree, stating that it agrees with the Department's justification for the degree, which is that the degree will benefit students and practitioners by affording them the opportunity to earn a doctoral degree and expanding access to higher level research and lifelong learning, which ultimately translates to better client care.

DEPARTMENT RESPONSE:

The Department appreciates the supportive comment as it works to both protect the public and provide greater access to OT services to New Yorkers.

11. COMMENT:

A commenter expressed support for the O.T.D. degree because there is an expanded role for OTs due to a changing healthcare structure. The O.T.D. will provide education in inter-professional collaboration and specialized training. With the O.T.D. degree there will be a stronger, more qualified pool of therapists in NY. It will also provide additional training and a credential for OTs that make OTs equal to other healthcare practitioners.

DEPARTMENT RESPONSE:
The Department appreciates the supportive comment as it works to both protect the public and provide greater access to OT services to New Yorkers.
12. COMMENT:
Three faculty members, seventeen OTs and a commenter expressed their support for the O.T.D. because they feel that this degree is necessary for the development of the profession. It is their hope that the new degree will address many critical needs within the OT profession including: providing qualified faculty members for OT programs; providing leadership in efficacy studies necessary for developing the profession's evidence based practice resources; advancing quality of services delivered by including advanced clinical expertise from evidence-based research and improved community-based practice to meet changing needs in urban and rural settings; and the development of strong leaders for improved consultative roles and expanded supervisory and management roles.
DEPARTMENT RESPONSE:
The Department appreciates the supportive comment as it works to both protect the public and provide greater access to OT services to New Yorkers.

NOTICE OF ADOPTION

Instruction in Cardiopulmonary Resuscitation (CPR) and Use of Automated External Defibrillators (AEDs)

I.D. No. EDU-26-15-00013-A
Filing No. 814
Filing Date: 2015-09-21
Effective Date: 2015-09-21

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

Action taken: Amendment of section 100.2(c)(11) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 305(1), (2), (20), (52), 308(not subdivided), 804-c(2) and 804-d(not subdivided); L. 2014, ch. 417

Subject: Instruction in Cardiopulmonary Resuscitation (CPR) and Use of Automated External Defibrillators (AEDs).

Purpose: To require hands-only instruction in CPR and instruction in the use of AEDs in senior high schools.

Text or summary was published in the July 1, 2015 issue of the Register, I.D. No. EDU-26-15-00013-P.

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

Text of rule and any required statements and analyses may be obtained from: Kirti Goswami, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Avenue, Albany NY 12234, (518) 474-5915, email: legal@nysed.gov

Initial Review of Rule
As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment
Since publication of a Notice of Proposed Rule Making in the State Register on July 1, 2015, the State Education Department received the following comments:
1. COMMENT:
Commenter expressed support for the proposed rule. Specifically, commenter shared the enthusiasm for preparing students in the event of a cardiac emergency, at little to no costs for school districts. For victims of sudden cardiac arrest, CPR and AEDs are critical. Unfortunately, for many high school students across our state, hands-only CPR instruction is missing from the school curriculum. Adoption of the rule will mean that hundreds of thousands of students become lifesavers in New York.
DEPARTMENT RESPONSE:
No response necessary as the comment is supportive.
2. COMMENT:
I want to express support for CPR in our high schools. A retired veteran of 28 years in EMS, I have observed the value of effective CPR before I arrived on the scene. As a principal of a private religious school, I also required all of our students to be trained in CPR.
DEPARTMENT RESPONSE:
No response necessary as the comment is supportive.
3. COMMENT:
Commenter noted the valuable skills CPR training provides to students and shared the positive outcome that resulted when a student utilized the CPR–related skills learned in school to aid her younger brother.
DEPARTMENT RESPONSE:
No response necessary as the comment is supportive.
4. COMMENT:
Commenter expressed support for providing CPR training to high school students, because it will create thousands of CPR trained bystanders, develop a culture of willing responders, and save countless lives.
DEPARTMENT RESPONSE:
No response necessary as the comment is supportive.

NOTICE OF ADOPTION

Administration of Opioid Related Overdose Treatment and Hepatitis C Tests by Registered Professional Nurses (RNs)

I.D. No. EDU-27-15-00007-A
Filing No. 807
Filing Date: 2015-09-21
Effective Date: 2015-10-07

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

Action taken: Amendment of section 64.7 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2)(a), 6527(6)(e), (f), 6902(1), 6909(4)(e) and (f); L. 2014; ch. 352; L. 2015, ch. 57, part V

Subject: Administration of opioid related overdose treatment and hepatitis C tests by registered professional nurses (RNs).

Purpose: To implement part V of ch. 57 of the Laws of 2015 and ch. 352 of the Laws of 2014 regarding opioid related overdose treatment and hepatitis C tests.

Text of final rule: Section 64.7 of the Regulations of the Commissioner of Education is amended, effective October 7, 2015, as follows:

64.7 *Administration of* [I]*i*mmunizations, emergency treatment of anaphylaxis, purified protein derivative (PPD) mantoux tuberculin skin tests*,* [and] human immunodeficiency virus (HIV) tests*, opioid related overdose treatments and hepatitis C tests* pursuant to non-patient specific orders and protocols.
(a) . . .
(b) . . .
(c) . . .
(d) . . .
(e) Opioid related overdose treatment.
(1) As used in this subdivision, opioid related overdose treatment shall include the administration of naloxone or another drug approved by the federal Food and Drug Administration to treat opioid related overdose.
(2) A registered professional nurse may administer opioid related overdose treatment for the urgent or emergency treatment of opioid related overdose or suspected opioid related overdose pursuant to a written non-patient specific order and protocol prescribed or ordered by a licensed physician or a certified nurse practitioner, provided that the requirements of this subdivision are met.
(3) Order and protocol.
(i) The non-patient specific order shall include, at a minimum, the following:
(a) the name, license number and signature of the licensed physician or certified nurse practitioner who orders or prescribes the non-patient specific order and protocol;
(b) the name, dose and route of administration of the drug to be administered to treat opioid related overdose;
(c) a protocol for administering the ordered opioid related overdose treatment or a specific reference to a separate written protocol for administering the ordered opioid related overdose treatment, which shall meet the requirements of subparagraph (ii) of this paragraph;
(d) the period of time that the order is effective, including the beginning and ending dates;
(e) a description of the group(s) of persons to be treated; and
(f) the name and license number of the registered professional nurse(s) authorized to execute the non-patient specific order and protocol to administer the opioid related overdose treatment; or the name of the entity that employs or contracts with registered professional nurses to execute the non-patient specific order and protocol, provided that the registered professional nurses execute the non-patient specific order and protocol only in the course of such employment or pursuant to such contract and provided further that the entity is legally authorized to employ or contract with registered professional nurses to provide nursing services.
(ii) The written protocol, incorporated into the order prescribed in subparagraph (i) of this paragraph, shall, at a minimum, include instruc-

tions for administering the opioid related overdose treatment and require the registered professional nurse to ensure that:

(a) each potential recipient is assessed, pursuant to criteria in the protocol, for conditions that would qualify or preclude him or her from receiving the ordered opioid related overdose treatment;

(b) consent to administer treatment is obtained, pursuant to criteria in the protocol, if the potential recipient is capable of providing it;

(c) the opioid related overdose treatment is documented, pursuant to criteria in the protocol, and includes the name and dose of drug administered, the date, time and location of the treatment, the recipient's name and the administering registered professional nurse's name and this medical documentation relating to opioid related overdose treatment is maintained in accordance with paragraph 29.2(a)(3) of this Title; and

(d) when opioid related overdose treatment is administered outside of a general hospital, the recipient of the treatment is transferred to a hospital for follow-up care to the extent possible along with documentation describing the opioid related overdose treatment that was administered, in accordance with criteria in the protocol.

(f) Hepatitis C tests.

(1) As used in this subdivision, hepatitis C tests mean one or more laboratory or point of care tests approved by the federal Food and Drug Administration to detect the presence of antibodies or antigens to hepatitis C or the hepatitis C virus.

(2) A registered professional nurse may administer hepatitis C tests pursuant to a written non-patient specific order and protocol prescribed or ordered by a licensed physician or a certified nurse practitioner, provided that the requirements of this subdivision are met.

(3) Order and protocol.

(i) The non-patient specific order shall include, at a minimum, the following:

(a) the name, license number and signature of the licensed physician or certified nurse practitioner who orders or prescribes the non-patient specific order and protocol;

(b) the name of the specific hepatitis C tests to be administered;

(c) a protocol for administering the ordered hepatitis C tests or a specific reference to a separate written protocol for administering the ordered hepatitis C tests, which shall meet the requirements of subparagraph (ii) of this paragraph;

(d) the period of time that the order is effective, including the beginning and ending dates;

(e) a description of the group(s) of persons to be tested; and

(f) the name and license number of the registered professional nurse(s) authorized to execute the non-patient specific order and protocol to administer the hepatitis C tests; or the name of the entity that employs or contracts with registered professional nurses to execute the non-patient specific order and protocol, provided that the registered professional nurses execute the non-patient specific order and protocol only in the course of such employment or pursuant to such contract and provided further that the entity is legally authorized to employ or contract with registered professional nurses to provide nursing services.

(ii) The written protocol, incorporated into the order prescribed in subparagraph (i) of this paragraph, shall, at a minimum, require the registered professional nurse(s) to ensure that:

(a) each potential recipient is assessed, pursuant to criteria in the protocol, for conditions that would qualify or preclude him or her from receiving the ordered hepatitis C tests;

(b) informed consent for administering the ordered hepatitis C tests or disclosing the hepatitis C test results to a third party (if applicable) has been obtained pursuant to the criteria in the protocol from the recipient, or when the recipient lacks capacity to consent, a person authorized pursuant to law to consent to health care for the recipient;

(c) confirmatory, positive hepatitis C test results are not disclosed to the test recipient or the recipient's authorized representative by the registered professional nurse without a patient specific order from a licensed physician, licensed physician assistant or certified nurse practitioner; and

(d) the administration of the ordered hepatitis C test(s) is documented in the recipient's medical record in accordance with criteria in the protocol and that documentation relating to the hepatitis C testing is maintained in accordance with section 29.2(a)(3) of this Title.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 64.7(e)(3).

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

Revised Regulatory Impact Statement

Since the publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on July 8, 2015, a nonsubstantial revision was made in order to clarify the text of the proposed regulation as follows:

In clause (d) of subparagraph (ii) of paragraph (3) of subdivision (e) of section 64.7, the words "to the extent possible" were added so that the revised language states that "the recipient of the treatment is transferred to a hospital for follow-up care to the extent possible".

The above nonsubstantial revision does not require any changes to the previously published Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis

Since the publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on July 8, 2015, a nonsubstantial revision was made to the proposed regulation as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above nonsubstantial revision does not require any changes to the previously published Statement in Lieu of Regulatory Flexibility Analysis for Small Businesses and Local Governments.

Revised Rural Area Flexibility Analysis

Since the publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on July 8, 2015, a nonsubstantial revision was made to the proposed regulation as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above nonsubstantial revision does not require any changes to the previously published Rural Area Flexibility Analysis.

Revised Job Impact Statement

Since the publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on July 8, 2015, a nonsubstantial revision was made to the proposed regulation as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The revised proposed amendment is necessary to implement Part V of Chapter 57 of the Laws of 2015 and Chapter 352 of the Laws of 2014, relating to the execution by registered professional nurses of non-patient specific orders to administer opioid related overdose treatment and hepatitis C tests, respectively.

The revised proposed amendment will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the revised proposed rule 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.

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2020, which is the 4th or 5th year after the year in which this rule is being adopted. This review period, justification for proposing same, and invitation for public comment thereon, were contained in a RFA, RAFA or JIS.

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

Assessment of Public Comment

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the July 8, 2015 State Register, the State Education Department received the following comment:

COMMENT:

A hospital association indicated that hospitals may have difficulty complying with proposed 8 NYCRR § 64.7(e)(3)(ii)(d) because this regulatory provision would require written protocols for opioid related overdose treatment to include a provision ensuring that overdose treatment recipients will be transferred to a hospital for follow-up care, along with a record describing the overdose treatments administered. The association noted that hospitals receiving patients, who received opioid overdose treatments, have no way to ensure that appropriate pre-hospital assessments were performed correctly and that hospitals may not be aware of the protocol criteria used by emergency responders for the treatment of opioid overdose. The association urged the Department to clarify the specific requirements for hospital compliance with the regulation in order to ensure consistent interpretation of the regulation.

The hospital association also expressed support for the concept of the proposed regulation.

DEPARTMENT RESPONSE:

The Department notes that Education Law § § 6527 and 6909 and the proposed regulation apply only to licensed physicians and nurses and do not directly impose legal obligations on hospitals or emergency services providers subject to Public Health Law Articles 28 and 30. The Department further notes that the regulatory provision in question, which requires that a treatment record be sent to the hospital with the recipient of the overdose treatment, is intended to assist hospital staff in providing appropriate emergency care to the patient/recipient.

NOTICE OF ADOPTION

Opioid Overdose Prevention

I.D. No. EDU-27-15-00009-A
Filing No. 817
Filing Date: 2015-09-21
Effective Date: 2015-10-07

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

Action taken: Addition of section 136.8 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 305(1), (2), 922(1) and (2); L. 2015, ch. 57, part 5

Subject: Opioid Overdose Prevention.

Purpose: To establish standards for the elective participation by school districts, boards of cooperative educational services, county vocational education and extension boards, charter schools, and non-public elementary and secondary schools.

Text or summary was published in the July 8, 2015 issue of the Register, I.D. No. EDU-27-15-00009-P.

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

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

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2020, 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 State Register on July 8, 2015, the State Education Department received the following comments:

1. COMMENT:

Would a volunteer, trained teacher taking students overseas in a non-school sponsored trip, be allowed to carry Naloxone on that trip?

DEPARTMENT RESPONSE:

Pursuant to the provisions of Education Law section 922, as added by Part V of Chapter 57 of the Laws of 2015, the purpose of this rule is for school districts who choose to participate as an opioid antagonist recipient pursuant to the provisions of Public Health Law section 3309, to permit any person employed by such entity who has been trained by a program approved under that section to administer an opioid antagonist to any student or staff having symptoms of an opioid overdose in an instructional school facility, in the event of an emergency pursuant to the requirements of Public Health Law section 3309. An instructional school facility is defined as any building or other facility maintained by a school district, board of cooperative educational services (BOCES), county vocational education and extension board, charter school, or non-public elementary or secondary school where instruction is provided to students pursuant to its curriculum. Accordingly, in the event of an emergency, unlicensed trained school personnel may provide an opioid antagonist to students or staff at any school sponsored activity occurring on-site in an instructional school facility. Therefore, the provisions of this rule governing a school district's participation as an opioid antagonist recipient would not be applicable to the scenario presented in the above comment.

2. COMMENT:

Is it the intention of the program to allow volunteer, unlicensed personnel to administer naloxone only during the school day? I would think that once they are trained, they could provide that care during a school activity, when it may be more likely to happen, especially at a dance or football game (often evening events) that are often held on school grounds or in the school building where the naloxone is readily available along with an AED. I know that the police carry intranasal (IN) naloxone on their person. Is it the intention of this program to allow the volunteer, unlicensed school employee to carry that medication as well?

DEPARTMENT RESPONSE:

Education Law section 922 provides that school districts, boards of cooperative educational services (BOCES), county vocational education and extension boards, charter schools, and non-public elementary and secondary schools may participate in the opioid overdose prevention program as an opioid antagonist recipient pursuant to the provisions of Public Health Law section 3309. For school districts who choose to participate as an opioid antagonist recipient pursuant to the provisions of Public Health Law section 3309, any person employed by such entity who has been trained by a program approved under that section may administer an opioid antagonist to any student or staff having symptoms of an opioid overdose in an instructional school facility, in the event of an emergency pursuant to the requirements of Public Health Law section 3309. An instructional school facility is defined as any building or other facility maintained by a school district, board of cooperative educational services (BOCES), county vocational education and extension board, charter school, or non-public elementary or secondary school where instruction is provided to students pursuant to its curriculum. Accordingly, in the event of an emergency unlicensed trained school personnel may provide an opioid antagonist to students or staff at any school sponsored activity occurring on-site in an instructional school facility.

3. COMMENT:

Is this already provided through hospitals?

DEPARTMENT RESPONSE:

Pursuant to the provisions of Education Law section 922, the proposed rule sets forth standards for the elective participation by school districts, boards of cooperative educational services, county vocational education and extension boards, charter schools, and non-public elementary and secondary schools in an opioid overdose prevention program pursuant to the provisions of Public Health Law section 3309.

The proposed rule is not related to the general manner and methods of obtaining Naloxone in a hospital setting. Naloxone is routinely stocked in hospital pharmacies for the treatment of patients, primarily in their emergency departments. There are hospitals that are registered opioid overdose programs. Some of those hospital-based programs happen to be based in—or focused on—emergency departments for purposes of providing naloxone to patients at risk of (another) overdose. Some other hospital-based programs are focused on behavioral health patients. A hospital is not routinely a place where individuals can obtain naloxone.

4. COMMENT:

This law says the school is allowed—does this mean we are not required?

DEPARTMENT RESPONSE:

Correct. The proposed rule sets forth the standards for the elective participation by school districts, boards of cooperative educational services, county vocational education and extension boards, charter schools, and non-public elementary and secondary schools in an opioid overdose prevention program pursuant to the provisions of Public Health Law section 3309. Schools are allowed, but not required, to implement an opioid overdose program.

5. COMMENT:

If a school district chooses to participate, can an RN administer Naloxone without a patient-specific order? Is there liability should the district decide against stocking Narcan?

DEPARTMENT RESPONSE:

Part V of Chapter 57 of the Laws of 2015 permits, but does not require, school districts to participate in an opioid overdose prevention program pursuant to the provisions of Public Health Law section 3309. If a school district chooses to participate, the school district's medical director, who is required to be a licensed physician or a certified nurse practitioner, may write a non-patient specific order, under which the registered professional nurse can administer naloxone. Part V of Chapter 57 also includes amendments to Education Law § § 6527 and 6909 to authorize registered professional nurses (RNs) to administer opioid-related overdose treatment pursuant to a non-patient specific order and protocol prescribed by a licensed physician or a certified nurse practitioner (i.e., school district medical director).

6. COMMENT:

Is there an opioid school policy template?

DEPARTMENT RESPONSE:

Currently, there is not an opioid overdose prevention school policy template, however comprehensive guidance on the Opioid Overdose Prevention Program is available from the New York Statewide School Health Services Center site – http://www.schoolhealthservicesny.com/azindex.cfm?subpage=367

NOTICE OF ADOPTION

Foster Youth College Success Initiative

I.D. No. EDU-27-15-00010-A
Filing No. 812
Filing Date: 2015-09-21
Effective Date: 2015-10-07

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

Action taken: Addition of Subpart 152-3 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 210(not subdivided), 215(not subdivided), 305(1), (2), 6451(1)(6) and 6456(1)(7); L. 2015, ch. 56

Subject: Foster Youth College Success Initiative.

Purpose: To implement the Foster Youth College Success Initiative, as added by part X of chapter 56 of the Laws of 2015.

Text or summary was published in the July 8, 2015 issue of the Register, I.D. No. EDU-27-15-00010-EP.

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

Text of rule and any required statements and analyses may be obtained from: Kirti Goswami, New York State Education Department, 89 Washington Avenue, Albany, New York 12234, (518) 474-6400, email: kgoswami @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 2020, 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 State Register on July 8, 2015, the State Education Department (SED) received the following comments:

1. COMMENT:

The definition of foster care youth in section 152-3.2 of the Commissioner's regulations should be amended to include an additional subsection that states as follows: "Eligible foster youth, orphans or wards of the court should apply for services on, or before their 25th birthday".

DEPARTMENT RESPONSE:

The regulatory definition of foster care youth is consistent with the definition in Education Law § 6456(2). Therefore, the Department believes that no regulatory change is needed.

2. COMMENT:

The commenter requested that section 152-3.4 of the Commissioner's regulations be amended to allow housing to be included in what constitutes necessary supplemental financial aid for foster youth.

DEPARTMENT RESPONSE:

The Department believes and agrees that these funds may be for housing purposes. However, the Department believes that no regulatory change is needed because the regulation already provides that funds may be used for any other expenses determined by the Commissioner to be necessary for such foster youth to attend college, which could include housing expenses.

3. COMMENT:

One commenter has asked that section 152-3.5(a) of the proposed amended to require institutions to include specific enumerated information relating to number of youth who meet federal definition of foster youth, retention rates, comparisons of credit accumulation by cohort and the number of students surveyed to be in need of break and intersession housing.

DEPARTMENT RESPONSE:

The proposed amendment is broad and indicates that an institution must provide "any information or documentation as the Commissioner may request relating to this initiative in the annual report", which may include some of the information the commenter suggests. Therefore, the Department does not believe a regulatory amendment is needed. However, the Department is in the process of determining what information it believes should be required in the annual report and the requirements for the annual report will be posted on the Department's website.

4. COMMENT:

The commenter also requests clarification in the regulation to require any campus receiving this funding, to the extent possible, to designate a campus liaison who has knowledge about the needs and challenges of foster care youth.

DEPARTMENT RESPONSE:

While the Department agrees that a designated campus liaison that could serve as the point person responsible for guiding and coordinating the initiative across the campus would be helpful, the Department believes that funding on various campuses differs and that no regulatory change is needed. This is a local decision that needs to be made at each campus, based on where it believes resources can be allocated best.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Students with Disabilities Diploma Requirements

I.D. No. EDU-40-15-00007-P

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

Proposed Action: Amendment of section 100.5(d)(7) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided), 209(not subdivided), 215(not subdivided), 305(1), (2), 308(not subdivided) and 309(not subdivided)

Subject: Students with Disabilities Diploma Requirements.

Purpose: To extend to students with disabilities the option to graduate with a Local Diploma via an Appeals Process on Regents examination passing scores.

Text of proposed rule: Subparagraph (i) of paragraph (7) of subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education is amended by adding a new clause (c), effective December 30, 2015, to read as follows:

(c) A student who is otherwise eligible to graduate in January 2016 or thereafter, is identified as a student with a disability as defined in section 200.1(zz) of this Title, and fails, after at least two attempts, to attain a score of 55 or above on up to two of the required Regents examinations for graduation shall be given an opportunity to appeal such score in accordance with the provisions of this paragraph for purposes of graduation with a local diploma, provided that the student:

(1) has scored within three points of a score of 55 on the required Regents examination under appeal and has attained at least a 65 course average in the subject area of the Regents examination under appeal; and

(2) has met the criteria specified in subclauses (2) - (5) of clause (a) of this subparagraph.

Notwithstanding the provisions of this clause, a student with a disability who makes use of the compensatory option in clause (c) of subparagraph (vi) of paragraph (7) of subdivision (b) of this section to obtain a local diploma may not also appeal a score below 55 on the English language arts or mathematics Regents examinations pursuant to this clause.

Text of proposed rule and any required statements and analyses may be obtained from: Kirti Goswami, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@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: 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 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 Regents and the Commissioner to adopt rules and regulations to carry out State laws regarding education and the functions and duties conferred on the State Education Department by law.

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

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

Education Law section 305 (1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Board

of Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education, and execute all educational policies determined by the Regents.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to implement Regents policy to provide an option to students with disabilities who meet certain specified criteria to graduate with a Local Diploma via an appeals process.

NEEDS AND BENEFITS:

Most students with disabilities have the cognitive abilities to earn a high school diploma, but disability factors impede many of them from demonstrating their knowledge and skills through the standardized Regents exams. Without a regular high school diploma, these students will be greatly disadvantaged in achieving their post-secondary academic or employment goals. Data compiled by the State Education Department shows that New York State's graduation rate of students with disabilities with a regular high school diploma has been steadily increasing over the past several years, and more students with disabilities are taking and passing Regents exams. Of those students with disabilities who graduate with a regular diploma, more than half graduate with a Regents diploma. In the 2010 cohort of 31,873 students with disabilities, 7,799 graduated with a Regents diploma and 7,166 graduated with a local diploma. Nevertheless, far too many students with disabilities are not exiting school with a regular high school diploma.

Over the past several years, the Board of Regents has reviewed and revised the safety net options available to students with disabilities. Currently, there are three safety net options available to students with disabilities to graduate with a local diploma:

1. Low Pass Safety Net Option: 5 required Regents exams with a score of 55 or better.

2. Regents Competency Test (RCT) Safety Net Option: This option, which is available to students who entered grade 9 prior to September 2011, allows a student with a disability to receive a local diploma based on a passing score on the RCT if student does not achieve a score of 55 or higher on the Regents examination.

3. Compensatory Safety Net Option: For students not relying on RCTs, a student with a disability may receive a local diploma if he/she scores between 45-54 on one or more of the five required Regents exams, other than the English language arts (ELA) or mathematics, but achieves a score of 65 or higher on another required Regents exam which can compensate for the lower score. A score of 65 or higher on a single examination may not be used to compensate for more than one examination for which a score of 45-54 is earned.

All students, including students with disabilities, can appeal a score on a Regents exam that is within three points of a 65 on up to two Regents exams. Successful appeal of one Regents exam score results in the student graduating with a Regents diploma. Appeal of two Regents exam leads to a local diploma.

Currently there is no appeal option for a score of less than 55 for a student with a disability to earn a local diploma. While this appeal option may be important for some students, data shows that in the 2010 cohort, there were only 258 students with disabilities who did not graduate who received a test score between 52 and 54 on any Regents exam.

Under the proposed amendment, students with disabilities (except for students who make use of the compensatory option to obtain a local diploma pursuant to 8 NYCRR section 100.5[b][7][vi][c]) who are otherwise eligible to graduate in January 2016 or thereafter would be eligible to receive the Local Diploma via appeal if they:

- score up to three points below a score of 55 on a Regents exam after at least two attempts, and attain at least a 65 course average in the subject area of the Regents examination under appeal;
- provide evidence that they have received academic intervention services by the school in the subject area of the Regents examination under appeal;
- have an attendance rate of at least 95 percent for the school year during which the student last took the required Regents examination under appeal;
- attain a course average in the subject area of the Regents examination under appeal that meets or exceeds the required passing grade by the school and is recorded on the student's official transcript with grades achieved by the student in each quarter of the school year; and
- the student is recommended for an exemption to the passing score on the required Regents examination under appeal by his or her teacher or department chairperson in the subject area of such examination.

Appeals by students with disabilities of a score of less than 55 under the proposed amendment would be reviewed by the same committee that reviews all other Regents appeals.

COSTS:

(a) Costs to State government: none.

(b) Costs to local government: The proposed amendment will not impose any significant costs on local governments. An appeals process and criteria are already in place for students who score 65+ on three Regents exam and score 62-64 on two Regents exams, and the proposed amendment would merely expand the eligibility to a limited subset of qualifying students with disabilities who score within 3 points below a score of 55, after at least two tries, and meet all other conditions for appeal. Newly qualifying students would merely go through this existing appeals process, and the same personnel who review appeals under the current system would review the additional appeals. Any costs associated with the processing of these additional appeals are expected to be minimal and capable of being absorbed by using existing district staff and resources. In the long term, the proposed amendment is expected to be a cost saving measure in that it will boost the graduation rate, allowing more students with disabilities to access higher education or enter the workforce with a high school diploma. Both of these outcomes will in turn stimulate workforce productivity and economic performance in local communities.

(c) Costs to private regulated parties: none.

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

LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon school districts. An appeals process and criteria are already in place for students who score 65+ on three Regents exam and score 62-64 on two Regents exams, and the proposed amendment would merely expand the eligibility to a limited subset of qualifying students with disabilities who score within 3 points below a score of 55, after at least two tries, and meet all other conditions for appeal. Appeals by such students under the proposed amendment would be reviewed by the same committee that reviews all other appeals of Regents examination scores. Such students would remain eligible for the current appeals process as well.

PAPERWORK:

The proposed amendment will not require any additional paperwork beyond what is necessary to process a limited number of additional appeals for a local diploma from qualifying students with disabilities who score within 3 points below a score of 55, after at least two tries, and meet all other conditions for appeal. Appeals by such students under the proposed amendment would be subject to the existing requirement in section 100.5(d)(7) that each school keep a record of all appeals received and granted and report this information to Department on a form prescribed by the Commissioner. All school records relating to appeals of scores shall be made available for inspection by the Department.

DUPLICATION:

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

ALTERNATIVES:

There were no significant alternatives and none were considered.

FEDERAL STANDARDS:

There are no applicable Federal standards.

COMPLIANCE SCHEDULE:

It is anticipated that school districts and BOCES will be able to achieve compliance with the proposed amendment by its effective date. An appeals process and criteria are already in place for students who score 65+ on three Regents exam and score 62-64 on two Regents exams, and the proposed amendment would merely expand the eligibility to a limited subset of qualifying students with disabilities who score within 3 points below a score of 55, after at least two tries, and meet all other conditions for appeal. Newly qualifying students would merely go through this existing appeals process, and the same personnel who review appeals under the current system would review the additional appeals.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment would extend the ability to graduate with a Local Diploma via appeal of a score of 55 to students with disabilities who meet all other conditions for appeal and are otherwise eligible to graduate in January 2016 and thereafter.

The proposed amendment relates to State learning standards, State assessments and graduation and diploma requirements, and is necessary to implement policy adopted by the Regents to improve graduation outcomes for students with disabilities. The proposed amendment does not impose any adverse economic impact, reporting, record keeping or 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 steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

EFFECT OF RULE:

The proposed amendment applies to each of the 689 public school districts and 37 boards of cooperative educational services (BOCES) in the State.

COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any additional compliance requirements on school districts or BOCES. An appeals process and criteria are already in place for students who score 65+ on three Regents exam and score 62-64 on two Regents exams, and the proposed amendment would merely expand the eligibility to a limited subset of qualifying students with disabilities who score within 3 points below a score of 55, after at least two tries, and meet all other conditions for appeal. Appeals by such students under the proposed amendment would be reviewed by the same committee that reviews all other appeals of Regents examination scores. Such students would remain eligible for the current appeals process as well.

PROFESSIONAL SERVICES:

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

COMPLIANCE COSTS:

The proposed amendment will not impose any significant costs on school districts or BOCES. An appeals process and criteria are already in place for students who score 65+ on three Regents exam and score 62-64 on two Regents exams, and the proposed amendment would merely expand the eligibility to a limited subset of qualifying students with disabilities who score within 3 points below a score of 55, after at least two tries, and meet all other conditions for appeal. Newly qualifying students would merely go through this existing appeals process, and the same personnel who review appeals under the current system would review the additional appeals. Any costs associated with the processing of these additional appeals are expected to be minimal and capable of being absorbed by using existing district staff and resources. In the long term, the proposed amendment is expected to be a cost saving measure in that it will boost the graduation rate, allowing more students with disabilities to access higher education or enter the workforce with a high school diploma. Both of these outcomes will in turn stimulate workforce productivity and economic performance in local communities.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

MINIMIZING ADVERSE IMPACT:

The proposed amendment relates to State learning standards, State assessments and graduation and diploma requirements, and is necessary to implement policy adopted by the Regents to improve graduation outcomes for students with disabilities. The proposed amendment does not impose any additional compliance requirements or significant costs upon school districts or BOCES. An appeals process and criteria are already in place for students who score 65+ on three Regents exam and score 62-64 on two Regents exams, and the proposed amendment would merely expand the eligibility to a limited subset of qualifying students with disabilities who score within 3 points below a score of 55, after at least two tries, and meet all other conditions for appeal. Appeals by such students under the proposed amendment would be reviewed by the same committee that reviews all other appeals of Regents examination scores. Such students would remain eligible for the current appeals process as well. Any costs associated with the processing of these additional appeals are expected to be minimal and capable of being absorbed by using existing district staff and resources. In the long term, the proposed amendment is expected to be a cost saving measure in that it will boost the graduation rate, allowing more students with disabilities to access higher education or enter the workforce with a high school diploma. Both of these outcomes will in turn stimulate workforce productivity and economic performance in local communities.

LOCAL GOVERNMENT PARTICIPATION:

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

INITIAL REVIEW OF RULE (SAPA § 207):

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment is necessary to implement long-range Regents policy relating to improving graduation outcomes for students with disabilities. Accordingly, there is no need for a shorter review period.

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

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

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

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

The proposed amendment does not impose any additional compliance requirements on school districts or BOCES in rural areas. An appeals process and criteria are already in place for students who score 65+ on three Regents exam and score 62-64 on two Regents exams, and the proposed amendment would merely expand the eligibility to a limited subset of qualifying students with disabilities who score within 3 points below a score of 55, after at least two tries, and meet all other conditions for appeal. Appeals by such students under the proposed amendment would be reviewed by the same committee that reviews all other appeals of Regents examination scores. Such students would remain eligible for the current appeals process as well.

The proposed amendment does not impose any additional professional services requirements on school districts and BOCES located in rural areas.

3. COMPLIANCE COSTS:

The proposed amendment will not impose any significant costs on school districts or BOCES located in rural areas. An appeals process and criteria are already in place for students who score 65+ on three Regents exam and score 62-64 on two Regents exams, and the proposed amendment would merely expand the eligibility to a limited subset of qualifying students with disabilities who score within 3 points below a score of 55, after at least two tries, and meet all other conditions for appeal. Newly qualifying students would merely go through this existing appeals process, and the same personnel who review appeals under the current system would review the additional appeals. Any costs associated with the processing of these additional appeals are expected to be minimal and capable of being absorbed by using existing district staff and resources. In the long term, the proposed amendment is expected to be a cost saving measure in that it will boost the graduation rate, allowing more students with disabilities to access higher education or enter the workforce with a high school diploma. Both of these outcomes will in turn stimulate workforce productivity and economic performance in local communities.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any additional compliance requirements or significant costs upon school districts or BOCES located in rural areas. An appeals process and criteria are already in place for students who score 65+ on three Regents exam and score 62-64 on two Regents exams, and the proposed amendment would merely expand the eligibility to a limited subset of qualifying students with disabilities who score within 3 points below a score of 55, after at least two tries, and meet all other conditions for appeal. Appeals by such students under the proposed amendment would be reviewed by the same committee that reviews all other appeals of Regents examination scores. Such students would remain eligible for the current appeals process as well. Any costs associated with the processing of these additional appeals are expected to be minimal and capable of being absorbed by using existing district staff and resources. In the long term, the proposed amendment is expected to be a cost saving measure in that it will boost the graduation rate, allowing more students with disabilities to access higher education or enter the workforce with a high school diploma. Both of these outcomes will in turn stimulate workforce productivity and economic performance in local communities. The proposed amendment relates to State learning standards, State assessments and graduation and diploma requirements, and is necessary to implement policy adopted by the Regents to improve graduation outcomes for students with disabilities. Because this policy is applicable throughout the State, it was not possible to provide for a lesser standard or an exemption for school districts and BOCES in rural areas.

5. RURAL AREA PARTICIPATION:

Comments on the proposed rule 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 relating to improving graduation outcomes for students with disabilities. Accordingly, there is no need for a shorter review period.

The Department invites public comment on the proposed five year

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

Job Impact Statement

The proposed amendment would extend the ability to graduate with a Local Diploma via appeal of a score of 55 to students with disabilities who meet all other conditions for appeal and are otherwise eligible to graduate in January 2016 and thereafter.

The proposed amendment relates to State learning standards, State assessments and graduation and diploma requirements, and is necessary to implement policy adopted by the Regents to improve graduation outcomes for students with disabilities. The proposed amendment will not have a substantial adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact, or a positive impact, on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Mathematics Graduation Requirements

I.D. No. EDU-40-15-00008-P

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

Proposed Action: Amendment of section 100.5(g)(1)(ii) 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 in Mathematics by allowing, at the discretion of the applicable school district, students receiving Algebra II (Common Core) instruction to take the Regents Examination in Algebra 2/Trigonometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Algebra II (Common Core), and meet the mathematics requirement for graduation by passing either examination.

Text of proposed rule: Subparagraph (ii) of paragraph (1) of subdivision (g) of section 100.5 of the Regulations of the Commissioner is amended, effective December 30, 2015, as follows:

(ii) Mathematics.

(a) Students who first begin instruction in a commencement level mathematics course aligned to the Common Core Learning Standards in September 2013 and thereafter shall meet the mathematics requirement for graduation in clause (a)(5)(i)(b) of this section by passing a commencement level Regents examination in mathematics that measures the Common Core Learning Standards, or an approved alternative pursuant to section 100.2(f) of this Part; provided that:

(1) . . .

(2) . . .

(3) for the June 2016, August 2016 and January 2017 administrations only, students receiving algebra II (common core) instruction may, at the discretion of the applicable school district, take the Regents examination in algebra 2/trigonometry aligned to the 2005 Learning Standards in addition to the Regents examination in algebra II (common core), and may meet the mathematics requirement for graduation in clause (a)(5)(i)(b) of this section by passing either examination.

(b) . . .

(c) . . .

Text of proposed rule and any required statements and analyses may be obtained from: Kirti Goswami, 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: Charles Szuberla, Acting 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@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:

At their 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. Section 100.5(g) was permanently adopted at the October 2013 Regents meeting. Section 100.5(g)(1)(ii) allows, at local discretion, students receiving Algebra I (Common Core) instruction to take the Regents Examination in Integrated Algebra (2005 Revised) in addition to the Regents Examination in Algebra I (Common Core) and meet the mathematics graduation requirement by passing either exam. In April 2014, the Board provided the same flexibility with regard to the rollout of the new Regents examination in Geometry (Common Core).

The proposed amendment would provide similar flexibility with respect to the Regents Examination in Algebra II (Common Core) by allowing, at the discretion of the applicable school district, students receiving Algebra II (Common Core) instruction to take the Regents Examination in Algebra 2/Trigonometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Algebra II (Common Core), and meet the mathematics requirement for graduation by passing either examination. This flexibility would be permitted until the final administration of the Algebra 2/Trigonometry Regents examination in January 2017.

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 additional flexibility in the transition to Common Core-aligned Regents Examinations in mathematics by allowing, at the discretion of the applicable school district, students receiving Algebra II (Common Core) instruction to take the Regents Examination in Algebra 2/Trigonometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Algebra II (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 additional flexibility in the transition to Common Core-aligned Regents Examinations in mathematics by allowing, at the discretion of the applicable school district, students receiving Algebra II (Common Core) instruction to take the Regents Examination in Algebra 2/Trigonometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Algebra II (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. School districts may choose or decline to exercise the flexibility provided by the proposed amendment. The first administration of the Regents Examination in Algebra II (Common Core) will be in June 2016, and the last administration of the Algebra 2/Trigonometry Regents examination will be in January 2017.

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 additional flexibility in the transition to Common Core-aligned Regents Examinations in mathematics by allowing, at the discretion of the applicable school district, students receiving Algebra II (Common Core) instruction to take the Regents Examination in Algebra 2/Trigonometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Algebra II (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. At present, there are 70 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 additional flexibility in the transition to Common Core-aligned Regents Examinations in mathematics by allowing, at the discretion of the applicable school district, students receiving Algebra II (Common Core) instruction to take the Regents Examination in Algebra 2/Trigonometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Algebra II (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 additional flexibility in the transition to Common Core-aligned Regents Examinations in mathematics by allowing, at the discretion of the applicable school district, students receiving Algebra II (Common Core) instruction to take the Regents Examination in Algebra 2/Trigonometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Algebra II (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 additional flexibility in the transition to Common Core-aligned Regents Examinations in mathematics by allowing, at the discretion of the applicable school district, students receiving Algebra II (Common Core) instruction to take the Regents Examination in Algebra 2/Trigonometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Algebra II (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 Algebra II (Common Core) will be in June 2016, and the last administration of the Algebra 2/Trigonometry Regents examination will be in January 2017. 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 local

governments. The proposed amendment would provide additional flexibility in the transition to Common Core-aligned Regents Examinations in mathematics by allowing, at the discretion of the applicable school district, students receiving Algebra II (Common Core) instruction to take the Regents Examination in Algebra 2/Trigonometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Algebra II (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.

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

3. 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 additional flexibility in the transition to Common Core-aligned Regents Examinations in mathematics by allowing, at the discretion of the applicable school district, students receiving Algebra II (Common Core) instruction to take the Regents Examination in Algebra 2/Trigonometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Algebra II (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.

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 additional flexibility in the transition to Common Core-aligned Regents Examinations in mathematics by allowing, at the discretion of the applicable school district, students receiving Algebra II (Common Core) instruction to take the Regents Examination in Algebra 2/Trigonometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Algebra II (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 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 Algebra II (Common Core) will be in June 2016, and the last administration of the Algebra 2/Trigonometry Regents examination will be in January 2017. 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 additional flexibility in the transition to Common Core-aligned Regents Examinations in mathematics by allowing, at the discretion of the applicable school district, students receiving Algebra II (Common Core) instruction to take the Regents Examination in Algebra 2/Trigonometry aligned to the 2005 Learning Standards in addition to the Regents Examination in Algebra II (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.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Annual Professional Performance Reviews of Classroom Teachers and Building Principals

I.D. No. EDU-27-15-00019-RP

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

Proposed Action: Amendment of Subpart 30-2, section 100.2(o); and addition of Subpart 20-3 and section 30-2.13 to Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 305(1), (2), 3009(1), 3012-c(1-10) and 3012-d(1-15); L. 2015, ch. 56, part EE, subparts D and E

Subject: Annual Professional Performance Reviews of Classroom Teachers and Building Principals.

Purpose: To Implement subparts D and E of part EE of chapters 20 and 56 of the Laws of 2015.

Text of revised rule: 1. Subparagraph (ii) of paragraph (1) of section 100.2(o) of the Commissioner's regulations is amended, effective September 28, 2015, to read as follows:

(ii) Annual review. The governing body of each school district and BOCES shall ensure that the performance of all teachers providing instructional services or pupil personnel services, as defined in section 80-1.1 of this Title, is reviewed annually in accordance with this subdivision, except evening school teachers of adults enrolled in nonacademic, vocational subjects; and supplementary school personnel, as defined in section 80-5.6 of this Title, and any classroom teacher subject to the evaluation requirements prescribed in [Subpart] *Subparts* 30-2 *and 30-3* of this Title.

2. The title of Subpart 30-2 of the Rules of the Board of Regents is amended effective September 28, 2015, to read as follows:

SUBPART 30-2

ANNUAL PROFESSIONAL PERFORMANCE REVIEWS OF CLASSROOM TEACHERS AND BUILDING PRINCIPALS *CONDUCTED PRIOR TO THE 2015-2016 SCHOOL YEAR OR FOR ANNUAL PROFESSIONAL PERFORMANCE REVIEWS CONDUCTED PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT ENTERED INTO ON OR BEFORE APRIL 1, 2015 WHICH REMAINS IN EFFECT ON OR AFTER APRIL 1, 2015 UNTIL A SUBSEQUENT AGREEMENT IS REACHED*

3. Subdivision (b) of section 30-2.1 of the Rules of the Board of Regents is amended, effective September 28, 2015, to read as follows:

(b) For annual professional performance reviews conducted by school districts or BOCES [in] *from* the 2012-2013 school year [and any school year thereafter] *through the 2015-2016 school year or for any annual professional performance review conducted pursuant to a collective bargaining agreement entered into on or before April 1, 2015 that remains in effect on and after April 1, 2015 until a successor agreement is reached*, the governing body of each school district and BOCES shall ensure that the reviews of all classroom teachers and building principals are conducted in accordance with the requirements of section 3012-c of the Education Law and the provisions of this Subpart.

4. Subdivision (d) of section 30-2.1 of the Rules of the Board of Regents is amended, effective September 28, 2015, to read as follows:

(d) Annual professional performance reviews of classroom teachers and building principals conducted pursuant to this Subpart shall be a significant factor for employment decisions, including but not limited to, promotion, retention, tenure determinations, termination and supplemental compensation, in accordance with Education Law § 3012-c(1). Nothing in this Subpart shall be construed to affect the unfettered statutory right of a school district or BOCES to terminate a probationary teacher or principal for any statutorily and constitutionally permissible reasons [other than the

performance of the teacher or principal in the classroom or school,] including but not limited to misconduct*, and until a tenure decision is made, the performance of the teacher or principal in the classroom or school*. [For purposes of this subdivision, Education Law § 3012-c(1) and (5)(b), performance shall mean a teacher's or principal's overall composite rating pursuant to an annual professional performance review conducted under this Subpart.]

5. Subdivision (c) of section 30-2.11 of the Rules of the Board of Regents is amended, effective September 28, 2015, to read as follows:

(c) Nothing in this section shall be construed to alter or diminish the authority of the governing body of a school district or BOCES to grant or deny tenure to or terminate probationary teachers or probationary building principals during the pendency of an appeal pursuant to this section for statutorily and constitutionally permissible reasons [other than] *including* the teacher's or principal's performance that is the subject of the appeal.

6. A new section 30-2.13 of the Rules of the Board of Regents is added, effective September 28, 2015, to read as follows:

§ 30-2.13. Challenges to State-Provided Growth Score Results for the 2014-2015 School Year and Thereafter.

(a) A teacher/principal shall have the right to challenge their State-provided growth score under this Subpart; provided that the teacher/principal provides sufficient documentation that he/she meets at least one of the following criteria in their annual evaluation:

(1) a teacher/principal was rated Ineffective on his/her State-provided growth score and Highly Effective on the other measures of teacher/leader effectiveness subcomponent in the current year and was rated either Effective or Highly Effective on his/her State-provided growth score in the previous year; or

(2) a high school principal of a building that includes at least all of grades 9-12, was rated Ineffective on the State-provided growth score but such percent of students as shall be established by the Commissioner in his/her school/program within four years of first entry into grade 9 received results on department-approved alternative examinations in English Language Arts and/or or mathematics as described in section 100.2(f) of this Title (including, but not limited to, advanced placement examinations, and/or International Baccalaureate examinations, SAT II, etc.) scored at proficiency (i.e., a Level 3 or higher).

(b) A teacher/principal shall submit an appeal to the Department, in a manner prescribed by the Commissioner, within 20 days of receipt of his/her overall annual professional performance review rating or the effective date of this section, whichever is later, and submit a copy of the appeal to the school district and/or BOCES. The school district and/or BOCES shall have ten days from receipt of a copy of such appeal to submit a reply to the Department.

(c) Based on the documentation received, if the Department overturns a teacher's/principal's rating on the State-provided growth score, the district/BOCES shall substitute the teacher's/principal's results on the back-up SLO developed by the district/BOCES for such teacher/principal. If a back-up SLO was not developed, then the teacher's/principal's overall composite score and rating shall be based on the portions of their annual professional performance review not affected by the nullification of the State-provided growth score. Provided, however, that following a successful appeal under paragraph (1) of subdivision (a) of this section, if a back-up SLO is used a teacher/principal shall not receive a score/rating higher than developing on such SLO.

(d) An evaluation that is the subject of an appeal shall not be sought to be offered in evidence or placed in evidence in any proceeding conducted pursuant to Education Law sections 3020-a and 3020-b or any locally negotiated alternate disciplinary procedure until the appeal process is concluded.

(e) Nothing in this section shall be construed to alter or diminish the authority of the governing body of a district to grant or deny tenure to or terminate probationary teachers or probationary building principals during the pendency of an appeal pursuant to this section for statutorily and constitutionally permissible reasons, including the teacher's/principal's performance that is the subject of the appeal.

(f) Nothing in this Subpart shall be construed to authorize a teacher/principal to commence the appeal process prior to receipt of his/her overall rating from the district/BOCES.

(g) During the pendency of an appeal under this section, nothing shall be construed to alter the obligation of a school district/BOCES to develop and implement a teacher improvement plan or principal improvement plan during the pendency of an appeal.

(h) Nothing in this section shall be construed to limit any rights of a teacher/principal under section 30-2.11 of this Subpart.

(i) Notwithstanding any other provision of rule or regulation to the contrary, a high school principal of a building that includes at least all of grades 9-12 who meets either of the criteria in paragraphs (1) or (2) of this subdivision shall not receive a State-provided growth score and shall instead use back-up SLOs:

(1) the principal would be rated Ineffective or Developing on the State-provided growth score but the graduation rate of the students in that school building exceeded 90%, and the proportion of the student population included in either the ELA Regents Median Growth Percentile or the Algebra Regents Median Growth Percentile was less than ten percent of the total enrollment for the school; or the principal.

(2) has no Combined Median Growth Percentile rating or score, and the proportion of the student population included in the ELA Regents Median Growth Percentile and Algebra Regents Median Growth Percentile was less than five percent of the total enrollment for the school in one subject, and less than ten percent of the total enrollment in the other subject.

(3) If a back-up SLO was not developed, then the principal's overall composite score and rating shall be based on the remaining portions of their annual professional performance review.

7. A new Subpart 30-3 of the Rules of the Board of Regents shall be added, effective September 28, 2015, to read as follows:

SUBPART 30-3

ANNUAL PROFESSIONAL PERFORMANCE REVIEWS OF CLASSROOM TEACHERS AND BUILDING PRINCIPALS FOR THE 2015-2016 SCHOOL YEAR AND THEREAFTER

§ 30-3.1 Applicability.

(a) For annual professional performance reviews conducted by districts for the 2015-2016 school year and any school year thereafter, the governing body of each district shall ensure that the reviews of all classroom teachers and building principals are conducted in accordance with the requirements of Education Law § 3012-d and this Subpart, except as otherwise provided in subdivision (b) of this section.

(b) The requirements of Education Law § 3012-c and Subpart 30-2 of this Part shall continue to apply to annual professional performance reviews conducted prior to the 2015-2016 school year and thereafter, where such reviews are conducted pursuant to a collective bargaining agreement entered into on or before April 1, 2015 that remains in effect on and after April 1, 2015 until entry into a successor agreement.

(c) In accordance with Education Law § 3012-d(12), all collective bargaining agreements entered into after April 1, 2015 shall be consistent with the requirements of Education Law § 3012-d and this Subpart, unless such agreement related to the 2014-2015 school year only. Nothing in this Subpart shall be construed to abrogate any conflicting provisions of any collective bargaining agreement in effect on and after April 1, 2015 during the term of such agreement and until entry into a successor collective bargaining agreement, provided that notwithstanding any other provision of law to the contrary, upon expiration of such term and the entry into a successor collective bargaining agreement, all the requirements of Education Law § 3012-d and this Subpart shall apply.

(d) Annual professional performance reviews of classroom teachers and building principals shall be a significant factor for employment decisions, including but not limited to, promotion, retention, tenure determination, termination, and supplemental compensation, in accordance with Education Law § 3012-d(1). Such evaluations shall also be a significant factor in teacher and principal development, including but not limited to coaching, induction support, and differentiated professional development. Nothing herein shall be construed to affect the unfettered statutory right of a district to terminate a probationary (non-tenured) teacher or principal for any statutorily and constitutionally permissible reasons.

(e) The Board of Regents shall convene an assessment and evaluation workgroup or workgroups, comprised of stakeholders and experts in the field to provide recommendations to the Board of Regents on assessments and evaluations that could be used for annual professional performance reviews in the future.

§ 30-3.2 Definitions. As used in this Subpart:

(a) Approved teacher or principal practice rubric shall mean a rubric approved by the commissioner for inclusion on the State Education Department's list of approved rubrics in teacher or principal evaluations.

(b) Approved student assessment shall mean a student assessment approved by the commissioner for inclusion in the State Education Department's lists of approved student assessments to measure student growth for use in the mandatory subcomponent and/or for use in the optional subcomponent of the student performance category.

(1) Approved assessments in grades kindergarten through grade two. Traditional standardized assessments in grades kindergarten through

grade two shall not be on the approved list. However, an assessment that is not a traditional standardized assessment shall be considered an approved student assessment if the superintendent, district superintendent, or chancellor of a district that chooses to use such assessment certifies in its annual professional performance review plan that the assessment is not a traditional standardized assessment, and that the assessment meets the minimum requirements prescribed by the Commissioner in guidance.

(c) Classroom teacher or teacher shall mean a teacher in the classroom teaching service as that term is defined in section 80-1.1 of this Title who is a teacher of record as defined in this section, except evening school teachers of adults enrolled in nonacademic, vocational subjects, and supplemental school personnel as defined in section 80-5.6 of this Title.

(d) Common branch subjects shall mean common branch subjects as defined in section 80-1.1 of this Title.

(e) Co-principal means a certified administrator under Part 80 of this Title, designated by the school's controlling authority to have executive authority, management, and instructional leadership responsibility for all or a portion of a school or BOCES-operated instructional program in a situation in which more than one such administrator is so designated. The term co-principal implies equal line authority, with each designated administrator reporting to a district-level or comparable BOCES-level supervisor.

(f) Developing means an overall rating of Developing received by a teacher or building principal, based on the ratings an educator received in the student performance category and observation/school visit category pursuant to the matrix prescribed in section 30-3.6 of this Subpart.

(g) District means school district and/or board of cooperative educational services, unless otherwise provided in this Subpart.

(h) Effective means an overall rating of Effective received by a teacher or building principal, based on the ratings an educator received in the student performance category and observation/school visit category pursuant to the matrix prescribed in section 30-3.6 of this Subpart.

(i) Evaluator shall mean any individual who conducts an evaluation of a classroom teacher or building principal under this Subpart.

(j) Highly Effective means an overall rating of Highly Effective received by a teacher or building principal, based on the ratings an educator received in the student performance category and observation/school visit category pursuant to the matrix prescribed in section 30-3.6 of this Subpart.

(k) Ineffective means an overall rating of Ineffective received by a teacher or building principal, based on the ratings an educator received in the student performance category and observation/school visit category pursuant to the matrix prescribed in section 30-3.6 of this Subpart.

(l) Lead evaluator shall mean the primary individual responsible for conducting and completing an evaluation of a classroom teacher or building principal under this Subpart. To the extent practicable, the building principal, or his or her designee, shall be the lead evaluator of a classroom teacher in this Subpart. To the extent practicable, the lead evaluator of a principal should be the superintendent or BOCES district superintendent or his/her designee.

(m) Leadership standards shall mean the Educational Leadership Policy Standards: ISLLC 2008 as adopted by the National Policy Board for Educational Administration (Council of Chief State School Officers, Washington DC, One Massachusetts Avenue, NW, Suite 700, Washington, DC 20001-1431; 2008- available at the Office of Counsel, State Education Department, State Education Building, Room 148, 89 Washington Avenue, Albany, New York 12234). The Leadership Standards provide that an education leader promotes the success of every student by:

(1) facilitating the development, articulation, implementation, and stewardship of a vision of learning that is shared and supported by the school community;

(2) advocating, nurturing and sustaining a school culture and instructional program conducive to student learning and staff professional growth;

(3) ensuring management of the organization, operations and resources for a safe, efficient, and effective learning environment;

(4) collaborating with families and community members, responding to diverse community interests and needs, and mobilizing community resources;

(5) acting with integrity, fairness, and in an ethical manner; and

(6) understanding, responding to, and influencing the larger political, social, economic, legal, and cultural context.

(n) Principal shall mean a building principal or an administrator in charge of an instructional program of a board of cooperative educational services.

(o) School building shall mean a school or program identified by its Basic Educational Data System (BEDS) code, as determined by the commissioner.

(p) State approved student growth model means a statistical model that uses prior academic history, poverty, students with disabilities and English language learners, and any additional factors approved by the Commissioner to measure student growth.

(q) State-designed supplemental assessment shall mean a selection of state tests or assessments developed or designed by the Department, or that the Department purchased or acquired from (i) another state; (ii) an institution of higher education; or (iii) a commercial or not-for-profit entity, provided that such entity must be objective and may not have a conflict of interest or appearance of a conflict of interest; and tests or assessments that have been previously designed or acquired by local districts, but only if the Department significantly modifies growth targets or scoring bands for such tests or assessments or otherwise adapts the test or assessment to the Department's requirements. Such assessments may only be used in the optional student performance subcomponent in order to produce a growth score calculated pursuant to a State-provided or approved growth model.

(r) Student growth means the change in student achievement for an individual student between two or more points in time.

(s) Student growth percentile score shall mean the result of a statistical model that calculates each student's change in achievement between two or more points in time on a State assessment or other comparable growth measure and compares each student's performance to that of similarly achieving students.

(t) Student Learning Objective(s) (SLOs) are academic goals for an educator's students that are set at the start of a course, except in rare circumstances as defined by the Commissioner. SLOs represent the most important learning for the year (or semester, where applicable). They must be specific and measurable, based on available prior student learning data, and aligned to the New York State learning standards, as well as to any other school and district priorities. An educator's scores are based upon the degree to which his or her goals were attained.

(u) Superintendent of schools shall mean the chief school officer of a district or the district superintendent of a board of cooperative educational services, provided that in the case of the City School District of the City of New York, superintendent shall mean the Chancellor of the City School District of the City of New York or his or her designee.

(v) Teacher or principal state provided growth scores shall mean a measure of central tendency of the student growth percentile scores through the use of standard deviations and confidence ranges to identify with statistical certainty educators whose students' growth is well above or well below average compared to similar students for a teacher's or principal's students after the following student characteristics are taken into consideration: poverty, students with disabilities and English language learners. Additional factors may be added by the Commissioner, subject to approval by the Board of Regents.

(w) Teacher(s) of record shall be defined in a manner prescribed by the commissioner.

(x) Teaching Standards are enumerated below:

(1) the teacher acquires knowledge of each student, and demonstrates knowledge of student development and learning to promote achievement for all students;

(2) the teacher knows the content they are responsible for teaching, and plans instruction that ensures growth and achievement for all students;

(3) the teacher implements instruction that engages and challenges all students to meet or exceed the learning standards;

(4) the teacher works with all students to create a dynamic learning environment that supports achievement and growth;

(5) the teacher uses multiple measures to assess and document student growth, evaluate instructional effectiveness, and modify instruction;

(6) the teacher demonstrates professional responsibility and engages relevant stakeholders to maximize student growth, development, and learning; and

(7) the teacher sets informed goals and strives for continuous professional growth.

(y) Testing standards shall mean the ''Standards for Educational and Psychological Testing'' (American Psychological Association, National Council on Measurement in Education, and American Educational Research Association; 2014- available at the Office of Counsel, State Education Department, State Education Building, Room 148, 89 Washington Avenue, Albany, New York 12234).

(z) The governing body of each district shall mean the board of educa-

tion of each district, provided that, in the case of the City School District of the City of New York, governing body shall mean the Chancellor of the City School District of the City of New York or, to the extent provided by law, the board of education of the City School District of the City of New York and, in the case of BOCES, governing body shall mean the board of cooperative educational services.

(aa) Traditional standardized assessment shall mean a systematic method of gathering information from objectively scored items that allow the test taker to select one or more of the given options or choices as their response. Examples include multiple-choice, true-false, and matching items. Traditional standardized assessments are those that require the student (and not the examiner/assessor) to directly use a ''bubble'' answer sheet. Traditional standardized assessments do not include performance assessments or assessments in which students perform real-world tasks that demonstrate application of knowledge and skills; assessments that are otherwise required to be administered by Federal law; and/or assessments used for diagnostic or formative purposes, including but not limited to assessments used for diagnostic screening required by Education Law section 3208(5).

§ 30-3.3. Requirements for annual professional performance review plans submitted under this Subpart.

(a) Applicability.

(1) The governing body of each district shall adopt a plan, in a form and timeline prescribed by the commissioner, for the annual professional performance review of all of the district's classroom teachers and building principals in accordance with the requirements of Education Law section 3012-d and this Subpart and shall submit such plan to the commissioner for approval. The commissioner shall approve or reject the plan. The commissioner may reject a plan that does not rigorously adhere to the provisions of Education Law section 3012-d and the requirements of this Subpart. Absent a finding by the Commissioner of extraordinary circumstances, if any material changes are made to the plan, the district must submit the material changes by March 1 of each school year, on a form prescribed by the commissioner, to the commissioner for approval. The provisions of Education Law § 3012-c(2)(k) shall only apply to the extent provided in this paragraph.

(2) Such plan shall be filed in the district office, as applicable, and made available to the public on the district's web-site no later than September 10th of each school year, or within 10 days after the plan's approval by the commissioner, whichever shall later occur.

(3) Any plan submitted to the commissioner shall include a signed certification on a form prescribed by the commissioner, by the superintendent, district superintendent or chancellor, attesting that:

(i) the amount of time devoted to traditional standardized assessments that are not specifically required by State or Federal law for each classroom or program of the grade does not exceed, in the aggregate, one percent of the minimum in required annual instructional hours for such classroom or program of the grade; and

(ii) the amount of time devoted to test preparation under standardized testing conditions for each grade does not exceed, in the aggregate, two percent of the minimum required annual instructional hours for such grade. Time devoted to teacher administered classroom quizzes or exams, portfolio reviews, or performance assessments shall not be counted towards the limits established by this subdivision. In addition, formative and diagnostic assessments shall not be counted towards the limits established by this subdivision and nothing in this subdivision shall be construed to supersede the requirements of a section 504 plan of a qualified student with a disability or Federal law relating to English language learners or the individualized education program of a student with a disability.

(b) Content of the plan. The annual professional performance review plan shall:

(1) describe the district's process for ensuring that the department receives accurate teacher and student data, including enrollment and attendance data and any other student, teacher, school, course and teacher/student linkage data necessary to comply with this Subpart, in a format and timeline prescribed by the commissioner. This process shall also provide an opportunity for every classroom teacher and building principal to verify the subjects and/or student rosters assigned to them;

(2) describe how the district will report to the Department the individual scores and ratings for each subcomponent and category and overall rating for each classroom teacher and building principal in the district, in a format and timeline prescribed by the commissioner;

(3) describe the assessment development, security, and scoring processes utilized by the district. Such processes shall ensure that any assessments and/or measures used to evaluate teachers and principals under this section are not disseminated to students before administration and that teachers and principals do not have a vested interest in the outcome of the assessments they score;

(4) describe the details of the district's evaluation system, which shall include, but not be limited to, whether the district chose to use each of the optional subcomponents in the student performance and observation/school visit categories and the assessments and/or measures, if any, that are used in each subcomponent of the student performance category and the observation/school visit category and the name of the approved teacher and/or principal practice rubrics that the district uses or evidence that a variance has been granted by the Commissioner from this requirement;

(5) describe how the district will provide timely and constructive feedback to classroom teachers and building principals on their annual professional performance review;

(6) describe the appeal procedures that the district is using pursuant to section 30-3.12 of this section; and

(7) include any certifications required under this Subpart.

(c) The entire annual professional performance review shall be completed and provided to the teacher or the principal as soon as practicable but in no case later than September 1st of the school year next following the school year for which the teacher or principal's performance is measured. The teacher's and principal's score and rating on the observation/school visit category and in the student performance category, if available, shall be computed and provided to the teacher or principal, in writing, by no later than the last day of the school year for which the teacher or principal is being measured, but in no case later than September 1st of the school year next following the school year for which the teacher or principal's performance is measured. Nothing in this subdivision shall be construed to authorize a teacher or principal to commence the appeal process prior to receipt of his or her overall rating. Districts shall ensure that there is a complete evaluation for all classroom teachers and building principals, which shall include scores and ratings on the subcomponent(s) of the student performance category and the observation/school visit category and the combined category scores and ratings, determined in accordance with the applicable provisions of Education Law § 3012-d and this Subpart, for the school year for which the teacher's or principal's performance is measured.

§ 30-3.4 Standards and criteria for conducting annual professional performance reviews of classroom teachers under Education Law § 3012-d.

(a) Annual professional performance reviews conducted under this section shall differentiate teacher effectiveness resulting in a teacher being rated Highly Effective, Effective, Developing or Ineffective based on multiple measures in two categories: the student performance category and the teacher observation category.

(b) Student performance category. The student performance category shall have one mandatory subcomponent and one optional subcomponent as follows:

(1) Mandatory first subcomponent.

(i) for a teacher whose course ends in a State-created or administered test for which there is a State-provided growth model and at least 50% of a teacher's students are covered under the State-provided growth measure, such teacher shall have a State-provided growth score based on such model; and

(ii) for a teacher whose course does not end in a State-created or administered test or where less than 50% of the teacher's students are covered by a State-provided growth measure, such teacher shall have a Student Learning Objective (SLO) developed and approved by his/her superintendent or his or her designee, using a form prescribed by the commissioner, consistent with the SLO process determined or developed by the commissioner, that results in a student growth score; provided that, for any teacher whose course ends in a State-created or administered assessment for which there is no State-provided growth model, such assessment must be used as the underlying assessment for such SLO. The SLO process determined by the Commissioner shall include a minimum growth target of one year of expected growth, as determined by the superintendent or his or her designee. Such targets, as determined by the superintendent or his or her designee, may take the following characteristics into account: poverty, students with disabilities, English language learners status and prior academic history. SLOs shall include the following SLO elements, as defined by the commissioner in guidance:

(a) student population;

(b) learning content;

(c) interval of instructional time;

(d) evidence;

(e) baseline;
(f) target;
(g) criteria for rating a teacher Highly Effective, Effective, Developing or Ineffective ("HEDI"); and
(h) rationale.

(iii) for a teacher whose course does not end in a State-created or administered test or where a State-provided growth measure is not determined, districts may determine whether to use SLOs based on a list of approved student assessments, or a school-or-BOCES-wide group, team, or linked results based on State/Regents assessments, as defined by the Commissioner in guidance.

(iv) Districts shall develop back-up SLOs for all teachers whose courses end in a State created or administered test for which there is a State-provided growth model, to use in the event that no State-provided growth score can be generated for such teachers.

(2) Optional second subcomponent. A district may locally select a second measure that shall be applied in a consistent manner, to the extent practicable, across the district based on State/Regents assessments or State-designed supplemental assessments and be either:

(i) a second State-provided growth score on a state-created or administered test; provided that the State-provided growth measure is different than that used in the required subcomponent of the student performance category, which may include one or more of the following measures:

(a) a teacher-specific growth score computed by the State based on percentage of students who achieve a State-determined level of growth (e .g., percentage of students whose growth is above the median for similar students);

(b) school-wide growth results based on a State-provided school-wide growth score for all students attributable to the school who took the State English language arts or math assessment in grades 4-8; or

(c) school-wide, group, team, or linked growth results using available State-provided growth scores that are locally-computed; or

(ii) a growth score based on a State-designed supplemental assessment, calculated using a State-provided or approved growth model. Such growth score may include school or BOCES –wide group, team, or linked results where the State-approved growth model is capable of generating such a score.

(3) All State-provided or approved growth model scores must control for poverty, students with disabilities, English language learners status and prior academic history. For SLOs, these characteristics may be taken into account through the use of targets based on one year of "expected growth", as determined by the superintendent or his or her designee.

(4) The district shall measure student growth using the same measure(s) of student growth for all classroom teachers in a course and/or grade level in a district.

(c) Weighting of Subcomponents Within Student Performance Category.

(1) If a district does not locally select to use the optional second student growth subcomponent, then the mandatory subcomponent shall be weighted at 100%.

(2) If the optional second student growth subcomponent is selected, then the mandatory subcomponent shall be weighted at a minimum of 50% and the optional second subcomponent shall be weighted at no more than 50%.

(3) Each measure used in the student performance category (State provided growth score, SLOs, State-designed supplemental assessments) must result in a score between 0 and 20. The State will generate scores of 0-20 for measures using a State-provided growth score. Districts shall calculate scores for SLOs in accordance with the minimum percentages prescribed in the table below; provided however that for teachers with courses with small "n" sizes as defined by the Commissioner in guidance, districts shall calculate scores for SLOs using a methodology prescribed by the Commissioner in guidance. For all other measures that are not State-provided growth measures, scores of 0-20 shall be computed locally in accordance with the State provided or approved growth model used.

SLOs	
Percent of Students Meeting Target	*Scoring Range*
0-4%	*0*
5-8%	*1*
9-12%	*2*
13-16%	*3*
17-20%	*4*
21-24%	*5*
25-28%	*6*
29-33%	*7*
34-38%	*8*
39-43%	*9*
44-48%	*10*
49-54%	*11*
55-59%	*12*
60-66%	*13*
67-74%	*14*
75-79%	*15*
80-84%	*16*
85-89%	*17*
90-92%	*18*
93-96%	*19*
97-100%	*20*

(d) Overall Rating on Student Performance Category.

(1) Multiple student performance measures shall be combined using a weighted average pursuant to subdivision (c) of this section to produce an overall student performance category score of 0 to 20. Based on such score, an overall student performance category rating shall be derived from the table below:

	Overall Student Performance Category Score and Rating	
	Minimum	*Maximum*
H	*18*	*20*
E	*15*	*17*
D	*13*	*14*
I	*0*	*12*

(2) Teacher observation category. The observation category for teachers shall be based on at least two observations; one of which must be unannounced.

(i) Two Mandatory subcomponents.

(a) One observation shall be conducted by a principal or other trained administrator and;

(b) a second observation shall be conducted by: either one or more impartial independent trained evaluator(s) selected and trained by the district or in cases where a hardship waiver is granted by the Department pursuant to subclause (1) of this clause, a second observation shall be conducted by one or more evaluators selected and trained by the district, who are different than the evaluator(s) who conducted the evaluation pursuant to clause (a) of this paragraph. An independent trained evaluator may be employed within the district, but may not be assigned to the same school building as the teacher being evaluated.

(1) A rural school district, as defined by the Commissioner in guidance, or a school district with only one registered school pursuant to section 100.18 of the Commissioner's regulations may apply to the Department for a hardship waiver on an annual basis, in a timeframe and manner prescribed by the Commissioner, if due to the size and limited resources of the school district, it is unable to obtain an independent evaluator within a reasonable proximity without an undue burden to the school district.

(ii) Optional third subcomponent. The observations category may include a third optional subcomponent based on classroom observations conducted by a trained peer teacher rated Effective or Highly Effective on his or her overall rating in the prior school year from the same school or from another school in the district.

(iii) Frequency and Duration of Observations. The frequency and duration of observations shall be determined locally.

(iv) All observations must be conducted using a teacher practice rubric approved by the commissioner pursuant to a Request for Qualification ("RFQ") process, unless the district has an approved variance from the Commissioner.

(a) Variance for existing rubrics. A variance may be granted to a district that seeks to use a rubric that is either a close adaptation of a rubric on the approved list, or a rubric that was self-developed or developed by a third-party, upon a finding by the Commissioner that the

rubric meets the criteria described in the Request for Qualification and the district has demonstrated that it has made a significant investment in the rubric and has a history of use that would justify continuing the use of that rubric.

(b) Variance for use of new innovative rubrics. A variance may be granted to a district that seeks to use a newly developed rubric, upon a finding by the Commissioner that the rubric meets the criteria described in the RFQ, has demonstrated how it will ensure inter-rater reliability and the rubric's ability to provide differentiated results over time.

(v) All observations for a teacher for the school year must use the same approved rubric; provided that districts may locally determine whether to use different rubrics for teachers who teach different grades and/or subjects during the school year.

(vi) At least one of the mandatory observations must be unannounced.

(vii) Observations may occur either live or via recorded video, as determined locally.

(viii) Nothing in this Subpart shall be construed to limit the discretion of a board of education, superintendent of schools or a principal or other trained administrator to conduct observations in addition to those required by this section for non-evaluative purposes.

(ix) Observations must be based only on observable rubric subcomponents. The evaluator may select a limited number of observable rubric subcomponents for focus within a particular observation, so long as all observable Teaching Standards/Domains are addressed across the total number of annual observations.

(x) New York State Teaching Standards/Domains that are part of the rubric but not observable during the classroom observation may be observed during any optional pre-observation conference or post-observation review or other natural conversations between the teacher and the evaluator and incorporated into the observation score.

(xi) Points shall not be allocated based on any artifacts, unless such artifact constitutes evidence of an otherwise observable rubric subcomponent (e.g., a lesson plan viewed during the course of the observation may constitute evidence of professional planning).

(xii) Each observation shall be evaluated on a 1-4 scale based on a State- approved rubric aligned to the New York State Teaching Standards and an overall score for each observation shall be generated between 1-4. Multiple observations shall be combined using a weighted average pursuant to subparagraph (xiv) of this paragraph, producing an overall observation category score between 1-4. In the event that a teacher earns a score of 1 on all rated components of the practice rubric across all observations, a score of 0 will be assigned.

(xiii) Weighting of Subcomponents Within Teacher Observation Category. The weighting of the subcomponents within the teacher observation category shall be established locally within the following constraints:

(a) observations conducted by a principal or other trained administrator shall be weighted at a minimum of 80%.

(b) observations conducted by independent impartial observer(s), or other evaluators selected by the district if a hardship waiver is granted, shall be weighted at a minimum of 10%.

(c) if a district selects to use the optional third observation subcomponent, then the weighting assigned to the optional observations conducted by peers shall be established locally within the constraints outlined in clause (1) and (2) of this subparagraph.

(xiv) Overall Rating on the Teacher Observation Category. The overall observation score calculated pursuant to paragraphs (xii) and (xiii) shall be converted into an overall rating, using cut scores determined locally for each rating category; provided that such cut scores shall be consistent with the permissible ranges identified below:

	Overall Observation Category Score and Rating	
	Min	*Max*
H	*3.5 to 3.75*	*4.0*
E	*2.5 to 2.75*	*3.49 to 3.74*
D	*1.5 to 1.75*	*2.49 to 2.74*
I	*0*	*1.49 to 1.74*

§ 30-3.5 Standards and criteria for conducting annual professional performance reviews of building principals under Education Law § 3012-d.

(a) Ratings. Annual professional performance reviews conducted under this section shall differentiate principal effectiveness resulting in a principal being rated Highly Effective, Effective, Developing or Ineffective based on multiple measures in the following two categories: the student performance category and the school visit category.

(b) Student performance category. Such category shall have at least one mandatory first subcomponent and an optional second subcomponent as follows:

(1) Mandatory first subcomponent.

(i) for a principal with at least 30% of his/her students covered under the State-provided growth measure, such principal shall have a State-provided growth score based on such model; and

(ii) for a principal where less than 30% of his/her students are covered under the State-provided growth measure, such principal shall have a Student Learning Objective (SLO), on a form prescribed by the commissioner, consistent with the SLO process determined or developed by the commissioner, that results in a student growth score; provided that, for any principal whose building or program includes courses that end in a State-created or administered assessment for which there is no State-provided growth model, such assessment must be used as the underlying assessment for such SLO. The SLO process determined by the Commissioner shall include a minimum growth target of one year of expected growth, as determined by the superintendent or his or her designee. Such targets, as determined by the superintendent or his or her designee in the exercise of their pedagogical judgment, may take the following characteristics into account: poverty, students with disabilities, English language learners status and prior academic history. SLOs shall include the following elements, as defined by the Commissioner in guidance:

(a) student population;
(b) learning content;
(c) interval of instructional time;
(d) evidence;
(e) baseline;
(f) target;
(g) criteria for rating a principal Highly Effective, Effective, Developing or Ineffective ("HEDI"); and
(h) Rationale.

(iii) for a principal of a building or program whose courses do not end in a State-created or administered test or where a State-provided growth score is not determined, districts shall use SLOs based on a list of State approved student assessments.

(2) Optional second subcomponent. A district may locally select one or more other measures for the student performance category that shall be applied in a consistent manner, to the extent practicable, across the district based on either:

(i) a second State-provided growth score on a State-created or administered test; provided that a different measure is used than that for the required subcomponent in the student performance category, which may include one or more of the following measures:

(a) principal-specific growth computed by the State based on percentage of students who achieve a State-determined level of growth (e .g. percentage of students whose growth is above the median for similar students);

(b) school-wide growth results using available State-provided growth scores that are locally-computed; or

(ii) a growth score based on a State-designed supplemental assessment, calculated using a State-provided or approved growth model. Such growth score may include school or BOCES –wide group, team, or linked measures where the state-approved growth model is capable of generating such a score.

(3) All State-provided or approved growth scores must control for poverty, students with disabilities, English language learners status and prior academic history. For SLOs, these characteristics may be taken into account through the use of targets based on one year of "expected growth", as determined by the superintendent or his or her designee.

(4) The district shall measure student growth using the same measure(s) of student growth for all building principals within the same building configuration or program.

(c) Weighting of Subcomponents Within Student Performance Category.

(1) If a district does not locally select to use the optional second student growth subcomponent, then the mandatory subcomponent shall be weighted at 100%.

(2) If the optional second student growth subcomponent is selected, then the mandatory subcomponent shall be weighted at a minimum of 50% and the optional second subcomponent shall be weighted at no more than 50%.

(3) Each measure used in the student performance category (State provided growth score, SLOs, State-designed supplemental assessments) must result in a score between 0 and 20. The State will generate scores of 0-20 for measures using a State-provided growth score. Districts shall calculate growth scores for SLOs in accordance with the minimum percentages prescribed in the table below; provided however that for principals of a building or program with small "n" sizes as defined by the Commissioner in guidance, districts shall calculate scores for SLOs using a methodology prescribed by the Commissioner in guidance. For all other measures that are not State-provided growth measures, scores of 0-20

shall be computed locally in accordance with the State provided or approved growth model used.

SLOs	
Percent of Students Meeting Target	*Scoring Range*
0-4%	*0*
5-8%	*1*
9-12%	*2*
13-16%	*3*
17-20%	*4*
21-24%	*5*
25-28%	*6*
29-33%	*7*
34-38%	*8*
39-43%	*9*
44-48%	*10*
49-54%	*11*
55-59%	*12*
60-66%	*13*
67-74%	*14*
75-79%	*15*
80-84%	*16*
85-89%	*17*
90-92%	*18*
93-96%	*19*
97-100%	*20*

(4) Overall Rating on Student Performance Category. Multiple measures shall be combined using a weighted average, to produce an overall student performance category score of 0 to 20. Based on such score, an overall student performance category rating shall be derived from the table below:

	Overall Student Performance Category Score and Rating	
	Minimum	*Maximum*
H	*18*	*20*
E	*15*	*17*
D	*13*	*14*
I	*0*	*12*

(d) Principal school visits category. The school visits category for principals shall be based on a State-approved rubric and shall include up to three subcomponents; two of which are mandatory and one of which is optional.

(1) Two Mandatory subcomponents. A district shall evaluate a principal based on at least:

(i) one school visit shall be based on a State-approved principal practice rubric conducted by the building principal's supervisor or other trained administrator; and

(ii) a second school visit shall be conducted by: either one or more impartial independent trained evaluator(s) selected and trained by the district or in cases where a hardship waiver is granted by the Department pursuant to clause (a) of this subparagraph, a second school visit shall be conducted by one or more evaluators selected and trained by the district, who are different than the evaluator(s) who conducted the evaluation pursuant to subparagraph (i) of this paragraph. An independent trained evaluator may be employed within the district, but may not be assigned to the same school building as the principal being evaluated.

(a) A rural school district, as defined by the Commissioner in guidance, or a school district with only one registered school pursuant to section 100.18 of the Commissioner's regulations may apply to the Department for a hardship waiver on an annual basis, in a timeframe and manner prescribed by the Commissioner, if due to the size and limited resources of the school district, it is unable to obtain an independent evaluator within a reasonable proximity without an undue burden to the school district.

(2) Optional third subcomponent. The school visit category may also include a third optional subcomponent based on school visits conducted by a trained peer administrator rated Effective or Highly Effective on his or her overall rating in the prior school year from the same or another school in the district.

(3) Frequency and Duration of School Visits. The frequency of school visits shall be established locally.

(4) All school visits must be conducted using a principal practice rubric approved by the Commissioner pursuant to an RFQ process, unless the district has a currently approved variance from the Commissioner.

(i) Variance for existing rubric. A variance may be granted to a district that seeks to use a rubric that is either a close adaptation of a rubric on the approved list, or a rubric that was self-developed or developed by a third-party, upon a finding by the Commissioner that the rubric meets the criteria described in the RFQ, and the district has demonstrated that it has made a significant investment in the rubric and has a history of use that would justify continuing the use of that rubric.

(ii) Variance for use of new innovative rubrics. A variance may be granted to a district that seeks to use a newly developed rubric, upon a finding by the Commissioner that the rubric meets the criteria described in the RFQ and the district has demonstrated how it will ensure inter-rater reliability and the rubric's ability to provide differentiated results over time.

(5) All school visits for a principal for the year must use the same approved rubric; provided that districts may locally determine whether to use different rubrics for a principal assigned to different grade level configurations or building types.

(6) At least one of the mandatory school visits must be unannounced.

(7) School visits may not be conducted via video.

(8) Nothing in this Subpart shall be construed to limit the discretion of a board of education, superintendent of schools, or other trained administrator from conducting school visits of a principal in addition to those required under this section for non-evaluative purposes.

(9) School visits may be based only on observable rubric subcomponents.

(10) The evaluator may select a limited number of observable rubric subcomponents for focus on within a particular school visit, so long as all observable ISLLC Standards are addressed across the total number of annual school visits.

(11) Leadership Standards and their related functions that are part of the rubric but not observable during the course of the school visit may be observed through other natural conversations between the principal and the evaluator and incorporated into the observation score.

(12) Points shall not be allocated based on any artifacts, unless such artifact constitutes evidence of a rubric subcomponent observed during a school visit. Points shall not be allocated based on professional goal-setting; however, organizational goal-setting may be used to the extent it is evidence from the school visit and related to a component of the principal practice rubric.

(13) Each school visit shall be evaluated on a 1-4 scale based on a state approved rubric aligned to the ISLLC standards and an overall score for each school visit shall be generated between 1-4. Multiple observations shall be combined using a weighted average, producing an overall observation category score between 1-4. In the event that a principal earns a score of 1 on all rated components of the practice rubric across all observations, a score of 0 will be assigned. Weighting of Subcomponents Within Principal School Visit Category. The weighting of the subcomponents within the principal school visit category shall be established locally within the following constraints:

(i) school visits conducted by a superintendent or other trained administrator shall be weighted at a minimum of 80%.

(ii) school visits conducted by independent impartial trained evaluators or other evaluators selected by the district if a hardship waiver is granted, shall be weighted at a minimum of 10%.

(iii) if a district selects to use the optional third school visit subcomponent, then the weighting assigned to the optional school visits conducted by peers shall be established locally within the constraints outlined in clause (i) and (ii) of this subparagraph.

(14) Overall Rating on the Principal School Visits Category. The overall principal school visit score shall be converted into an overall rating, using cut scores determined locally for each rating category; provided that such cut scores shall be consistent with the permissible ranges identified below:

(15) The overall principal/school visit score shall be converted into an overall rating, using cut scores determined locally for each rating category; provided that such cut scores shall be consistent with the permissible ranges identified below:

Overall Observation Category Score and Rating

	Min	Max
H	3.5 to 3.75	4.0
E	2.5 to 2.75	3.49 to 3.74
D	1.5 to 1.75	2.49 to 2.74
I	0	1.49 to 1.74

§ 30-3.6. Rating determination.

(a) The overall rating determination for a teacher or principal shall be determined according to a methodology as follows:

		Observation/School Visit			
		Highly Effective (H)	Effective (E)	Developing (D)	Ineffective (I)
Student Performance	Highly Effective (H)	H	H	E	D
	Effective (E)	H	E	E	D
	Developing (D)	E	E	D	I
	Ineffective (I)	D	D	I	I

(b) Notwithstanding subdivision (a) of this section, a teacher or principal who is rated using both subcomponents in the student performance category and receives a rating of Ineffective in such category shall be rated Ineffective overall; provided, however, that if the measure used in the second subcomponent is a State-provided growth score on a state-created or administered test, a teacher or principal who receives a rating of Ineffective in the student performance category shall not be eligible to receive a rating of Effective or Highly Effective overall;

(c) The district shall ensure that the process by which weights and scoring ranges are assigned to subcomponents and categories is transparent and available to those being rated before the beginning of each school year. Such process must ensure that it is possible for a teacher or principal to obtain any number of points in the applicable scoring ranges, including zero, in each subcomponent. In the event that a teacher/principal earns a score of 1 on all rated components of the practice rubric across all observations, a score of 0 will be assigned. The superintendent, district superintendent or chancellor and the representative of the collective bargaining unit (where one exists) shall certify in the district's plan that the evaluation process shall use the weights and scoring ranges provided by the commissioner.

§ 30-3.7. Prohibited elements. Pursuant to Education Law § 3012-d(7), the following elements shall no longer be eligible to be used in any evaluation subcomponent pursuant to this Subpart:

(a) evidence of student development and performance derived from lesson plans, other artifacts of teacher practice, and student portfolios, except for student portfolios measured by a State-approved rubric where permitted by the department;

(b) use of an instrument for parent or student feedback;

(c) use of professional goal-setting as evidence of teacher or principal effectiveness;

(d) any district or regionally-developed assessment that has not been approved by the department; and

(e) any growth or achievement target that does not meet the minimum standards as set forth in regulations of the commissioner adopted hereunder.

§ 30-3.8. Approval process for student assessments.

(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.

(b) The commissioner shall evaluate a student assessment(s) for inclusion on the Department's list(s) of approved student assessments for use in the required and/or optional subcomponents of the student performance category, based on the criteria outlined in the RFQ or request for proposals (''RFP).

(c) Termination of approval. Approval shall be withdrawn for good cause, including, but not limited to, a determination by the commissioner that:

(1) the assessment does not comply with one or more of the criteria for approval set forth in Subpart or in the RFQ or RFP;

(2) the Department determines that the assessment is not identifying meaningful and/or observable differences in performance levels across schools and classrooms; and/or

(3) high quality academic research calls into question the correlation between high performance on the assessment and positive student learning outcomes.

§ 30-3.9. Approval process for approved teacher and principal practice rubrics.

(a) A provider who seeks to place a teacher or principal practice rubric on the list of approved rubrics under this section shall submit to the commissioner a written application in a form and within the time prescribed by the commissioner.

(b) Teacher practice rubric. The commissioner shall evaluate a rubric for inclusion on the department's list of approved practice rubrics for classroom teachers pursuant to a request for qualification (''RFQ'') process. Such proposals shall meet the criteria outlined by the commissioner in the RFQ process.

(c) Principal practice rubric. The commissioner shall evaluate a rubric for inclusion on the department's list of approved practice rubrics for building principals pursuant to a request for qualification (''RFQ'') process. Such proposals shall meet the criteria outlined by the commissioner in the RFQ process.

(d) Termination of approval of a teacher or principal scoring rubric. Approval for inclusion on the department's list of approved rubrics may be withdrawn for good cause, including, but not limited to, a determination by the commissioner that the rubric:

(1) does not comply with one or more of the criteria for approval set forth in this section or the criteria set forth in the request for qualification;

(2) the department determines that the practice rubric is not identifying meaningful and/or observable differences in performance levels across schools and classrooms; and/or

(3) high-quality academic research calls into question the correlation between high performance on this rubric and positive student learning outcomes.

(e) The Department's lists of approved rubrics established pursuant to section 30-2.7 of the Part shall continue in effect until superseded by a list generated from a new RFQ issued pursuant to this section or the list is abolished by the commissioner as unnecessary.

§ 30-3.10. Training of evaluators and lead evaluators.

(a) The governing body of each district shall ensure that evaluators, including impartial and independent observers and peer observers, have appropriate training before conducting a teacher or principal's evaluation under this section. The governing body shall also ensure that any lead evaluator has been certified by such governing body as a qualified lead evaluator before conducting and/or completing a teacher's or principal's evaluation in accordance with the requirements of this Subpart, except as otherwise provided in this subdivision. Nothing herein shall be construed to prohibit a lead evaluator who is properly certified by the Department as a school administrator or superintendent of schools from conducting classroom observations or school visits as part of an annual professional performance review under this Subpart prior to completion of the training required by this section provided such training is successfully completed prior to completion of the evaluation.

(b) To qualify for certification as a lead evaluator, individuals shall successfully complete a training course that meets the minimum requirements prescribed in this subdivision. The training course shall provide training on:

(1) the New York State Teaching Standards and their related elements and performance indicators and the Leadership standards and their related functions, as applicable;

(2) evidence-based observation techniques that are grounded in research;

(3) application and use of the student growth percentile model and any other growth model approved by the Department as defined in section 30-3.2 of this Subpart;

(4) application and use of the State-approved teacher or principal rubric(s) selected by the district for use in evaluations, including training on the effective application of such rubrics to observe a teacher or principal's practice;

(5) application and use of any assessment tools that the district utilizes to evaluate its classroom teachers or building principals;

(6) application and use of any locally selected measures of student growth used in the optional subcomponent of the student performance category used by the district to evaluate its teachers or principals;

(7) use of the statewide instructional reporting system;

(8) the scoring methodology utilized by the department and/or the district to evaluate a teacher or principal under this Subpart, including the weightings of each subcomponent within a category; how overall scores/ratings are generated for each subcomponent and category and application and use of the evaluation matrix(es) prescribed by the com-

missioner for the four designated rating categories used for the teacher's or principal's overall rating and their category ratings; and

(9) specific considerations in evaluating teachers and principals of English language learners and students with disabilities.

(c) Independent evaluators and peer evaluators shall receive training on the following elements:

(1) the New York State Teaching Standards and their related elements and performance indicators and the Leadership standards and their related functions, as applicable;

(2) evidence-based observation techniques that are grounded in research; and

(3) application and use of the State-approved teacher or principal rubric(s) selected by the district for use in evaluations, including training on the effective application of such rubrics to observe a teacher or principal's practice;

(d) Training shall be designed to certify lead evaluators. Districts shall describe in their annual professional performance review plan the duration and nature of the training they provide to evaluators and lead evaluators and their process for certifying lead evaluators under this section.

(e) Districts shall also describe in their annual professional performance review plan their process for ensuring that all evaluators maintain inter-rater reliability over time (such as data analysis to detect disparities on the part of one or more evaluators; periodic comparisons of a lead evaluator's assessment with another evaluator's assessment of the same classroom teacher or building principal; annual calibration sessions across evaluators) and their process for periodically recertifying all evaluators.

(f) Any individual who fails to receive required training or achieve certification or re-certification, as applicable, by a district pursuant to the requirements of this section shall not conduct or complete an evaluation under this Subpart.

§ 30-3.11. Teacher or principal improvement plans.

(a) Upon rating a teacher or a principal as Developing or Ineffective through an annual professional performance review conducted pursuant to Education Law section 3012-d and this Subpart, a district shall formulate and commence implementation of a teacher or principal improvement plan for such teacher or principal by October 1 in the school year following the school year for which such teacher's or principal's performance is being measured or as soon as practicable thereafter.

(b) Such improvement plan shall be developed by the superintendent or his or her designee in the exercise of their pedagogical judgment and shall include, but need not be limited to, identification of needed areas of improvement, a timeline for achieving improvement, the manner in which the improvement will be assessed, and, where appropriate, differentiated activities to support a teacher's or principal's improvement in those areas.

§ 30-3.12. Appeal procedures.

(a) An annual professional performance review plan under this Subpart shall describe the appeals procedure utilized by a district through which an evaluated teacher or principal may challenge their annual professional performance review. Pursuant to Education Law § 3012-d, a teacher or principal may only challenge the following in an appeal:

(1) the substance of the annual professional performance review; which shall include the following:

(i) in the instance of a teacher or principal rated Ineffective on the student performance category but rated Highly Effective on the observation/school visit category based on an anomaly, as determined locally.

(2) the district's adherence to the standards and methodologies required for such reviews, pursuant to Education Law § 3012-d and this Subpart;

(3) the adherence to the regulations of the commissioner and compliance with any applicable locally negotiated procedures, as required under Education Law § 3012-d and this Subpart; and

(4) district's issuance and/or implementation of the terms of the teacher or principal improvement plan under Education Law § 3012-d and this Subpart.

(b) Appeal procedures shall provide for the timely and expeditious resolution of any appeal.

(c) An evaluation that is the subject of an appeal shall not be sought to be offered in evidence or placed in evidence in any proceeding conducted pursuant to Education Law § § 3020-a and 3020-b or any locally negotiated alternate disciplinary procedure until the appeal process is concluded.

(d) Nothing in this section shall be construed to alter or diminish the authority of the governing body of a district to grant or deny tenure to or terminate probationary teachers or probationary building principals during the pendency of an appeal pursuant to this section for statutorily and constitutionally permissible reasons, including the teacher's or principal's performance that is the subject of the appeal.

(e) Nothing in this Subpart shall be construed to authorize a teacher or principal to commence the appeal process prior to receipt of his or her rating from the district.

§ 30-3.13. Monitoring and consequences for non-compliance.

(a) The department will annually monitor and analyze trends and patterns in teacher and principal evaluation results and data to identify districts and/or schools where evidence suggests that a more rigorous evaluation system is needed to improve educator effectiveness and student learning outcomes. The department will analyze data submitted pursuant to this Subpart to identify:

(1) schools or districts with unacceptably low correlation results between student growth on the student performance category and the teacher observation/principal school visit category used by the district to evaluate its teachers and principals; and/or

(2) schools or districts whose teacher and principal overall ratings and subcomponent scores and/or ratings show little differentiation across educators and/or the lack of differentiation is not justified by equivalently consistent student achievement results; and/or schools or districts that show a pattern of anomalous results in the student performance and observation/school visits categories.

(b) A district identified by the department in one of the categories enumerated above may be highlighted in public reports and/or the commissioner may order a corrective action plan, which may include, but not be limited to, a timeframe for the district to address any deficiencies or the plan will be rejected by the Commissioner, changes to the district's target setting process, a requirement that the district arrange for additional professional development, that the district provide additional in-service training and/or utilize independent trained evaluators to review the efficacy of the evaluation system.

(c) Corrective action plans may require changes to a collective bargaining agreement.

§ 30-3.14. Prohibition against Student Being Instructed by Two Consecutive Ineffective Teachers.

(a) A student may not be instructed, for two consecutive school years, in the same subject by any two teachers in the same district, each of whom received a rating of Ineffective under an evaluation conducted pursuant to this section in the school year immediately prior to the school year in which the student is placed in the teacher's classroom; provided, that if a district deems it impracticable to comply with this subdivision, the district shall seek a teacher-specific waiver from the department from such requirement, on a form and timeframe prescribed the commissioner.

(b) If a district assigns a student to a teacher rated Ineffective in the same subject for two consecutive years, the district must seek a waiver from this requirement for the specific teacher in question. The commissioner may grant a waiver from this requirement if:

(1) the district cannot make alternative arrangements and/or reassign a teacher to another grade/subject because a hardship exists (for example, too few teachers with higher ratings are qualified to teach such subject in that district); and

(2) the district has an improvement and/or removal plan in place for the teacher at issue that meets certain guidelines prescribed by the commissioner.

§ 30-3.15. Applicability of the provisions in Education Law § 3012-c. The provisions of Education Law § 3012-c shall apply to annual professional performance reviews pursuant to this Subpart as follows:

(a) the provisions of paragraphs (d) and (k) of subdivision (2) , subdivision (4), subdivision (5) and subdivision (9) of Education Law § 3012-c that apply are set forth in the applicable language of this Subpart;

(b) the provisions of paragraphs (k-1), (k-2) and (l) of subdivision (2) of Education Law § 3012-c shall apply without any modification;

(c) the provisions of subdivision (5-a) of Education Law § 3012-c shall apply without modification except:

(1) Any reference in subdivision (5-a) to a proceeding pursuant to Education Law § 3020-a based on a pattern of ineffective teaching shall be deemed to be a reference to a proceeding pursuant to Education Law § 3020-b against a teacher or principal who receives two or more consecutive composite Ineffective ratings; and in accordance with Education Law § 3020(3) and (4)(a), notwithstanding any inconsistent language in subdivision (5-a), any alternate disciplinary procedures contained in a collective bargaining agreement that becomes effective on or after July 1, 2015 shall provide that two consecutive Ineffective ratings pursuant to annual professional performance reviews conducted in accordance with the provisions of Education Law § 3012-c or 3012-d shall constitute prima facie evidence of incompetence that can only be overcome by clear and convincing evidence that the employee is not incompetent in light of all surrounding circumstances, and if not successfully overcome, the finding, absent extraordinary circumstances, shall be just cause for removal, and that three consecutive Ineffective ratings pursuant to annual professional performance reviews conducted in accordance with the provisions of Education Law § 3012-c or 3012-d shall constitute prima facie evidence of incompetence that can only be overcome by clear and convincing evi-

dence that the calculation of one or more of the teacher's or principal's underlying components on the annual professional performance reviews pursuant to Education Law § 3012-c or 3012-d was fraudulent, and if not successfully overcome, the finding, absent extraordinary circumstances, shall be just cause for removal.

(d) the provisions of subdivision (10) of Education Law § 3012-c shall apply without modification, except that there is no composite effectiveness score under Education Law § 3012-d.

§ 30-3.16. Challenges to State-Provided Growth Scores.

(a) A teacher/principal shall have the right to challenge their State-provided growth score under this Subpart; provided that the teacher/principal provides sufficient documentation that he/she meets at least one of the following criteria in their annual evaluation:

(1) a teacher/principal was rated Ineffective on his/her State-provided growth score and Highly Effective on the Observation/School Visit category in the current year and was rated either Effective or Highly Effective on his/her State-provided growth score in the previous year; or

(2) a high school principal of a building that includes at least all of grades 9-12, was rated Ineffective on the State-provided growth score but such percent of students as shall be established by the Commissioner in his/her school/program within four years of first entry into grade 9 received results on department-approved alternative examinations in English Language Arts and/or or mathematics as described in section 100.2(f) of this Title (including, but not limited to, advanced placement examinations, and/or International Baccalaureate examinations, SAT II, etc.) scored at proficiency (i.e., a Level 3 or higher).

(b) A teacher/principal shall submit an appeal to the Department, in a manner prescribed by the Commissioner, within 20 days of receipt of his/her overall annual professional performance review rating or the effective date of this section, whichever is later, and submit a copy of the appeal to the school district and/or BOCES. The school district and/or BOCES shall have ten days from receipt of a copy of such appeal to submit a reply to the Department.

(c) Based on the documentation received, if the Department overturns a teacher's/principal's rating on the State-provided growth score, the district/BOCES shall substitute the teacher's/principal's results on the back-up SLO developed by the district/BOCES for such teacher/principal. If a back-up SLO was not developed, then the teacher's/principal's overall composite score and rating shall be based on the portions of their annual professional performance review not affected by the nullification of the State-provided growth score. Provided, however, that following a successful appeal under paragraph (1) of subdivision (a) of this section, if a back-up SLO is used a teacher/principal shall not receive a score/rating higher than developing on such SLO.

(d) An evaluation that is the subject of an appeal shall not be sought to be offered in evidence or placed in evidence in any proceeding conducted pursuant to Education Law sections 3020-a and 3020-b or any locally negotiated alternate disciplinary procedure until the appeal process is concluded.

(e) Nothing in this section shall be construed to alter or diminish the authority of the governing body of a district to grant or deny tenure to or terminate probationary teachers or probationary building principals during the pendency of an appeal pursuant to this section for statutorily and constitutionally permissible reasons, including the teacher's/principal's performance that is the subject of the appeal.

(f) Nothing in this Subpart shall be construed to authorize a teacher/principal to commence the appeal process prior to receipt of his/her overall rating from the district/BOCES.

(g) During the pendency of an appeal under this section, nothing shall be construed to alter the obligation of a school district/BOCES to develop and implement a teacher improvement plan or principal improvement plan during the pendency of an appeal.

(h) Nothing in this section shall be construed to limit any rights of a teacher/principal under section 30-2.11 of this Subpart.

(i) Notwithstanding any other provision of rule or regulation to the contrary, a high school principal of a building that includes at least all of grades 9-12 who meets either of the criteria in paragraphs (1) or (2) of this subdivision shall not receive a State-provided growth score and shall instead use back-up SLOs:

(1) the principal would be rated Ineffective or Developing on the State-provided growth score but the graduation rate of the students in that school building exceeded 90%, and the proportion of the student population included in either the ELA Regents Median Growth Percentile or the Algebra Regents Median Growth Percentile was less than ten percent of the total enrollment for the school; or the principal.

(2) has no Combined Median Growth Percentile rating or score, and the proportion of the student population included in the ELA Regents Median Growth Percentile and Algebra Regents Median Growth Percentile was less than five percent of the total enrollment for the school in one subject, and less than ten percent of the total enrollment in the other subject.

(3) If a back-up SLO was not developed, then the principal's overall composite score and rating shall be based on the remaining portions of their annual professional performance review.

Revised rule compared with proposed rule: Substantial revisions were made in sections 100.2(o), 30-2.13, 30-3.16, 30-3.4, 30-3.15, 30-3.3 and 30-3.5.

Text of revised proposed rule and any required statements and analyses may be obtained from Kirti Goswami, New York State Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 474-6400, email: kgoswami@nysed.gov

Data, views or arguments may be submitted to: Peg Rivers, New York State Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 474-6400, email: regcomments@nysed.gov

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

Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on July 8, 2015, the following substantial revisions were made to the proposed rule:

First, the Department has decided to reexamine the State growth model, which will take additional time. In the interim, the Department has added a new section 30-2.13 and 30-3.16 to prescribe an appeals process whereby certain teachers or principals who were rated Ineffective on their State-provided growth score may appeal to the Department from their State-provided growth score based on certain anomalies described in the regulation. The appeals process would apply to growth scores for the 2014-2015 school year and thereafter until the growth model has been re-examined by the Department and appropriate experts in the field.

The Department has also revised sections 30-3.4(d)(2)(i)(b) and 30-3.5(d)(1)(ii) of the regulation to provide for a hardship waiver from the requirement for an independent observer for rural school districts and for school districts with one registered school who be unduly burdened if they were required to retain an independent evaluator. A school district would need to demonstrate that due to the size and limited resources of the school district it is unable to find an independent evaluator within a reasonable proximity to the school district. In lieu of an independent evaluator, the school district would be required to have a second evaluation conducted by a trained evaluator, who is different from the supervisor or evaluator who conducted the first evaluation.

Also, in response to concerns relating to a teacher's/principal's privacy, the Department revised the provisions of section 30-3.15(d) of the Commissioner's regulation relating to teacher/principal privacy to eliminate the requirement that parents be provided with the scores/ratings on the student performance and observation categories and instead, are requiring that Education Law § 3012-c apply without modification, except that there is no composite effectiveness score under Education Law § 3012-d.

The Department also made the following technical amendments to the proposed amendment:

The Department modified section 100.2(o)(1)(ii) of the Commissioner's regulations to add a reference to Subpart 30-3 to conform to Education Law § 3012-d.

The Department amended 30-3.3(c) of the Rules of the Board of Regents to clarify that a teacher's and principal's score and rating on the observation/school visit category and in the student performance category, if available, shall be computed and provided to the teacher or principal, in writing, by no later than the last day of the school year for which the teacher or principal is being measured, but in no case later than September 1st of the school year next following the school year for which the teacher or principal's performance is measured. This will ensure that a teacher's or principal's score on SLO's used for the mandatory component and their scores on the optional subcomponent, if used, are provided on or before September 1st.

The Department further revised section 30-3.4(d)(2)(vii) of the Rules of the Board of Regents clarified that nothing in this Subpart shall be construed to limit the discretion of a board of education or superintendent of schools or other trained administrator from conducting school visits of a principal in addition to those required under this section for non-evaluative purposes.

Consistent with the requirements for the teacher evaluation system, the Department revised section 30-3.4(d)(6) of the Rules of the Board of Regents, the proposed amendment to eliminate references to a supervisor or other trained administrator from the requirement for unannounced school visit and instead just generally provides that at least one mandatory school visit shall be unannounced in an effort to be aligned to the teacher evaluation system.

The above changes require that the following sections of the Regulatory Impact Statement be revised to read as follows:

1. STATUTORY AUTHORITY:

Education Law 101 charges the Department with the general manage-

ment and supervision of the educational work of the State and establishes the Regents as head of the Department.

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

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

Education Law 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 3012-c 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).

Education Law 3012-d, as added by Section 2 of Subpart E of Part EE of Chapter 56 of the Laws of 2015 establishes a new evaluation system for classroom teachers and building principals employed by school districts and BOCES for the 2015-16 school year and thereafter.

Section 1 of Subpart E of Part EE of Chapter 56 of the Laws of 2015 requires the Commissioner of Education to adopt regulations of the Commissioner no later than June 30, 2015, to implement a statewide annual teacher and principal evaluation system in New York state pursuant to Education Law § 3012-d, after consulting with experts and practitioners in the fields of education, economics and psychometrics and with the Secretary of the United States Department of Education on weights, measures and ranking of evaluation categories and subcomponents. Section 3 of Subpart C of Chapter 20 of the Laws of 2015 amends Education Law § 3012-d to require the State-provided growth score to be based on such model, which shall take into consideration certain student characteristics, as determined by the commissioner, including but not limited to students with disabilities, poverty, English language learner status and prior academic history and which shall identify educators whose students' growth is well above or well below average compared to similar students for a teacher's or principal's students after the certain student characteristics above are taken into account.

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 Ch.56, L.2015, as amended by Ch.20, L.2015, and is necessary to support the commitment made by the Legislature, the Governor, the Regents and Commissioner to ensure effective evaluation of classroom teachers and building principals.

3. NEEDS AND BENEFITS:

On April 13, 2015, the Governor signed Chapter 56 of the Laws of 2015 to add a new Education Law § 3012-d, to establish a new evaluation system for classroom teachers and building principals.

The new law requires the Commissioner to adopt regulations necessary to implement the evaluation system by June 30, 2015, after consulting with experts and practitioners in the fields of education, economics and psychometrics. It also required the Department to establish a process to accept public comments and recommendations regarding the adoption of regulations pursuant to the new law and consult in writing with the Secretary of the United States Department of Education on weights, measures and ranking of evaluation categories and subcomponents. It further required the release of the response from the Secretary upon receipt thereof, but in any event, prior to the publication of the regulations.

By letter dated April 28, 2015, the Department sought guidance from the Secretary of the United States Department of Education on the weights, measures and ranking of evaluation, as required under the new law and the Secretary responded.

In accordance with the requirements of the statute, the Department created an email box to accept comments on the new evaluation system (eval2015@nysed.gov). The Department has received and reviewed over 4,000 responses and has taken these comments into consideration in formulating the proposed amendments. In addition, the Board of Regents convened on May 7, 2015 to hold a Learning Summit, wherein the Board of Regents hosted a series of panels to provide recommendations to the Board on the new evaluation system. Such panels included experts in education, economics, and psychometrics and State-wide stakeholder groups including but not limited to NYSUT, UFT, School Boards, NYSCOSS and principal and parent organizations. A video recording and the submitted materials for the Learning Summit are available on the Department's website at http://www.nysed.gov/learning-summit. The national experts and the representatives of stakeholder groups who presented at the Learning Summit are listed at http://www.nysed.gov/content/learning-summit-presenter- biographies. The materials submitted by the national experts and stakeholder groups are listed at http://www.nysed.gov/content/learning-summit-submitted- materials.

The proposed amendment reflects areas of consensus among the groups, and in areas where there were varying recommendations, the Department attempted to reconcile those differences to reflect best practices while also taking into consideration recommendations in the Testing Reduction Report regarding the reduction of unnecessary testing. The Department distilled the various recommendations received at the Learning Summit into a powerpoint presentation presented to the Board of Regents at their May 20, 2015 meeting, which is posted at http://www.regents.nysed.gov/common/regents/files/meetings/May%202015/ APPR.pdf.

Based on the statutory language in Education Law § 3012-d and Subpart C of the Chapter 20 of the Laws of 2015, the State-provided growth model used under Education Law § 3012-c has been continued under the new regulations promulgated under Education Law § 3012-d. The growth model used under Education Law § 3012-c was based on recommendations from the Regents Task Force on Teacher and Leader Effectiveness, which can be found at http:// www.regents.nysed.gov/common/regents/files/documents/meetings/2011Meetings/April2011/RegentsTaskforceonTeacherandPrincipalEffectiveness.pdf and the recommendations of the Metrics Workgroup of the Task Force and a Technical Advisory Committee, comprised of psychometric experts in the field. Additional research supporting evaluations, including the use of a growth model, can be found on our website at https://www.engageny.org/resource/research-supporting-all-components-of-teacherprincipal-evaluation. A variety of other research materials/analyses regarding the growth model can be found on the Department's website at http://www.engageny.org/resource/resources-about-state-growth- measures.

Proposed amendment

The proposed rule conforms the regulations to the provisions of the 2015 legislation by making the following major changes to Subpart 30-2 of the Rules of the Board of Regents.

The title of section 30-2 and section 30-2.1 are amended to clarify that Subpart 30-2 only applies to APPRs conducted prior to the 2015-2016 school year or APPRs conducted pursuant to a CBA entered into on or before April 1, 2015 that remains in effect on or after April 1, 2015 until a subsequent agreement is reached.

Section 30-2.1(d) is amended to clarify that a school district or BOCES has an unfettered statutory right to terminate a probationary teacher or principal for any statutorily and constitutionally permissible reason, including but not limited to misconduct, and until a tenure decision is made, the performance of a teacher or principal in the classroom or school. Section 30-2.11 also clarifies that a school district or BOCES may terminate a probationary teacher or principal during an appeal for any statutorily and constitutionally permissible reason, including a teacher's or principal's performance.

A new Subpart 30-3 is added to implement the new evaluation system.

Section 30-3.1 clarifies that the new evaluation system only applies to CBA's entered into after April 1, 2015 unless the agreement relates to the 2014-2015 school year only. The section further clarifies that nothing in the new Subpart shall be construed to abrogate any conflicting provisions of any CBA in effect on effect on or after April 1, 2015 during the term of such agreement and until entry into a successor CBA agreement. The section further clarifies that APPRs shall be a significant factor for employment decisions and teacher and principal development, consistent with the prior law. The section also clarifies the unfettered right to terminate a probationary teacher or principal for any statutorily and constitutionally permissible reason. This section also provides that the Board will convene workgroup(s) comprised of stakeholders and experts in the field to provide recommendations to the Board on assessments and evaluations that could be used for APPRs in the future.

Section 30-3.2 defines several terms used in the Subpart.

Section 30-3.3 prescribes the requirements for APPR plans submitted under the new Subpart.

New Teacher Evaluation Requirements

Section 30-3.4 describes the standards and criteria for conducting APPRs of classroom teachers under the new law. The new law requires teachers to be evaluated based on two categories: the student performance category and the teacher observation category.

Student performance category

The first category has two subcomponents, one mandatory and the other optional. For the first mandatory component, teachers shall be evaluated as follows:

- For teachers whose courses end in a State created or administered test for which there is a State-provided growth model and at least 50% of a teacher's students are covered under the State-provided growth measure, such teachers shall have a State-provided growth score based on such model.
- For a teachers whose course does not end in a State created or administered test or where less than 50% of the teacher's students are covered under the State-provided growth measure, such teachers shall have a Student Learning Objective ("SLO") consistent with a goal setting process determined or developed by the Commissioner that results in a

student growth score; provided that for any teacher whose course ends in a State created or administered assessment for which there is no State-provided growth model, such assessment must be used as the underlying assessment for such SLO.

The second optional subcomponent shall be comprised of the one or more the following options, as determined locally:

A second State-provided growth score on a State-created or administered test; provided that the State provided growth measure is different than that used in the required subcomponent of the student performance category, which may include one or more of the following measures:

- a teacher-specific growth score computed by the State based on percentage of students who achieve a State-determined level of growth (e .g., percentage of students whose growth is above the median for similar students);
- school-wide growth results based on a State-provided school-wide growth score for all students attributable to the school who took the State English language arts or math assessment in grades 4-8; or
- school-wide, group, team, or linked growth results using available State-provided growth scores that are locally-computed;
- A growth score based on a state designed supplemental assessment calculated using a State provided or approved growth model.

The law requires the Commissioner to establish weightings and scoring ranges for the subcomponents of the student performance category. The proposed amendment applies the following weights to each of the subcomponents:

- If a district does not locally select to use the optional second student growth subcomponent, then the mandatory subcomponent shall be weighted at 100%.
- If the optional second student growth subcomponent is selected, then the mandatory subcomponent shall be weighted at a minimum of 80% and the optional second subcomponent shall be weighted at no more than 20%; provided, however, that if the optional second subcomponent does not include traditional standardized tests, the weightings shall be established locally, provided that the mandatory student growth subcomponent shall be weighted at a minimum of 50% and the optional student growth subcomponent shall be weighted no more than 50%.

Each measure used in the student performance category (State provided growth score, SLOs, State-designed supplemental assessments) must result in a score between 0 and 20. The State will generate scores of 0-20 for measures using a State-provided growth score. Districts shall calculate scores for SLOs in accordance with the table provided in the proposed amendment; provided however that for teachers with courses with small "n" sizes as defined by the Commissioner in guidance, districts shall calculate scores for SLOs using a methodology specified by the Commissioner in guidance. For all other measures that are not State-provided growth measures, scores of 0-20 shall be computed locally in accordance with the State provided or approved growth model used.

Teacher observation category

The second subcomponent shall be comprised of three subcomponents; two mandatory and one optional. The two mandatory subcomponents shall be based on:

- one observation that shall be conducted by a principal or other trained administrator and;
- a second observation that shall be conducted by one or more impartial independent trained evaluator(s) selected and trained by the district. An independent trained evaluator may be employed within the district, but may not be assigned to the same school building as the teacher being evaluated.

One of the mandatory observations must be unannounced. The third optional subcomponent may include:

- classroom observations conducted by a trained peer teacher rated Effective or Highly Effective on his or her overall rating in the prior school year from the same school or from another school in the district.

The law also requires the Commissioner to establish the frequency and duration of observations in regulations. The proposed amendment allows the frequency and duration of observations to be established locally.

This section also requires all observations to be conducted using a teacher practice rubric approved by the commissioner pursuant to a Request for Qualification ("RFQ") process, unless the district has an approved variance from the Commissioner and prescribes parameters for the observations category.

The law further requires the Commissioner to establish weightings and scoring ranges for the subcomponents of the teacher observations category. The proposed amendment provides that the weighting of the subcomponents within the teacher observation category shall be established locally within the following constraints:

- observations conducted by a principal or other trained administrator shall be weighted at a minimum of 80%.
- observations conducted by independent impartial observers shall be weighted at a minimum of 10%.
- if a district selects to use the optional third observation subcomponent, then the weighting assigned to the optional observations conducted by peers shall be established locally within the constraints outlined above.

The overall observation score shall be converted into an overall rating pursuant to the ranges identified in the proposed amendment.

New Principal Evaluation Requirements

Section 30-3.5 describes the standards and criteria for conducting APPRs of building principals under the new law. The new law requires the Commissioner to establish a principal evaluation system that is aligned to the new teacher evaluation system set forth in Education Law § 3012-d.

To implement the new law, the proposed amendment requires building principals to be evaluated based on two categories: the student performance category and the school visit category.

The first category has two subcomponents, one mandatory and the other optional. For the first mandatory component, teachers shall be evaluated as follows:

For principals with at least 30% of their students covered under a State-provided growth measure, such principal shall have a State-provided growth score based on such model; except for if: (1) the principal would be rated Ineffective or Developing on the State-provided growth score but the graduation rate of the students in that school building exceeded 90%, and the proportion of the student population included in either the ELA Regents Median Growth Percentile or the Algebra Regents Median Growth Percentile was less than ten percent of the total enrollment for the school; or the principal

(2) has no Combined Median Growth Percentile rating or score, and the proportion of the student population included in the ELA Regents Median Growth Percentile and Algebra Regents Median Growth Percentile was less than five percent of the total enrollment for the school in one subject, and less than ten percent of the total enrollment in the other subject.

- For principals where less than 30% of their students are covered under a State-provided growth measure, such principals shall have a SLO consistent with a goal setting process determined or developed by the Commissioner that results in a student growth score; provided that for any teacher whose course ends in a State created or administered assessment for which there is no State-provided growth model, such assessment must be used as the underlying assessment for such SLO.

If the district opts to use the second optional subcomponent, it shall be comprised of one or more of the following measures:

- A second State-provided growth score on a State-created or administered test; provided that the State provided growth measure is different than that used in the required subcomponent of the student performance category, which may include one or more of the following measures:
- a principal-specific growth score computed by the State based on percentage of students who achieve a State-determined level of growth (e .g., percentage of students whose growth is above the median for similar students); and/or
- school-wide, group, team, or linked growth results using available State-provided growth scores that are locally-computed
- A growth score based on a state designed supplemental assessment calculated using a State provided or approved growth model.

The law requires the Commissioner to establish weightings and scoring ranges for the subcomponents of the student performance category. The proposed amendment applies the following weights to each of the subcomponents:

- If a district does not locally select to use the optional second student growth subcomponent, then the mandatory subcomponent shall be weighted at 100%.
- If the optional second student growth subcomponent is selected, then the mandatory subcomponent shall be weighted at a minimum of 80% and the optional second subcomponent shall be weighted at no more than 20%; provided, however, that if the optional second subcomponent does not include traditional standardized tests, the weightings shall be established locally, provided that the mandatory student growth subcomponent shall be weighted at a minimum of 50% and the optional student growth subcomponent shall be weighted no more than 50%.

Each measure used in the student performance category (State provided growth score, SLOs, State-designed supplemental assessments) must result in a score between 0 and 20. The State will generate scores of 0-20 for measures using a State-provided growth score. Districts shall calculate scores for SLOs in accordance with the table provided in the proposed amendment; provided however that for teachers with courses with small "n" sizes as defined by the Commissioner in guidance, districts shall calculate scores for SLOs using a methodology specified by the Commissioner in guidance. For all other measures that are not State-provided growth measures, scores of 0-20 shall be computed locally in accordance with the State provided or approved growth model used.

Principal school visit category

The principal school visit category shall be comprised of three subcomponents; two mandatory and one optional. The two mandatory subcomponents shall be based on:

• one observation shall be conducted by the principal's supervisor or other trained administrator; and

• a second observation shall be conducted by one or more impartial independent trained evaluator(s) selected and trained by the district. An independent trained evaluator may be employed within the district, but may not be assigned to the same school building as the principal being evaluated.

One of the mandatory school visits by the principal's supervisor must be unannounced.

The third optional subcomponent may include:

• School visits conducted by a trained peer administrator rated Effective or Highly Effective on his or her overall rating in the prior school year from the same school or from another school in the district.

The law also requires the Commissioner to establish the frequency and duration of school visits in regulations. The proposed amendment requires the frequency and duration of observations to be set locally.

The section also requires all observations to be conducted using a principal practice rubric approved by the commissioner pursuant to a Request for Qualification ("RFQ") process, unless the district has an approved variance from the Commissioner.

This section further prescribes parameters for the school visits category. The law requires the Commissioner to establish weightings and scoring ranges for the subcomponents of the school visits category. The proposed amendment provides that the weighting of the subcomponents within the principal school visits category shall be established locally within the following constraints:

• School visits conducted by the principal's supervisor or other trained administrator shall be weighted at a minimum of 80%.

• School visits conducted by independent impartial trained evaluators shall be weighted at a minimum of 10%.

• If a district selects to use the optional third observation subcomponent, then the weighting assigned to the optional school visits conducted by peers shall be established locally within the constraints outlined above.

The overall school visit category score shall be converted into an overall rating pursuant to the ranges identified in the proposed amendment.

Section 30-3.6 describes how the overall rating is computed, based on the evaluation matrix established by the new law, which combines the teacher's or principal's ratings on the student performance category and the observation/school visit category:

		Observation/School Visit			
		Highly Effective (H)	Effective (E)	Developing (D)	Ineffective (I)
Student Performance	Highly Effective (H)	H	H	E	D
	Effective (E)	H	E	E	D
	Developing (D)	E	E	D	I
	Ineffective (I)	D*	D*	I	I

*If a teacher is rated ineffective on the student performance category and a State-designed supplemental assessment was included as an optional subcomponent of the student performance category, the teacher can be rated no higher than ineffective overall pursuant to Education Law §§ 5(a) and 7.

This section also provides that it must be possible to obtain each point in the scoring ranges, including 0, for each subcomponent and category. It further requires that the superintendent, district superintendent or Chancellor and the president of the collective bargaining representative, where one exists, must certify in the APPR plan that the evaluation system will use the weights and scoring ranges provided by the Commissioner and that the process by which weights and scorings are assigned to subcomponents and categories is transparent and available to those being rated before the beginning of each school year.

Section 30-3.7 lists the prohibited elements set forth in Education Law § 3012-d, which precludes districts/BOCES from using the following as part of a teacher's and/or principal's evaluation:

• evidence of student development and performance derived from lesson plans, other artifacts of teacher practice, and student portfolios, except for student portfolios measured by a State-approved rubric where permitted by the department;

• use of an instrument for parent or student feedback;

• use of professional goal-setting as evidence of teacher or principal effectiveness;

• any district or regionally-developed assessment that has not been approved by the department; and

• any growth or achievement target that does not meet the minimum standards as set forth in regulations of the commissioner adopted hereunder.

Sections 30-3.8 and 30-3.9 set forth the approval processes for student assessments and teacher and principal practice rubrics.

Section 30-3.10 sets forth the training requirements for evaluators and lead evaluators; which now requires evaluators and lead evaluations to be trained on certain prescribed elements relating to observations and the applicable teacher/principal practice rubrics pursuant to Education Law § 3012-d(15).

Section 30-3.11 addresses teacher and principal improvement plans, which now allows the superintendent in the exercise of his or her pedagogical judgment to develop and implement the improvement plans pursuant to Education Law § 3012-d(15).

Section 30-3.12 addresses local appeal procedures. Currently, the regulations set forth the grounds for an appeal which includes the ability of a teacher or principal to challenge the substance of their APPR in an appeal. The proposed amendment defines the substance of an APPR to include appeals in circumstances where a teacher or principal is rated Ineffective on the student performance category, but rated Highly Effective on the observation/school visit category based on an anomaly, as determined locally pursuant to Education Law § 3012-d(15).

Section 30-3.13, which addresses monitoring and consequences for non-compliance, which now allows the Department to require changes to a CBA pursuant to Education Law § 3012-d(15).

Section 30-3.14 codifies the statutory requirement that no student be assigned to two teachers in the same subject in two consecutive school years, each of whom received a rating of Ineffective pursuant to an evaluation conducted pursuant to Education Law § 3012-d in the school year immediately prior to the year in which the student is placed in the teacher's classroom. The proposed amendment provides for a teacher-specific waiver from the Department from such requirement where it is impracticable to comply with this requirement.

Section 30-3.15 describes the extent to which provisions of Education Law § 3012-c(2)(d), (k), (k-1), (k-2) and (l), (4), (5), (5-a), (9) and (10) are carried over into the new evaluation system, as required by Education Law § 3012-d(15).

Revisions to the Proposed Amendment following the public comment period

Following the 45-day public comment period required under the State Administrative Procedure Act, the proposed amendment was revised in several places as follows:

First, the Department has decided to reexamine the State growth model, which will take additional time. In the interim, the Department has amended Subpart 30-2 and 30-3 to prescribe an appeals process whereby certain teachers or principals who were rated Ineffective on their State-provided growth score may appeal to the Department based on certain anomalies described in the regulation. The appeals process would apply to growth scores for the 2014-2015 school year and thereafter until the growth model has been re-examined by the Department and appropriate experts in the field.

The Department has also revised the regulation to provide for a hardship waiver from the requirement for an independent observer for rural school districts and for school districts with one registered school building who would be unduly burdened if the district were required to retain an independent evaluator. A school district would need to demonstrate that due to the size and limited resources of the school district it is unable to obtain an independent evaluator within a reasonable proximity to the school district. In lieu of an independent evaluator, the school district would be required to provide a second observation conducted by a trained evaluator who is different than the supervisor or evaluator who conducted the first observation.

Also, in response to concerns relating to a teacher's/principal's privacy, the Department revised the provisions in the June regulations relating to teacher/principal privacy to eliminate the requirement that parents be provided with the scores/ratings on the student performance and observation categories and instead, are requiring that Education Law § 3012-c apply without modification, except that there is no composite effectiveness score under Education Law § 3012-d.

The Department also received several comments on the use of artifacts. Education Law § 3012-d(10)(b) requires implementation of the observation category to be subject to local negotiation. Therefore, while no additional changes were made in response to these comments, the regulations adopted by the Board at its June meeting recognize that parts of the rubric that are not observable during classroom observations may be incorporated into the observation score where they are observed during any optional pre- or post-observation review or other natural conversations between teachers and their evaluators.

The Department also made the following technical amendments to the proposed amendment:

The Department modified section 100.2(o) of the Commissioner's regulation to conform to Education Law § 3012-d.

The Department clarified that a teacher's and principal's score and rating on the observation/school visit category and in the student performance category, if available, shall be computed and provided to the teacher or principal, in writing, by no later than the last day of the school year for which the teacher or principal is being measured, but in no case later than September 1st of the school year next following the school year for which the teacher or principal's performance is measured. This will ensure that a teacher's or principal's score on SLOs used for the required subcomponent and their scores on the optional subcomponent, if used, are provided on or before September 1st.

The Department further clarified that nothing in this Subpart shall be construed to limit the discretion of a board of education or superintendent of schools or other trained administrator to conduct observations/school visits of a teacher/principal in addition to those required under this section for non-evaluative purposes.

Consistent with the requirements for the teacher evaluation system, the Department revised the proposed amendment to eliminate references to a supervisor or other trained administrator from the requirement for an unannounced school visit for principals and instead just generally provides that at least one mandatory school visit shall be unannounced in an effort to be aligned to the teacher evaluation system.

4. COSTS:

a. Costs to State government: The rule implements Education Law section 3012-d and does not impose any costs on State government, including the State Education Department, beyond those costs imposed by the statute. The new appeal process for the State-provided growth score will be performed by existing staff and therefore, the Department believes there will be no additional costs to the State government.

b. Costs to local government: Education Law section 3012-d, as added by Chapter 56 of the Laws of 2015, 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) for the 2015-2016 school year and thereafter.

The proposed rule may result in additional costs on school districts and BOCES related to collective bargaining. However, Education Law § 3012-d(10) explicitly requires collective bargaining relating to the decision on whether to use the optional second subcomponent in the student performance category and which measure is to be used in such subcomponent, and collective bargaining relating to how to implement the observation/school visit category in accordance with the Taylor Law. Since collective bargaining is already required by the statute and it is impossible to ascertain in advance what issues might trigger additional bargaining in more than 700 school districts and BOCES in the State, the State Education Department has no basis for determining whether and to what extent provisions of the proposed rule might result in additional costs attributable to collective bargaining beyond those required by statute.

The costs discussed below are based on the following assumptions: (1) an estimated hourly rate for teachers of $53.18 (based on an average annual teacher salary of $76,572.00 divided by 1,440 hours per school year (180 days, 8 hours each day)); (2) an estimated hourly rate for principals of $67.20 (based on an average annual principal salary of $118,269.00 divided by 1,760 hours per school year (220 days, 8 hours each day)); and (3) an estimated hourly rate for superintendents of $86.59 (based on an average annual superintendent of schools salary of $166,244.00 divided by 1,920 hours per school year (240 days, 8 hours each day)). The Department anticipates that the proposed rule will impose the following costs on school districts/BOCES. The estimated costs below assume that school districts and BOCES will need to pay for extra time for personnel at current rates. However, most districts and BOCES are or should be performing these activities currently, but the State does not have data on the amount of hours currently dedicated to these activities.

Required Student Performance Category

The statute requires that a teacher or principal's evaluation be based on one required and one optional measure of student performance. For the required subcomponent, for teachers whose courses end in a State created or administered test for which there is a State-provided growth model and at least 50% of a teacher's students are covered under the State-provided growth measure, such teachers shall have a State-provided growth score based on such model. There are no additional costs beyond those imposed by statute for evaluating a teacher based on State assessments. For the required subcomponent, for principals with at least 30% of their students covered under a State-provided growth measure, such principal shall have a State-provided growth score and there are no additional costs beyond those imposed by statute.

For a teacher whose course does not end in a State created or administered test or where less than 50% of the teacher's students are covered under the State-provided growth measure, such teachers shall have a Student Learning Objective ("SLO") consistent with a goal setting process determined or developed by the Commissioner that results in a student growth score; provided that for any teacher whose course ends in a State created or administered assessment for which there is no State-provided growth model, such assessment must be used as the underlying assessment for such SLO. For a principal where less than 30% of their students are covered under a State-provided growth measure, such principals shall have a SLO consistent with a goal setting process determined by the Commissioner that results in a student growth score; provided that for any principal whose course building or program includes courses that ends in a State created or administered assessment for which there is no State-provided growth model, such assessment must be used as the underlying assessment for such SLO. The Department estimates that for teachers or principals who require SLOs, a teacher or principal will spend approximately 3 hours to set his/her goals for the year and that a principal/superintendent will take approximately 1 hour per year to work with a teacher/principal on the goal setting process. Based on the estimated hourly rates described above, the Department estimates that the goal-setting process will cost a school district/BOCES $226.74 per teacher (3 teacher hours to set goals plus 1 principal hour to review goals with teacher) and $288.19 per principal (3 principal hours to set goals plus 1 superintendent hour to review goals with principal). Moreover, districts and BOCES should have been setting SLOs for teachers and principals since 2012-2013 when districts and BOCES were first required to set SLOs under the evaluation system; except for the New York City School District, whose plan was imposed on them for the 2013-2014 school year pursuant to Education Law § 3012-c.

The SLO process also requires the use of a student assessment. In grades/subjects where no State created or administered assessment exists for such grades/subjects, the district/BOCES must use the SLO process with either an approved third-party assessment (at a cost per student of approximately $2.50-$14.00 per student), an approved district, regional, or BOCES developed assessment (which the Department expects would have minimal, if any costs), or a State assessment (which the Department expects would have no additional cost).

Optional Student Performance Category

For teachers, the second optional subcomponent shall be comprised of one or more the following options, as determined locally:

- A second State-provided growth score on a State-created or administered test; provided that the State provided growth measure is different than that used in the required subcomponent of the student performance category, which may include one or more of the following measures:
- a teacher-specific growth score computed by the State based on percentage of students who achieve a State-determined level of growth (e .g., percentage of students whose growth is above the median for similar students);
- school-wide growth results based on a State-provided school-wide growth score for all students attributable to the school who took the State English language arts or math assessment in grades 4-8; or
- school-wide, group, team, or linked growth results using available State-provided growth scores that are locally-computed;
- A growth score based on a State designed supplemental assessment calculated using a State provided or approved growth model.

Since the second subcomponent is optional, there are no additional costs imposed by the statute or regulation for this subcomponent. However, if a district/BOCES elects to use a State-designed supplemental assessment, the Department estimates that the cost of purchasing an assessment may cost approximately $2.50-$14.00 per student, depending on the particular assessment selected. If a district/BOCES elects to use the second subcomponent and utilizes a second State-provided growth score, there should be no additional costs.

For principals, the second optional subcomponent shall be comprised of the one or more the following options, as determined locally:

- A second State-provided growth score on a State-created or administered test; provided that the State provided growth measure is different than that used in the required subcomponent of the student performance category, which may include one or more of the following measures:
- a principal-specific growth score computed by the State based on percentage of students who achieve a State-determined level of growth (e .g., percentage of students whose growth is above the median for similar students); or
- school-wide, group, team, or linked growth results using available State-provided growth scores that are locally-computed;
- A growth score based on a State designed supplemental assessment calculated using a State provided or approved growth model.

Since the second subcomponent is optional, there are no additional costs imposed by the statute or regulation for this subcomponent. However, if a district/BOCES elects to use a State-designed supplemental assessment,

the Department estimates that the cost of purchasing an assessment may cost approximately $2.50-$14.00 per student, depending on the particular assessment selected. If a district/BOCES elects to use the second subcomponent and utilizes a second State-provided growth score, there should be no additional costs.

Teacher Observation/Principal School Visit Category

For the teacher observation/principal school visit category of the evaluation, the proposed amendment requires that ratings be based on at least two classroom observations for teachers and at least two school visits for principals. The proposed amendment requires at least one observation for teachers and at least one school visit for principal to be conducted by the supervisor/other trained administrator. The proposed amendment also requires at least one observation for teachers and at least one school visit for principals by trained independent evaluator(s) selected by the district. For teacher observations, the Department estimates the following costs:

Teacher Observations: While the regulation does not specifically prescribe how a district must conduct its observations, based on models currently in use, the Department expects a teacher will spend approximately 3 hours per classroom observation for pre- and post-conference meetings with the principal/evaluator and the 1 hour in the observation itself, which would equate to 6 hours per year (1 hour for the pre-conference, 1 hour for the observation, and 1 hour for the post-observation). Depending on the model used, these estimates could decrease to 1 hour and 10 minutes for classroom observations that include a post-conference and walkthrough observation with the principal/evaluator, which would equate to 2 hours and 20 minutes for the year. Based on the more extended observation model, the Department expects that a principal/evaluator would spend approximately 1 hour for a teacher classroom observation and 3 additional hours for pre-conference and post-conference meetings associated with the conference (1 hour for each pre-conference, 1 hour for preparation for post-conference, and 1 hour in post-conference), which would equate to 4 hours per observation or 8 hours per teacher per year. Therefore, for each teacher, a school district or BOCES would spend approximately $856.68 per year on classroom observations, under the proposed rule. The regulations allow for districts and BOCES to identify trained independent evaluators from within the district and, therefore, these estimates remain accurate as a yearly estimate for classroom observations. However, this cost may vary depending on what external independent evaluators the district selects.

Moreover, the Department has also revised the regulation to provide for a hardship waiver from the requirement for an independent observer for rural school districts and for school districts with one registered school who be unduly burdened if they were required to retain an independent evaluator. A school district would need to demonstrate that due to the size and limited resources of the school district it is unable to find an independent evaluator within a reasonable proximity to the school district. In lieu of an independent evaluator, the school district would be required to have a second evaluation conducted by a trained evaluator, who is different from the supervisor or evaluator who conducted the first evaluation.

Since the use of peer observers is optional, there are no additional costs imposed by the statute or regulation for this subcomponent. However, if a district/BOCES elects to use peer observers, the Department estimates that the use of a peer observer for teachers may cost approximately $372.26 per observation (total time for teacher observation cycle plus total time for peer observer in the teacher observation cycle times the teacher hourly rate), and will be dependent upon the particular parameters determined locally. Principal Assessment: The Department expects that a principal will spend approximately 3 hours preparing for a school visit by a supervisor/other trained administrator and that a supervisor/other trained administrator will spend approximately 3 hours assessing and observing a principal's practice per visit. Therefore, for each principal, a school district or BOCES would spend approximately $1325.94 per year on school site visits, under the proposed rule. The regulations allow for districts and BOCES to identify trained independent evaluators from within the district, therefore the estimate of $1325.94 remains accurate as a yearly estimate for school visits. This cost may vary upon the use of external independent evaluators.

Since the use of peer observers is optional, there are no additional costs imposed by the statute or regulation for this subcomponent. However, if a district/BOCES elects to use peer observers, the Department estimates that the use of a peer observer for principals may cost approximately $604.80 per site visit (total time for principal observation cycle plus total time for peer observer in the principal observation cycle times the principal hourly rate), and will dependent upon the particular parameters determined locally.

The proposed amendment also requires that the observations/school visits be based on a teacher or principal practice rubric approved by the Department or a rubric approved through a variance process. The majority of rubrics on the State's approved list are available to districts/BOCES at no cost. While some rubrics may offer training for a fee and others may require proprietary training, any costs incurred for training are costs imposed by the statute. Most rubric providers do not require a school district/BOCES to receive training through the provider and some providers even provide free online training. The Department estimates that districts/BOCES can obtain a teacher or principal practice in the following price range: $0-$360 per educator evaluated. Some practice rubrics may charge an additional fee for training on the rubric, estimated to cost approximately $0-$8,000, although most rubric providers do not require a user to receive training through the rubric provider.

Reporting and Data Collection

The proposed amendment requires that school districts or BOCES report information to the Department on enrollment and attendance data and any other student, teacher, school, course and teacher/student linkage data. The majority of this data is required to be reported under the America COMPETES Act (20 U.S.C. 9871). Therefore, no additional costs are imposed by the proposed amendment. To the extent such information is not required to be reported under federal law, the Department expects that most districts/BOCES already compile this information and, therefore, these reporting requirements are minimal and should be absorbed by existing district or BOCES resources.

The proposed amendment also requires that every teacher and principal be required to verify the subjects and/or student rosters assigned to them. This verification is part of the normal BEDS data verification process and therefore the Department believes that any costs imposed by this requirement in the regulation are minimal, if any. As for the additional reporting requirements contained in section 30-3.3 of the Rules of the Board of Regents, school districts or BOCES are required to report many of these requirements under the existing APPR regulations (section 30-2.3 of the Rules of the Board of Regents). Therefore, reporting of such information would not impose any additional costs on a school district or BOCES.

Vested Interest

The proposed amendment also requires that districts certify that teachers and principals not have a vested interest in the test results of students whose assessments they score. The Department believes that most districts already have this security mechanism in place, since it is a current requirement for evaluations conducted pursuant to Education Law § 3012-c. However, in the event a district currently allows a teacher to score their own assessment, the Department expects that districts/BOCES can assign other teachers or faculty to score such assessments. Therefore, the Department believes that any costs imposed by this requirement in the regulation are minimal, if any.

Scoring

The statute requires that a teacher receive an overall evaluation rating based on their ratings on the two categories (student performance and teacher observation/principal school visit). The proposed amendment sets forth the scoring ranges for the rating categories in these two categories and the overall rating category is prescribed by statute. The proposed amendment does not impose any additional costs beyond those imposed by statute.

Training

The statute requires that all evaluators be properly trained before conducting an evaluation. The proposed amendment requires that a lead evaluator be certified by the district/BOCES before conducting and/or completing a teacher's or principal's evaluation and that evaluators be properly trained. Since the training is required by statute, the only additional cost imposed are associated with the district or BOCES' certification and recertification of lead evaluators, which costs are expected to be negligible and capable of absorption using existing staff and resources.

Teacher and Principal Improvement Plans and Appeal Procedures

The statute, in subdivision 15 of § 3012-d, requires the Commissioner to determine the extent to which subdivisions 4, 5 and 5-a of § 3012-c should apply to the new evaluation system under § 3012-d. Subdivision 4 of § 3012-c requires school districts/BOCES to develop teacher and principal improvement plans for teachers rated Ineffective or Developing. Subdivision 5 of § 3012-crequires school districts and BOCES to develop an appeals procedure through which a teacher or principal may challenge their APPR. Subdivision 5-a of § 3012-c establishes special appeals procedures for the New York City School District. The proposed amendment does not impose any additional costs on districts/BOCES relating to the development of TIP/PIPs or an appeal procedure, beyond those currently imposed by statute under Education Law § 3012-c(4) and (5). The only changes made to the TIP/PIP requirement are with respect to its timing and the clarification that the superintendent or his/her designee, in the exercise of their pedagogical judgment develops the TIP/PIP. Neither change should generate additional costs. The only change made to the appeals provision is the clarification that an appeal from the substance of the evaluation, which is a ground for appeal under Education Law § 3012-c(5), includes an instance in which the teacher or principal receives a Highly Effective rating on the observation/school visit category and an Ineffective rating on the student performance category and challenges the

result based on an anomaly, as determined locally. If a district/BOCES locally determines that an appeal based on an anomaly may be taken where such an appeal could not be brought previously, the Department believes this additional grounds for an appeal could be incorporated into the district's/BOCES' current appeal process and therefore no additional costs should incur. The new appeal process for the State-provided growth score will be performed by existing staff and therefore, the Department believes there will be no additional costs to the State government.

(c) Costs to private regulated parties: none, except that if a teacher/principal chooses to appeal his/her State-provided growth score, he/she must file an appeal within 20 days of receipt of his/her score or within 20 days of the effective date of the regulation, whichever is later.

(d) Costs to regulating agency for implementation and continued administration: See above.

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.

6. PAPERWORK:

Section 30-3.3 of the proposed amendment requires that each school district shall adopt an APPR plan for its classroom teachers and building principals and submit such plan to the Commissioner for approval. The Commissioner shall approve or reject the plan. The Commissioner may reject a plan that does not rigorously adhere to the regulations and the law. The regulations also provide that if any material changes are made to the plan, the district must submit the material changes by March 1 of each school year, on a form prescribed by the Commissioner, to the Commissioner for approval. This section also requires that the APPR plan describe the school district's or BOCES' process for ensuring that the Department receives accurate teacher and student data, including certain identified information; the assessment development, security and scoring processes utilized by the school district or BOCES, which includes a requirement that any process and assessment or measures are not disseminated to students before administration and that teachers and principals do not have a vested interest in the outcome of the assessments they score; describe the details of the evaluation system used by the district or BOCES; how the district or BOCES will provide timely and constructive feedback to teachers and building principals and the appeal procedures used by the district or BOCES.

If a school district or BOCES seeks to use a teacher or principal practice rubric that is either a close adaptation of a rubric on the approved list, or a rubric that was self-developed or developed by a third-party or a newly developed rubric, the school district or BOCES must seek a variance from the Department for the use of such rubric.

The proposed amendment also requires that the process by which points are assigned in the various subcomponents and the scoring ranges for the subcomponents must be transparent and available to those being rated before the beginning of each school year.

The proposed amendment requires that the entire annual professional performance review be completed and provided to the teacher or principal as soon as practicable but in no case later than September 1st of the school year next following the school year for which the teacher or principal's performance is measured. The teacher's and principal's score and rating on the observation/school visit category and in the student performance category, if available, shall be computed and provided to the teacher or principal, in writing, by no later than the last day of the school year for which the teacher or principal is being measured, but in no case later than September 1st of the school year next following the school year for which the teacher or principal's performance is measured.

A provider seeking to place a practice rubric in the list of approved rubrics, or an assessment on the list of approved assessments, shall submit to the Commissioner a written application that meets the requirements of sections 30-2.7 and 30-2.8, respectively. An approved rubric or approved assessment may be withdrawn for good cause. The governing body of each school district is required to ensure that evaluators have appropriate training before conducting an evaluation under this section and the lead evaluator must be appropriately certified and periodically recertified.

If a teacher or principal is rated "Developing" or "Ineffective," the school district or BOCES is required to develop and implement a teacher or principal improvement plan (TIP or PIP) that complies with section 30-3.11. Such plan shall be developed by the Superintendent or his or her designee, as part of his/her pedagogical judgement, and include identification of needed areas of improvement, a timeline for achieving improvement, the manner in which the improvement will be assessed and, where appropriate, differentiated activities to support improvement in those areas.

In accordance with the requirements of the statute, the proposed amendment also requires a school district or BOCES to develop an appeals procedure through which a teacher or principal may challenge their annual professional performance review.

Education Law § 3012-d also requires the Commissioner to annually monitor and analyze trends and patterns in teacher and principal evaluation results and data to identify districts, BOCES and/or schools where evidence suggests a more rigorous evaluation system is needed to improve educator effectiveness and student learning outcomes. A school district or BOCES identified by the Department in one of the categories enumerated above may be highlighted in public reports and/or the Commissioner may order a corrective action plan.

The proposed amendment also prohibits a student from being instructed by two teachers in the same subject, in two consecutive years, by teachers who are rated ineffective. If a school district assigns a student to a teacher in the same subject for two consecutive years, and the teacher is rated ineffective for two consecutive years, the school district must seek a waiver from the Commissioner for the specific teacher if (1) the district cannot make alternative arrangements to reassign the teacher to another grade/class due to a hardship and (2) the district has an improvement or removal plan in place for the teacher that meets guidelines prescribed by the Commissioner. The regulation also establishes an appeals process for teachers/principals who wish to challenge their State provided growth score. Teachers/ principals would be required to submit an appeal within 20 days of their receipt of a State-provided growth score or within 20 days of the effective date of the regulation, whichever is later, and school districts would have 10 days to reply.

7. DUPLICATION:

The rule does not duplicate existing State or Federal requirements.

8. ALTERNATIVES:

As explained in the Needs and Benefits section of this Statement, the Department considered the over 4,000 comments it received before the regulations were adopted and reviewed the materials submitted by stakeholders and experts at the Learning Summit, which are available on the Department's website at http://www.nysed.gov/content/learning-summit-submitted- materials. The Department presented its recommendations based on its analysis of the materials and presentations at the Learning Summit and sought feedback on various components of the new evaluation system from the Board of Regents at its May meeting. The Department presented a powerpoint presentation or slide deck to the Board of Regents, posted on our website at http://www.regents.nysed.gov/common/regents/files/meetings/May%202015/ APPR.pdf, which explained the guiding principles and rationale for the Department's recommendations (see pp. 7-10). It further explained the 1-4 rubric scoring ranges recommended by NYSED, NYSUT and the NYC-Commissioner imposed rubric ranges for observations under Ed. Law § 3012-c (p.12) and the differences in differentiation that are produced using the NYSUT recommended and the Commissioner imposed NYC ranges (p.13).

The Department also provided recommendations for the number, frequency and duration of observations and the subcomponent weights for the observation category and recommendations on observation rubrics for the Board of Regents to consider, balancing the feedback it received from the field (p. 16, 18, 20).

It then produced the current scoring ranges for SLOs out of a 0-20 scale and the current method for determining points within the 0-20 scoring range for the State-provided growth score. The Department presented NYCDOE's and NYSUT's suggested cut scores (pp. 21-25) and recommended that the Board maintain the existing normative method to establish growth scores for the required and optional subcomponents of the student performance category. The Department further recommended that the Board maintain the full current list of characteristics in the growth model and that it explore with stakeholders and experts future options, new co-variates and possible adjustments to normative method and/or criterion referenced measures of growth (p. 26). The Department provided further recommendations on the optional subcomponent of the student performance category and the weightings for the student performance category (p. 27-30).

The Department then recommended that the principal system be aligned to the teacher evaluation system (p. 33) and provided recommendations to the Board on which provisions in Education Law § 3012-c should be continued under Education Law § 3012-d(15) (pg. 34-35). Recommendations were also provided on the waiver to assign students to an ineffective teacher for two consecutive years and the Hardship Waiver for November 15 approval deadline (p. 37).

After receiving input from the Board of Regents and stakeholders, the Department modified many of its May recommendations, which are reflected in red in the slide deck presented to the Board at its June meeting (http://www.regents.nysed.gov/common/regents/files/meetings//Revised%20Version%20of%20PowerPoint %20Presentation.pdf. The green text in the slide deck represents changes made to the recommendations during the June 2015 Regents meeting.

In response to field feedback, the Department revised its recommended rubric scoring ranges (pg. 7) to provide a range of permissible cut scores that reflected evidence of standards consistent with the four levels of the

observation rubrics. The Department further recommended that the actual cut scores within the ranges be determined locally. The Department also changed its recommendations on the subcomponent weightings on the observation category (pg. 8) to lower the weightings for independent observers and provide for more local flexibility by setting minimum weights. The Department also changed its recommendations on the frequency and duration of observations to instead provide a statewide minimum standard of two observations, with the frequency and duration of such observations to be determined locally. Based on comment, the Department also changed its recommendation to require all annual observations to use the same rubric across all observer types (p. 11). The Department further clarified its recommendation around adjustments in performance measures for student characteristic and for small numbers of students (p. 15). The Department also changed its recommendations on scoring ranges for growth scores (p. 18) and the weightings for the student performance category (p. 19) when the optional subcomponent is used.

In response to feedback from the Board, the Department also adjusted its recommendations to include as possible grounds for a local appeal in instances where the student performance and observation categories produce anomalous results.

The Department further amended its recommendations regarding the continuation of the corrective action provisions in Education Law § 3012-c to § 3012-d.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on July 8, 2015, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The above changes require that the Small Businesses section and the Compliance Requirements, Compliance Costs, Economic and Technologic Feasibility, Minimizing Adverse Impact and Local Government Participation in the Local Government section of the Revised Regulatory Flexibility Analysis be revised to read as follows:

(a) Small businesses:

The proposed rule implements, and otherwise conforms the Commissioner's Regulations to, Subparts D and E of Part EE of Ch.56, L.2015 and Ch. 20, L. 2015, relating to Annual Professional Performance Review (APPR) of classroom teachers and building principals employed by school districts and boards of cooperative educational services (BOCES) in order to implement new Education Law § 3012-d. The 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 rule 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:

2. COMPLIANCE REQUIREMENTS:

See Needs and Benefits and Paperwork sections of the Revised Regulatory Impact Statement for an analysis of the compliance requirements for school districts and boards of cooperative educational services.

3. PROFESSIONAL SERVICES:

The proposed rule does not impose any additional professional services requirements on local governments beyond those imposed by, or inherent in, the statute.

4. COMPLIANCE COSTS:

See the Costs section of the Summary of the Regulatory Impact Statement submitted herewith for an analysis of the costs of the proposed rule to school districts and BOCES.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The rule does not impose any additional technological requirements on school districts or BOCES. Economic feasibility is addressed in the Costs section of the Summary of the Revised Regulatory Impact Statement submitted herewith.

6. MINIMIZING ADVERSE IMPACT:

The rule is necessary to implement, and otherwise conform the Commissioner's Regulations to, Subparts D and E of Part EE of Chapter 56 of the Laws of 2015 and Chapter 20 of the Laws of 2015 relating to the Annual Professional Performance Review (APPR) of classroom teachers and building principals. Since these provisions of the Education Law apply equally to all school districts and BOCES throughout the State, it was not possible to establish different compliance and reporting requirements.

The proposed rule reflects areas of consensus among stakeholders, and in areas where there were varying recommendations, the Department attempted to reconcile those differences to reflect best practices while also taking into consideration recommendations in the Testing Reduction Report regarding the reduction of unnecessary testing.

The Department also considered the comments from the school districts and BOCES during the 45-day public comment period under the State Administrative Procedure Act. As a result of these comments, the Department provided for a hardship waiver from the requirement for an independent observer for rural school districts and for school districts with one registered school who be unduly burdened if they were required to retain an independent evaluator. A school district would need to demonstrate that due to the size and limited resources of the school district it is unable to find an independent evaluator within a reasonable proximity to the school district. In lieu of an independent evaluator, the school district would be required to have a second evaluation conducted by a trained evaluator, who is different from the supervisor or evaluator who conducted the first evaluation.

7. LOCAL GOVERNMENT PARTICIPATION:

The new law requires the Commissioner to adopt regulations necessary to implement the evaluation system by June 30, 2015, after consulting with experts and practitioners in the fields of education, economics and psychometrics. It also required the Department to establish a process to accept public comments and recommendations regarding the adoption of regulations pursuant to the new law and consult in writing with the Secretary of the United States Department of Education on weights, measures and ranking of evaluation categories and subcomponents. It further required the release of the response from the Secretary upon receipt thereof, but in any event, prior to the publication of the regulations.

By letter dated April 28, 2015, the Department sought guidance from the Secretary of the United States Department of Education on the weights, measures and ranking of evaluation, as required under the new law and the Secretary responded.

In accordance with the requirements of the statute, the Department created an email box to accept comments on the new evaluation system (eval2015@nysed.gov). The Department has received and reviewed over 4,000 responses and has taken these comments into consideration in formulating the proposed amendments. In addition, the Department held a Learning Summit on May 7, 2015, wherein the Board of Regents hosted a series of panels to provide recommendations to the Board on the new evaluation system. Such panels included experts in education, economics, and psychometrics and State-wide stakeholder groups including but not limited to NYSUT, UFT, School Boards, NYSCOSS and principal and parent organizations. Since the new law was enacted in April, the Department also met with individual stakeholder groups to discuss their recommendations on the new evaluation system.

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 State statute. 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.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on July 8, 2015, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

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

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

See the Needs and Benefits and Paperwork sections of the Revised Regulatory Impact Statement submitted herewith for the reporting, recordkeeping, and other compliance requirements for school districts and BOCES, including those located in rural areas of the State. The rule does not impose any additional professional services requirements on local governments beyond those imposed by, or inherent in, the statute.

3. COSTS:

See the Costs section of the Revised Regulatory Impact Statement submitted herewith for an analysis of the costs of the proposed rule, which include costs for school districts and BOCES across the State, including those located in rural areas.

4. MINIMIZING ADVERSE IMPACT:

The rule is necessary to implement, and otherwise conform the Commissioner's Regulations to, Subparts D and E of Part EE of Chapter 56 of the Laws of 2015, relating to the Annual Professional Performance Review (APPR) of classroom teachers and building principals employed by school districts and boards of cooperative educational services (BOCES) in order to implement new Education Law § 3012-d. Because the statute upon which the proposed amendment is based applies to all school districts and BOCES in the State, 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 rule reflects areas of consensus among stakeholders, and in areas where there were varying recommendations, the Department attempted to reconcile those differences to reflect best practices while also taking into consideration recommendations in the Testing Reduction Report regarding the reduction of unnecessary testing.

The Department also considered the comments from the school districts and BOCES during the 45-day public comment period under the State Administrative Procedure Act. As a result of these comments, the Department provided for a hardship waiver from the requirement for an independent observer for rural school districts and for school districts with one registered school who be unduly burdened if they were required to retain an independent evaluator. A school district would need to demonstrate that due to the size and limited resources of the school district it is unable to find an independent evaluator within a reasonable proximity to the school district. In lieu of an independent evaluator, the school district would be required to have a second evaluation conducted by a trained evaluator, who is different from the supervisor or evaluator who conducted the first evaluation.

5. RURAL AREA PARTICIPATION:

The new law requires the Commissioner to adopt regulations necessary to implement the evaluation system by June 30, 2015, after consulting with experts and practitioners in the fields of education, economics and psychometrics. It also required the Department to establish a process to accept public comments and recommendations regarding the adoption of regulations pursuant to the new law and consult in writing with the Secretary of the United States Department of Education on weights, measures and ranking of evaluation categories and subcomponents. It further required the release of the response from the Secretary upon receipt thereof, but in any event, prior to the publication of the regulations.

By letter dated April 28, 2015, the Department sought guidance from the Secretary of the United States Department of Education on the weights, measures and ranking of evaluation, as required under the new law and the Secretary responded.

In accordance with the requirements of the statute, the Department created an email box to accept comments on the new evaluation system (eval2015@nysed.gov). The Department has received and reviewed over 4,000 responses and has taken these comments into consideration in formulating the proposed amendments. In addition, the Department held a Learning Summit on May 7, 2015, wherein the Board of Regents hosted a series of panels to provide recommendations to the Board on the new evaluation system. Such panels included experts in education, economics, and psychometrics and State-wide stakeholder groups including but not limited to NYSUT, UFT, School Boards, NYSCOSS and principal and parent organizations. Since the new law was enacted in April, the Department has also been separately meeting with individual stakeholder groups and experts in psychometrics to discuss their recommendations on the new evaluation system.

During the 45-day public comment, the Department also received comments from representatives of various school districts and BOCES located across the State, including those located in rural areas of the State. In an effort to address some of these concerns, the Department has revised the regulation in various places as discussed in the Revised Regulatory Impact Statement, as submitted herewith.

Revised Job Impact Statement

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on July 8, 2015, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The purpose of proposed rule is to implement Subparts D and E of Part EE of Chapter 56 of the Laws of 2015 relating to Annual Professional Performance Reviews of classroom teachers and building principals employed by school districts and boards of cooperative educational services in order to implement Education Law § 3012-d. 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.

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on July 8, 2015, the State Education Department (SED) received the following comments:

1. COMMENT:

Revise provision in § 30-3.4(d)(2)(i)(b) requiring an impartial independent trained evaluator who may be employed within the district, but may not be assigned to the same school building as the teacher being evaluated to instead allow for small one-building districts to use "trained in-houses [sic] peer evaluators."

DEPARTMENT RESPONSE:

Education Law § 3012-d(4)(b) provides that an independent trained evaluator may be employed within the district, but may not be assigned to the same school building as the teacher being evaluated. Section 30-3.4(d)(2)(i)(b) repeats this statutory language without change, However, please note that § 30-3.2(o) defines "school building" to mean a school or program identified by its Basic Educational Data System (BEDS) code, as determined by the Commissioner.

The evaluator may be a district-wide employee reported to NYSED using the district BEDS code, not the school building BEDS code where the evaluation is taking place. For example, if the staff member is a Director of Special Education in a one-building district, the District BEDS code could be used to identify this person as an eligible independent trained evaluator.

Moreover, the Department has revised the regulation to provide for a hardship waiver for rural school districts and school districts with one registered school who, due to the size and limited resources of the district, is unable to find an independent evaluator within a reasonable proximity and who would be substantially harmed if they were required to obtain an independent evaluator. A district granted a hardship waiver would be required to conduct a second observation by one or more other evaluators selected and trained by the district who are different than the evaluators selected for the first mandatory subcomponent.

2. COMMENT:

Several comments expressed concern over the outside observers requirement, specifically the cost of independent evaluators, the impact of requiring principals to observe teachers in other schools given the lack of evidence to suggest that principals will be more reliable when observing teachers outside their school and the fact that any time spent off-site would clearly diminish their capability to effectively manage their own school, and sought to maintain authority for teacher-observations with school-based administrators rather than outside evaluators.

DEPARTMENT RESPONSE:

See Response to Comment #1.

3. COMMENT:

Several comments expressed support for accountability and high standards but request that SED gather input on the evaluation proposal from qualified practitioners and independent experts and reject the portions of the Cuomo Educational Reform Agenda which place undue reliance on state tests and are inappropriate reforms to APPR.

DEPARTMENT RESPONSE:

The Department held a Learning Summit on May 7, 2015, wherein the Board of Regents hosted a series of panels to provide recommendations to the Board on the new evaluation system. Such panels included experts in education, economics, and psychometrics and State-wide stakeholder groups including, but not limited to, the New York State United Teachers (NYSUT), the United Federation of Teachers (UFT), the New York State School Boards Association (NYSBA), the New York State Council of School Superintendents (NYSCOSS) and principal and parent organizations. Since the new law was enacted in April, the Department has also been separately meeting with individual stakeholder groups to discuss their recommendations on the new evaluation system. Additionally, the Department created an email box (eval2015@nysed.gov) to accept comments on the new evaluation system. In addition, section 30-3.1 of the proposed amendment also provides that the Board will convene workgroup(s) comprised of stakeholders and experts in the field to provide recommendations to the Board on assessments and evaluations that could be used for APPRs in the future.

4. COMMENT:

Several comments requested delays in the implementation schedule, including moving the deadline for submission of modified APPR plans to September 1, 2016.

DEPARTMENT RESPONSE:

Education Law 3012-d(11) requires that APPR plans be submitted by November 15, 2015 for a district to be eligible for their State aid increase. However, the appropriation language in Chapter 61 of the Laws of 2015 that links increases in school aid for the 2015-2016 and 2016-2017 school years to submission of documentation that the district has implemented the APPR in accordance with Education Law § 3012-d requires such submission by November 15, 2015 or by September 1, 2016. Accordingly, the Department has provided for a hardship waiver that would give districts additional time to complete collective bargaining and adopt an APPR plan to implement § 3012-d, provided that they must do so by September 1, 2016. Districts and BOCES that have collectively bargained in good faith but have been unable to meet the November 15th deadline are required to submit a Hardship Waiver application to the Department between October 1 and October 30, 2015. For districts, this is required in order to extend this deadline without risk of losing their eligibility for a State aid increase. More information on the hardship waiver can be found on the EngageNY website at https://www.engageny.org/resource/hardship-waiver-implementation-education-law- 3012-d.

5. COMMENT:

Several comments requested that the Board of Regents convene a task force to review the reliability, transparency, developmental appropriateness, and length of state tests and ensure test validity and linkage to the evaluation system.

DEPARTMENT RESPONSE:

Section 30-1.3(e) of the new regulation requires the Board of Regents to convene an assessment and evaluation workgroup or workgroups, comprised of stakeholders and experts in the field to provide recommendations to the Board of Regents on assessments and evaluations that could be used for annual professional performance reviews in the future.

6. COMMENT:

Several commenters expressed concern that policy deadlines are being tied to funding for public education and the very short time frame given to develop a teacher evaluation system and urged decoupling of school aid from the November 2015 APPR deadline. Commenters urged the Board of Regents and State Education Department "to freeze its current system and use the rest of 2015 to design a thoughtful evaluation system that is aligned to research and will yield reliable results. In redesigning the system, the State Education Department and the Board of Regents should elicit feedback from a representative group of educators from across NY State before finalizing any teacher evaluation system."

DEPARTMENT RESPONSE:

See Response to Comment No. 4 relating to the State aid deadlines for implementing the new statute. Increases in State school aid for the 2015-2016 and 2016-2017 school years are linked by statute to full implementation of the APPR pursuant to Education Law § 3012-d, in both Education Law § 3012-d(11) and in appropriation language in Chapter 61 of the Laws of 2015. The State Education Department does not have the authority to modify these statutes and decouple the State aid increases from APPR compliance. In addition, the Department held a Learning Summit on May 7, 2015, wherein the Board of Regents hosted a series of panels to provide recommendations to the Board on the new evaluation system. Such panels included experts in education, economics, and psychometrics and State-wide stakeholder groups including but not limited to NYSUT, UFT, School Boards, NYSCOSS and principal and parent organizations. In this way, the Department has sought to elicit feedback from educators, administrators and members of the public from across NY State.

7. COMMENT:

Several comments recommended an expansion of the measures allowable in a teacher evaluation system, including student portfolios and performance-based assessments, decoupling of teacher evaluations from student test scores and ending the use of value-added measures.

DEPARTMENT RESPONSE:

Education Law § 3012-d(4)(a) requires that an APPR include a student performance component that is explicitly linked to student test scores. The State Education Department cannot decouple teacher evaluations from test scores because that would conflict with statute.

Education Law § 3012-d(6) sets forth a list of prohibited elements that can no longer be used in any subcomponent. This list prohibits the use of artifacts, including student portfolios from being used in any subcomponent of a teacher's evaluation; except where the student portfolios measured by a State approved rubric where permitted by the Department. Accordingly, sections 30-3.4(d)(2)(ix) and (x) of the Rules of the Board of Regents limit observations to only those subcomponents of the practice rubric that are observable, while at the same time recognizing that parts of the rubric that are not observable during classroom observations may be incorporated into the observation score where they are observed during any optional pre- or post-observation review or other natural conversations between teachers and their evaluators. The intention of the regulatory language is provide flexibility to districts and BOCES to implement observation procedures that provide meaningful feedback to educators on their practice while maintaining fidelity to the requirements of Education Law § 3012-d.

Performance assessments continue to be an allowable option in the statute. A Request for Qualifications ("RFQ") for allowable assessments has been issued and a list of the performance based assessments approved by the Department for use in evaluations will be posted on our website as they are approved. If your district or BOCES would like to use a performance assessment in its evaluations, it should submit the assessment through the RFQ process for consideration by the Department, which can be found at http://www.p12.nysed.gov/compcontracts/rfq-15-001-assessments/ home.html.

8. COMMENT:

Comments support local decision making in the hiring, tenure and discipline decisions of educators rather than requiring the filing of mandatory 3020-b charges based on APPR scores.

DEPARTMENT RESPONSE:

Section 3020-b(2) of the Education Law requires a school district to bring charges of incompetence against any classroom teacher or building principal who receives three consecutive ineffective ratings. As such charges are required by statute and the Department has no authority or discretion in this regard. However, section 3020-b(2) of the Education Law leaves it to district/BOCES discretion as to whether they want to pursue charges against a classroom teacher or building principal who receives two consecutive ratings.

9. COMMENT:

When issuing guidance and/or amending the regulations, please consider defining who constitutes an "other trained administrator." Many districts use subject area department chairs at the secondary level to evaluate teaching staff. These department chairs are typically administratively certified, but are considered teachers because they continue to teach some classes and are represented by the teachers' union, sometimes in the same unit as other teachers and sometimes in a different bargaining unit. Many districts are asking if they are able to continue to have these administratively certified teachers evaluate other teachers.

DEPARTMENT RESPONSE:

Section 30-3.4(d)(2) of the Rules of the Board of Regents requires that observations be conducted by a principal or other trained administrator. This language is the same as the language used in Section 30-2.4(d)(1)(iii), and, thus, this is not a new or modified requirement for evaluations. Regarding the use of department chairs as impartial, independent evaluators, these evaluators may be employed within the school district, but may not be assigned to the same school building as the teacher or principal being evaluated.

10. COMMENT:

Expressed belief that the reliance upon students' scores on the common core state tests for fifty (50%) percent of a teacher's evaluation is misplaced.

DEPARTMENT RESPONSE:

There are no longer percentages assigned to each of the categories that make up a teacher's overall composite rating. Rather, the teacher's rating is based on a matrix prescribed by Education Law 3012-d(5)(b).

Nonetheless, the student performance category is comprised of two subcomponents, one of which is based on a State-provided growth score on State assessments, if available, and a district may choose to use a second optional subcomponent based on a supplemental assessment for the student performance category if they do not want a teacher's/principal's rating on the student performance category to be based solely on State assessments.

11. COMMENT:

Expressed concern that the use of independent observers to evaluate our teachers places an undue financial and/or administrative burden on districts without any proven benefit.

DEPARTMENT RESPONSE:

See Response to Comment #1.

12. COMMENT:

Requested that the Department interpret the new legislation governing the APPR as broadly as possible in order to minimize its potentially negative impact.

DEPARTMENT RESPONSE:

The Department believes it has done its best to ensure that the intent of the law is upheld while maintaining the maximum amount of local discretion where possible and to minimize any potential adverse effects from the new law.

13. COMMENT:

Urged the Department to draft a strong appeal to the Legislature and the Governor to amend the Education Transformation Act of 2015 requirements that the Board of Regents adopt new Commissioner's Regulations in June 2015 and that school districts receive Department approval for new APPR plans by November 15, 2015.

DEPARTMENT RESPONSE:

The Department worked to meet the statutory requirement that new regulations be adopted in June 2015, as required by Education Law 3012-d.

Additionally, Education Law 3012-d(11) provides that APPR plans must be submitted by November 15, 2015 for a district to be eligible for their State aid increase. However, the appropriation language in Chapter 61 of the Laws of 2015 that links increases in school aid in for the 2015-2016 and 2016-2017 school years to submission of documentation that the district has implemented the APPR in accordance with Education Law § 3012-d requires such submission by November 15, 2015 or by September 1, 2016. Accordingly, the Department has, however, provided for a Hardship Waiver. Districts and BOCES that have collectively bargained in good faith but have been unable to meet the November 15th deadline are required to submit a Hardship Waiver application to the Department between October 1st and October 30th. For districts, this is required in order to extend this deadline without risk of losing their eligibility for a State aid increase. More information on the hardship waiver can be found on the EngageNY website at https://www.engageny.org/resource/hardship-waiver-implementation-education-law- 3012-d.

14. COMMENT:
The Department should provide scoring ranges for the performance categories so that uniformity is achieved across the state, accompanied by a detailed discussion of the process by which the scoring ranges were determined.
DEPARTMENT RESPONSE:
Sections 30-3.4 and 30-3.5 of the Rules of the Board of Regents established scoring ranges for student learning objectives, the overall student performance category, and the overall observation and school visit category.
15. COMMENT:
Final APPR ratings for teachers should reduce the weight given to New York State tests.
DEPARTMENT RESPONSE:
There are no longer percentages assigned to either of the two categories that make up the overall evaluation rating of a teacher's evaluation. Rather, the teacher's rating is based on a matrix prescribed by Education Law 3012-d(5)(b). Nonetheless, the student performance category is comprised of two subcomponents, one of which is based on a State-provided growth score on State assessments, if available, and a district may choose to use a second optional subcomponent, based on a supplemental assessment, for the student performance if they do not want a teacher's/principal's rating on the student performance category to be based solely on State assessments.
16. COMMENT:
Disclose and clearly define the criteria for the establishment of cut scores, scoring bands, and weighting of the various components of performance evaluations for teachers and principals.
DEPARTMENT RESPONSE:
The Department believes that the criteria for scoring ranges and weighting of the various components of performance evaluations for teachers and principals are clearly defined in the Commissioner's regulations, as required by Education Law 3012-d. The criteria were developed based on information received from the APPR Learning Summit held in May 2015.
17. COMMENT:
The Department should differentiate between the performance evaluation process to be applied to tenured teachers and principals rated "Effective" or "Highly Effective" and those in the "Developing" and "Ineffective" categories. Commenter also suggested that the frequency and duration of observations for effective and highly effective teachers and should be less than those required for colleagues demonstrating less proficiency.
DEPARTMENT RESPONSE:
Education Law 3012-d(4)(b) requires the Commissioner to determine the minimum amount of observations, including the frequency, duration and parameters of observations. The Department has provided flexibility to school districts and BOCES in the observation subcomponent through sections 30-3.4 and 30-3.5 of the Rules of the Board of Regents, which require the frequency and duration of observations to be locally determined. Therefore, if a district/BOCES chooses to make the frequency and duration of observations for teachers rated effective and highly effective less than those required for other educators, they may do so.
18. COMMENT:
Teacher and principal ratings should be based on performance over a two or three year period in order to increase reliability.
DEPARTMENT RESPONSE:
The requirement that evaluations be conducted annually is prescribed by Education Law § 3012-d. Therefore, the Department has no discretion to change the requirements for annual evaluations.
19. COMMENT:
If the requirement for independent evaluators cannot be eliminated through changes in legislation, ensure that definition of "independent evaluator" includes principals, assistant principals, and department directors or chairs from other buildings, as well as central office administrators. If the definition must include persons not currently employed by the school district, draft language that minimizes the weight of any such observation in the teacher's final rating. Should districts be able to hire "outside evaluators" to participate in the observation process, additional funding should be provided by New York State so such a mandate does not impose additional financial burdens on the school districts.
DEPARTMENT RESPONSE:
The use of an independent evaluator is prescribed by Education Law § 3012-d(4) for teacher evaluations. Further, Education Law § 3012-d(14) requires the Commissioner to adopt regulations to align the principal evaluation system with the teacher evaluation system set forth in Education Law § 3012-d. Therefore, in order to align the principal evaluation system, the use of independent evaluators for principals is required.
20. COMMENT:
Ensure that approved observation rubric include consideration of such elements as lesson planning, accommodations for students with IEPs or 504 Plans, and the quality of teacher reflection on the lesson during the post observation conference.
DEPARTMENT RESPONSE:
Evaluation rubric(s) are selected by each individual district, not the Department. Thus a district/BOCES may select any observation rubric from the list of approved rubrics established pursuant to 30-2.7 of the Rules of the Board of Regents. Additionally, a number of rubrics from the State approved list can be used in a variety of classroom settings (e.g., the Danielson Framework has certain indicators that are intended to assess teachers' abilities to instruct students with a variety of different learning needs).
21. COMMENT:
Add flexibility for SLOs to include portfolios of student work to be assessed for growth against a mandated New York State rubric.
DEPARTMENT RESPONSE:
Education Law § 3012-d(6) allows student portfolios to be used with State approved rubrics. Districts/BOCES may submit a rubric through the assessment RFQ, which is currently available on our website at: http://www.p12.nysed.gov/compcontracts/rfq-15-001-assessments/ home.html.
22. COMMENT:
The Department should provide a standardized template for APPR plans with the format and wording required for district submissions.
DEPARTMENT RESPONSE:
The Department has provided a template for APPR plans on the EngageNY website. It can be found by at the following link: https://nysed-appr3. fluidreview.com/. Additionally, two sample plans have been posted on EngageNY at: https://www.engageny.org/resource/sample-appr-plans-aligned-education-law- 3012-d.
23. COMMENT:
It is mentioned in the regulation that other domains that are not observed during an observation but in the standards can be incorporated into the score through "other natural conversations". These other domains needs to be clearly contained in the observation component of the APPR plan and is of the utmost importance in the evaluation of a teacher. A teacher who continually arrives late to school, does not give extra help, is delinquent with entering scores into the student information system, to name a few, needs to be held accountable via the evaluation system.
DEPARTMENT RESPONSE:
Education Law § 3012-d(6) prohibits the use of artifacts of teacher practice in any subcomponent of a teacher's evaluation. Accordingly, sections 30-3.4(d)(2)(ix) and (x) of the Rules of the Board of Regents limit observations to only those subcomponents of the practice rubric that are observable, while at the same time recognizing that parts of the rubric that are not observable during classroom observations may be incorporated into the observation score where they are observed during any optional pre- or post-observation review or other natural conversations between teachers and their evaluators. The intention of the regulatory language is provide flexibility to districts and BOCES to implement observation procedures that provide meaningful feedback to educators on their practice while maintaining fidelity to the requirements of Education Law § 3012-d.
24. COMMENT:
The scale for determining the growth factor (0-20) is improperly skewed towards a preponderance of teachers achieving an ineffective score. This scale should be normally distributed because the data would lend itself to be normally distributed. It is a faulty premise to assume the data should be calculated using a "common sense" (as coined by Ken Wagener) 100% scale where 65% is passing.
DEPARTMENT RESPONSE:
After lengthy discussion and debate at the June Board of Regents meeting, and after taking into account the recommendations from the May Learning Summit and other stakeholder feedback, the Board of Regents chose to adopt the scoring ranges specified in sections 30-3.4(c)(3) and 30-3.4(d)(1).
25. COMMENT:
Commenter urged that the "independent" evaluator be eliminated from the new requirements. Having ''outside'' observers come in to observe, even for a small percentage of a teacher's APPR Score, is counterproductive and quite frankly a waste of time (given the nominal percentage of impact) and resources. It should be understood by now that the ''high scores'' that teachers were receiving out of 60 was due to the way that NYSED set up 3 of the 4 scoring bands, not because principals and other administrators cannot be ''trusted'' to appropriately observe their teachers.
DEPARTMENT RESPONSE:
See Response to Comment #1.
26. COMMENT:
Teacher evaluations should be performed by local School Boards and Administrations using local assessments and observations which stress growth and professional development for at least 80% of the assessment.
DEPARTMENT RESPONSE:

The weightings for a teacher's/principal's overall score and ratings for teacher and principal evaluations are prescribed by a matrix set forth in Education Law § 3012-d. Therefore, the Department does not have the ability to change the impact that ratings in the student performance and observation categories have on the overall composite rating.

27. COMMENT:

Classroom observation protocols instituted through the APPR have provided notable results and have received praise from across the education spectrum. What is the purpose of casting these measures aside and substituting a costly, unwieldy and unnecessary system of mandated "independent evaluators"?

DEPARTMENT RESPONSE:

See Response to Comment #1.

28. COMMENT:

Lengthen the public comment period to ensure that all New Yorkers have their voices heard and can offer specific input to shape the teacher evaluation process by expanding the official public comment period until December 31, 2015. Require the Department to report public comments by March 31, 2016.

DEPARTMENT RESPONSE:

The State Administrative Procedure Act ("SAPA") requires a 45-day public comment period from the date of publication of the Notice of Proposed Rule Making in the State Register. The proposed amendment is being revised based on the public comment received to date. Therefore, under the State Administrative Procedure Act, a second 30-day public comment period from the date of publication of a Notice of Revised Rule Making is required. As a result, the Department will continue to accept comments on the new evaluation system through both eval2015@nysed.gov and REGCOMMENTS@nysed.gov.

29. COMMENT:

Conduct 13 public forums, one in each Regents District, as part of the formal public comment period.

DEPARTMENT RESPONSE:

The Department held a Learning Summit on May 7, 2015, wherein the Board of Regents hosted a series of panels to provide recommendations to the Board on the new evaluation system. Such panels included experts in education, economics, and psychometrics and State-wide stakeholder groups including, but not limited to, New York State United Teachers (NYSUT), the United Federation of Teachers (UFT), the New York State School Boards Association, the New York State Council of School superintendents (NYSCOSS) and principal and parent organizations. Since the new law was enacted in April, the Department has also been separately meeting with individual stakeholder groups and experts in psychometrics to discuss their recommendations on the new evaluation system. Additionally, the Department created an email box (eval2015@nysed.gov) to accept comments on the new evaluation system. In addition, section 30-3.1 of the proposed amendment also provides that the Board will convene workgroup(s) comprised of stakeholders and experts in the field to provide recommendations to the Board on assessments and evaluations that could be used for APPRs in the future.

30. COMMENT:

Adopt regulations and guidelines by new State Education Commissioner Elia by December 31, 2016 and implement the approved APPR by schools on January 1, 2019 to coincide with the beginning of the use of Common Core test scores in assessing students.

DEPARTMENT RESPONSE:

Education Law § 3012-d prescribes the timeline for implementation of the new evaluation system and required that regulations be adopted by June 30, 2015. The Department adopted regulations by the statutory deadline and does not have authority to extend the deadline for when regulations must be promulgated. However, see Response to Comment #4.

31. COMMENT:

In developing the new APPR system, any resolution must include meaningful participation from all stakeholders and that all stakeholders need to not just be allowed to provide testimony in regards to the new system, which must be genuinely examined and considered; they must be partners in all phases of its crafting.

DEPARTMENT RESPONSE:

The Department held a Learning Summit on May 7, 2015, wherein the Board of Regents hosted a series of panels to provide recommendations to the Board on the new evaluation system. Such panels included experts in education, economics, and psychometrics and State-wide stakeholder groups including, but not limited to, New York State United Teachers (NYSUT), the United Federation of Teachers (UFT), the New York State School Boards Association, the New York State Council of School superintendents (NYSCOSS) and principal and parent organizations. Since the new law was enacted in April, the Department has also been separately meeting with individual stakeholder groups and experts in psychometrics to discuss their recommendations on the new evaluation system. Additionally, the Department created an email box (eval2015@nysed.gov) to accept comments on the new evaluation system. In addition, section 30-3.1 of the proposed amendment also provides that the Board will convene workgroup(s) comprised of stakeholders and experts in the field to provide recommendations to the Board on assessments and evaluations that could be used for APPRs in the future.

32. COMMENT:

Expressed support for high standards for our students and teachers. In developing the testing reduction report, go into classrooms throughout the State and witness the proctoring of the exams. As part of your work with students, parents, educators, school districts and other relevant stakeholders, come to the Finger Lakes region for a public hearing and hear recommendations and experiences of Senator Funke's constituents.

DEPARTMENT RESPONSE:

Since the new law was enacted in April, the Department has also been separately meeting with individual stakeholder groups and experts in their field to discuss their recommendations on the new evaluation system. The Department will also reach out to Senator Funke's office on this issue.

33. COMMENT:

Commenter is seeking more flexibility in the evaluation process. Propose that special consideration be made in regards to special education teachers and their evaluations as these teachers work with the most vulnerable populations and should not be punished because their students do not always perform at the same level as other students their age. Additionally, the matrix that is adopted should take into account both high performing schools and the needs of schools in high poverty areas that may need additional assistance.

DEPARTMENT RESPONSE:

The Department provides school districts and BOCES flexibility in setting targets for SLOs. Sections 30-3.4 and 30-3.5 of the Rules of the Board of Regents require that SLOs include a minimum growth target of one year of expected growth, as determined by the Superintendent or his or her designee. In determining what constitutes one year of expected growth, the regulations allow the Superintendent or his or her designee to take into account poverty, students with disabilities, English language learner status and prior academic history. Thus, targets may vary based on a student's present level of performance and learning needs in order to close achievement gaps or move low-performance towards grade-level expectations. The proposed amendment also requires that all State-provided or approved growth scores control for poverty, students with disabilities, English language learner status and prior academic history. The Department will continue to review the evaluation system to ensure that special education teachers are not adversely affected by this system.

The matrix is prescribed in statute and the Department does not have authority to modify it.

34. COMMENT:

Expressed support for Chancellor Tisch's comments regarding schools that are rated as high performing and the possibility for an exemption from the new evaluation matrix.

DEPARTMENT RESPONSE:

The Department believes that it has done its best to provide significant flexibility to districts in the proposed amendment while at the same time ensuring the intent of the statute has been met.

35. COMMENT:

Request that the Department adopt a flexible definition for the term "school building" to address the unique challenges faced by rural school districts in complying with the independent evaluator requirement.

DEPARTMENT RESPONSE:

See Response to Comment #1. In addition, section 30-3.4(d)(2)(i)(b) provides that an independent trained evaluator may be employed within the district, but may not be assigned to the same school building as the teacher being evaluated. Please note that "school building" shall mean a school or program identified by its Basic Educational Data System (BEDS) code, as determined by the Commissioner.

The evaluator may be a district-wide employee reported to NYSED using the district BEDS code, not the school building BEDS code where the evaluation in taking place. For example, if the staff member is a Director of Special Education in a one-building district or BOCES, the District BEDS code or the overarching BOCES could be used to identify this person as an eligible independent trained evaluator.

In addition, if the staff member is a BOCES employee and is reported to NYSED with a different virtual location code than the school or location BEDS code associated with the educator being evaluated, they too could be identified as an eligible independent trained evaluator.

For more information with regard to the proper use of BEDS codes, LEAs are encouraged to work with their Regional Information Centers (RICs).

36. COMMENT:

Expressed support for position paper signed onto by seven Regents. Included in the position paper and emphasized by the commenter: on the

student performance side of the matrix, the calculations (which are under the regulatory authority of the Board of Regents) should be: (a) 80 percent of the overall student performance side of the matrix would be on local assessments, student portfolios, etc.; and (b) No more than 20 percent of the overall student performance side of the matrix could be state tests; observation scores should be based on the NYSUT scoring ranges, which have been submitted to the Board of Regents, are more fair to educators and better aligned to the previous APPR law; no more than 10 percent of an observation score could be external or peer evaluators, and only at a local option; addressing needs of English Language Learners and students with disabilities in the APPR system; creation of a work group of practitioners to study a new accountability system, also allowing for submission of locally developed plans; and creation of a work group to analyze the Common Core Learning Standards and Common Core assessments.

DEPARTMENT RESPONSE:

The position paper was considered by the Board of Regents at its June Board of Regents meeting. After lengthy discussion and debate at that meeting, and after taking into account the recommendations from the May Learning Summit and other stakeholder feedback, the Board of Regents voted to adopt the regulations in their current form.

37. COMMENT:

For the Student Performance category, weigh student performance at no more than 40% of the composite score. Regarding a process for Student Learning Objectives, I favor a process that grants teachers partial credit for student achievement that moves toward proficiency, such as those illustrated in the EngageNY Alternative Target Setting webinar. Do not adopt a one size fits all growth target parameter for students with disabilities! Avoid a universal parameter for SWDs such as one year growth in achievement being the outcome that is aligned with an effective teacher rating. This presumption is seriously flawed and ignores the wide range of abilities across disability classifications or severity of disabilities. Rather, develop growth target bands as a model to be used locally in setting appropriate and rigorous growth targets in the SLO process. For the Observation Category, weigh the observation category at 60% of the composite score. Keep the Marzano Rubric on the approved list, it does a better job of scoring special education instructional strategies and it is evidence based. Have the Principal conduct two observations and limit the outside evaluator to one observation per year so that the administrator who is most familiar with the students and curriculum has more input. I feel strongly that Section 5a-c of Education Law 3012-c, which assures my due process rights through a locally established appeal process, should be applied to the new teacher evaluation law. Keeping the appeal process locally negotiated is fair and will keep the burden/expense at the local level.

DEPARTMENT RESPONSE:

The impact of the Student Performance Category on a teacher's overall evaluation rating is prescribed by Education Law § 3012-d(5). Section 30-3.6 of the Rules of the Board of Regents merely conforms to the provisions of the new law.

Concerning student growth targets, Education Law § 3012-d(4)(a)(2) requires the Commissioner to set appropriate targets for student growth in the Student Performance category. Sections 30-3.4 and 30-3.5 of the Rules of the Board of Regents require that SLOs include a minimum growth target of one year of expected growth, as determined by the Superintendent or his or her designee. In determining what constitutes one year of expected growth, the regulations allow the Superintendent or his or her designee significant flexibility and allow them to take into account poverty, students with disabilities, English language learner status and prior academic history. Thus, targets may vary based on a student's present level of performance and learning needs in order to close achievement gaps or move low-performance towards grade-level expectations.

Concerning the list of approved rubrics, section 30-3.9(e) provides that the Department's lists of approved rubrics established pursuant to section 30-2.7 of the Part shall continue in effect until superseded by a list generated from a new RFQ. The Department anticipates that a new RFQ will be issued in the near future.

Concerning the frequency and duration of observations by principals and independent evaluators, section 30-3.4(d)(2)(i) of the Rules of the Board of Regents requires a minimum of one observation by the principal or other trained administrator and a minimum of one observation by one or more impartial independent trained evaluators selected and trained by the district. Thus a district may choose to have two observations conducted by a building principal and only one conducted by an independent evaluator or other trained evaluators.

Moreover, section 30-3.15(c)(1) maintains the substantive provisions of Education Law § 3012-c(5-a) without modification except any reference in subdivision (5-a) to a proceeding pursuant to Education Law section 3020-a based on a pattern of ineffective teaching shall be deemed to be a reference to a proceeding pursuant to Education Law section 3020-b against a teacher or principal who receives two or more consecutive composite Ineffective ratings; and in accordance with Education Law section 3020(3) and (4)(a), notwithstanding any inconsistent language in subdivision (5-a), any alternate disciplinary procedures contained in a collective bargaining agreement that becomes effective on or after July 1, 2015 shall provide that two consecutive Ineffective ratings pursuant to annual professional performance reviews conducted in accordance with the provisions of Education Law section 3012-c or 3012-d shall constitute prima facie evidence of incompetence that can only be overcome by clear and convincing evidence that the employee is not incompetent in light of all surrounding circumstances, and if not successfully overcome, the finding, absent extraordinary circumstances, shall be just cause for removal, and that three consecutive Ineffective ratings pursuant to annual professional performance reviews conducted in accordance with the provisions of Education Law section 3012-c or 3012-d shall constitute prima facie evidence of incompetence that can only be overcome by clear and convincing evidence that the calculation of one or more of the teacher's or principal's underlying components on the annual professional performance reviews pursuant to Education Law section 3012-c or 3012-d was fraudulent, and if not successfully overcome, the finding, absent extraordinary circumstances, shall be just cause for removal.

38. COMMENT:

Regulations should be developed in a way that provides for a foundation for further development rather than something temporary that will be completely revised in the near future. Greater emphasis should be on the area that has been perceived as the most successful part of the current APPR teacher observations. There should be a reduction in the impact of student growth scores that would lead to "ineffective" ratings to avoid as much as possible the instances on the matrix that an ineffective in that area impacts negatively on a higher observation score. I recommend using a scoring chart for teacher observations that is more in line with the NYCDOE recommendation. The SED proposed scoring chart requires a 2.59 to be considered "developing." That would mean that a teacher with half of their scores being "3" and half being "2" could end up with a 2.5 average and be considered "ineffective." It would not be plausible to rate a teacher according to the rubric along the lines of effective and developing and then end with an "ineffective" rating. The 1.76 threshold that the NYCDOE recommended requires that there be some "1's" or ineffective ratings on the rubric. That is certainly more justifiable. We suggest using the NYSUT recommendation of two or more standard deviations below the mean for an ineffective rating on the student growth scores. This would allow for a smaller percentage of ineffective scores on the student growth measure, thus placing greater emphasis on the teacher observation portion of the process. This would also lessen the number of instances of an ineffective rating on the student growth measure impacting negatively on a higher observation score.

DEPARTMENT RESPONSE:

The recommendations of the NYCDOE and NYSUT on the observation scoring ranges were considered by the Board of Regents at its May meeting. The Board of Regents weighed all the recommendations it received at the May Learning Summit and from stakeholders and at its June meeting ultimately adopted the scoring ranges embedded in section 30-3.4(c)(2)(xiv).

39. COMMENT:

Merit pay should not be used in education. This proposed change will create competition among educators encouraging people to care more about their pay, discouraging collaboration among educators which will negatively impact their professional growth. It will create animosity between teachers and administrators leading already over stretched administrators to spend precious time arguing with teachers over points as they fight to get higher scores and increased pay. This puts the focus on additional composition versus where it should be focused: what is best for kids. I have yet to find a place where merit pay improved the educational setting.

DEPARTMENT RESPONSE:

Education Law § 3012-d provides that APPRs be a significant factor in supplemental compensation decisions. The proposed amendment implements this provision without modification and does not otherwise address merit pay.

40. COMMENT:

There is great disparity between the teachers who receive a state generated score in grades 4-8 and educators who receive a score based on Student Learning Objectives (SLO). While, as administrators, we do the best we can to increase the rigor on these exams, most teachers with an SLO exam are extremely successful, contributing to the reported 95% of all teachers being demeaned Highly Effective or Effective in NYS overall. Not to mention, in addition to my lost time on NYS exam prep, I lose at least another month preparing and organizing SLO exams in my building.

DEPARTMENT RESPONSE:

The Department believes that SLO results should be correlated with State-provided growth scores. However, SLOs are a locally determined

measure and, thus, are outside the control of the Department. Sections 30-3.4 and 30-3.5 of the proposed amendment require that SLOs include a minimum growth target of one year of expected growth, as determined by the Superintendent or his or her designee. In determining what constitutes one year of expected growth, the regulations allow the Superintendent or his or her designee to take into account poverty, students with disabilities, English language learner status and prior academic history, which is also consistent with the growth model.

41. COMMENT:

Stephen Caldas, a panelist at the State Education Department's May 7 APPR Summit, shared that the APPR system has an error rate up to 55 percent. Any teacher rated ineffective two years in row and is fired will fight this in a court of law. How well will this challenge hold up with such a great error rate?

DEPARTMENT RESPONSE:

We believe that Dr. Caldas, in discussing an error rate of up to 55 percent in the State-provided growth model, was referring to a statistic called the R-square. This statistic is commonly used to describe the goodness-of-fit of a regression model, and it indicates the amount of variance in student outcomes that we can account for with the predictors in the model. That is, the R-square tells us how well differences between how students were expected to perform and how they actually performed on a particular assessment are explained by the factors in our model. It is important to note that the amount of variance not explained by the model is neither an indication of error nor an error rate. It is an indication that student scores are determined by additional factors not already contained in the model. Because the New York State growth model is run separately for each subject in grades 4-8, and for each Regents Exam included in grades 9-12 results, multiple R-square values are reported annually. The R-square value in question was reported for the ELA Common Core Regents Exam in 2013-14, which had a value of 0.45 and is used as part of the model for high school principals, not teachers. For teachers, the R-square in 2014-15 ranged between.68 and.77.

Because this particular model explained about 45 percent of the variance in scores in 2013-14, and the remaining 55 percent of the variance was due to other factors (e.g., teachers, community, measurement variance in the test itself), we use a larger confidence interval in making our determinations the principal or school than we do with the models for teachers in grades 4-8. The fact that this particular ELA Common Core Regents model explained less variance than other models is therefore built into the reported results because we take the level of precision into account by using the confidence interval around the MGP when assigning HEDI ratings.

COMMENT:

The following questions are based on the May Board of Regents APPR Discussion slides. The slide number is indicated in parenthesis before each inquiry.

(Slide 8) Will the observable teaching standards be clearly outlined by the Department? Many of the state approved rubrics contain observable and non-observable indicators. Are we only going to address the observable standards and their respective indicators (e.g., NYSUT rubric)?

(Slide 18) Must there be a pre- and post-conferences for a minimum of one observation since one observation is unannounced?

(Slide 19) The slide references non-observable standards/domains. Must teachers be scored on all standards as we have done in the past or just the observable?

(Slide 26) Still concerned about SLOs because it has been creating problems between grades 4-8 ELA and math teachers receiving a growth score from the state and all other teachers having local control of SLOs. There still needs to be training on this – perhaps standardize SLOs for Regents exams and other state exams – at least the 1-20 point scale. The language is still very loose.

(Slide 28) Is the Department able to provide examples of State-designed supplemental assessments?

(Slide 33) Does a superintendent need to utilize an external evaluator in addition to them when it comes to evaluating principals?

(Slide 9) The slide indicates, with regard to the testing reduction report, "Offer flexibility to district to further reduce local testing time required by APPR: Allow the use of a school-wide, group, team, or linked measures for APPR purposes." Is this is for all other teachers besides grade 4-8 ELA and math teachers receiving a growth score from the state?

DEPARTMENT RESPONSE:

Rubric providers will be asked to identify the observable teaching standards in the rubrics in the new RFQ being issued by the Department. With regard to consideration of the observable standards and their respective indicators, Education Law § 3012-d(6) prohibits the use of artifacts of teacher practice in any subcomponent of a teacher's evaluation. Accordingly, sections 30-3.4(d)(2)(ix) and (x) of the Rules of the Board of Regents limit observations to only those subcomponents of the practice rubric that are observable, while at the same time recognizing that parts of the rubric that are not observable during classroom observations may be incorporated into the observation score where they are observed during any optional pre- or post-observation review or other natural conversations between teachers and their evaluators. The intention of the regulatory language is provide flexibility to districts and BOCES to implement observation procedures that provide meaningful feedback to educators on their practice while maintaining fidelity to the requirements of Education Law § 3012-d.

Pre-observation and post-observation conferences are not required by the law or regulations. Such conferences are within the discretion of the districts.

New York State Teaching Standards/domains that are part of the rubric but not observable during the classroom observation may be observed during any optional pre-observation conference or post-observation review or other natural conversations between the teacher and the evaluator and incorporated into the observation score.

The Department has posted guidance on SLOs under Education Law § 3012-d which can be found on Engage NY at: https://www.engageny.org/resource/student-learning-objectives-guidance-document. Additionally, all evaluators receive mandatory training on SLOs prior to conducting evaluations.

The Department does not have any approved state designed or approved supplemental assessments at this time but an RFQ has been issued for these assessments and the Department will notify the field once they are available.

A superintendent is required to utilize a trained independent evaluator or other trained evaluators in evaluations of principals, in accordance with section 30-3.5(d) of the Rules of the Board of Regents; which is aligned to the teacher evaluation system as required by Education Law § 3012-d(14). See Response to Comment #1.

The flexibility for districts to allow the use of a school-wide, group, team or linked measures for APPR purposes is an allowable option for all teachers, except those who receive a State-provided growth score or whose courses end in a State assessment or Regents examination.

42. COMMENT:

Commenter expressed concern over unreasonable deadlines, including the June 30, 2015 deadline for regulations; the September 1, 2015 deadline for submission of updated APPR plans; and the November 15, 2015 deadline for final approval of submitted APPR plans.

DEPARTMENT RESPONSE:

The Department worked to meet the statutory requirement that new regulations be adopted in June 2015, as required by Education Law 3012-d.

Additionally, Education Law 3012-d(11) provides that APPR plans must be submitted by November 15, 2015 for a district to be eligible for their State aid increase. However, the appropriation language in Chapter 61 of the Laws of 2015 that links increases in school aid in for the 2015-2016 and 2016-2017 school years to submission of documentation that the district has implemented the APPR in accordance with Education Law § 3012-d requires such submission by November 15, 2015 or by September 1, 2016. Accordingly, the Department has, however, provided for a Hardship Waiver. Districts and BOCES that have collectively bargained in good faith but have been unable to meet the November 15th deadline are required to submit a Hardship Waiver application to the Department between October 1st and October 30th. For districts, this is required in order to extend this deadline without risk of losing their eligibility for a State aid increase. More information on the hardship waiver can be found on the EngageNY website at https://www.engageny.org/resource/hardship-waiver-implementation-education-law- 3012-d.

43. COMMENT:

Several comments expressed concern over the scoring bands under the new regulations and the disproportionate amount of teachers that will receive ineffective ratings thereunder.

DEPARTMENT RESPONSE:

After lengthy discussion and debate at the June Board of Regents meeting, and after taking into account the recommendations from the May Learning Summit and other stakeholder feedback, the Board of Regents chose to adopt the scoring ranges specified in sections 30-3.4(c)(3) and 30-3.4(d)(1). Although the Ineffective range is now 0-12 points, the percentage of students meeting targets that this corresponds to (0-59%) is similar to the Department's longstanding guidance and recommendations under Education Law § 3012-c (see, e.g., D70 of the APPR guidance document posted at https://www.engageny.org/resource/guidance-on-new-york-s-annual-professional-performance-review-law-and- regulations). By expanding the number of points to which this percentage range corresponds, these percentages are being more evenly distributed across the entire 0-20 scoring range.

Additionally, the Department does not believe that there is a disproportionate amount of teachers that will receive an ineffective rating under the new regulations. However, the Department is required by law to review

the impact annually and will amend the regulations if it finds that there is an unreasonably disproportionate amount of teachers that receive an ineffective rating, if necessary.

44. COMMENT:

Why are Charter Schools not subject to APPR when they have the ability to select students and fire the low performing ones? Why are charter schools exempt from imposing this evaluation system when they have the ability to select students through admissions criteria?

DEPARTMENT RESPONSE:

Pursuant to Education Law § 2854(1)(b), charter schools are exempt from all other state and local laws, rules, regulations or policies governing public or private schools, boards of education, school districts and political subdivisions, including those relating to school personnel and students, except as specifically provided in the school's charter or in Article 56 of the Education Law. There is nothing in Article 56 of the Education Law that requires charter schools to be subject to APPR. Therefore, unless the school's charter requires them to comply with Education Law § 3012-d, charter schools are not required to comply with Education Law § 3012-d.

45. COMMENT:

In order to ensure that teachers don't have two consecutive years of failing grades, the school has started moving the teachers around which has wreaked havoc and in the end hurts the quality of teaching. Teachers who normally teach kindergarten do not belong teaching 5th or 6th grade and vice versa. There are different skill sets and patience levels these teachers have developed over the years and shouldn't have to move around just to avoid a failing mark.

DEPARTMENT RESPONSE:

Pursuant to section 30-3.14(b), a district may seek a waiver to assign a student to a teacher rated Ineffective in the same subject for two consecutive years. The Commissioner may grant a waiver if the district cannot make alternative arrangements and/or reassign a teacher to another grade/subject because a hardship exists (for example, too few teachers with higher ratings are qualified to teach such subject in that district); and the district has an improvement and/or removal plan in place for the teacher at issue that meets certain guidelines prescribed by the Commissioner.

46. COMMENT:

Will charter schools (those that accepted RTTT funds OR those that did not) have to follow all the new regulations for APPR as non-charter public schools will?

DEPARTMENT RESPONSE:

Pursuant to Education Law § 2854(1)(b), charter schools are exempt from all other state and local laws, rules, regulations or policies governing public or private schools, boards of education, school districts and political subdivisions, including those relating to school personnel and students, except as specifically provided in the school's charter or in Article 56 of the Education Law. There is nothing in Article 56 of the Education Law that requires charter schools to be subject to APPR. Therefore, unless the school's charter requires them to comply with Education Law § 3012-d, charter schools are not required to comply with Education Law § 3012-d.

47. COMMENT:

If a district wants to use the optional student growth subcomponent do they have to do it for ALL teachers or can they do a subset of teachers/groups? Can they do the following: 4-8 core teachers use 100% spg; Art teachers use one SLO 100%; PE teacher use one SLO 50-80% and optional site based state score measure 50%-20%.

DEPARTMENT RESPONSE:

Pursuant to section 30-3.4(b)(2), a district may locally select to use an optional second subcomponent, that shall be applied in a consistent manner, to the extent practicable, across the district.

48. COMMENT:

Request that the emergency rules relating to the APPR be declared invalid because they were adopted under emergency rule making provisions, rather than traditional rule making provisions, and no emergency existed; the notice of emergency rule making lacks the requisite detail describing the emergency; and the notice of the emergency rule making lacks the required detail on the research supporting the rule. Also request that the Department halt the current proposed rulemaking regarding the APPR because the notice of emergency rulemaking is insufficient and public comment would be undermined by the lack of the particular information.

DEPARTMENT RESPONSE:

Section 202(6) of the State Administrative Procedure Act provides as follows:

Notwithstanding any other provision of law, if an agency finds that the immediate adoption of a rule is necessary for the preservation of the public health, safety or general welfare and that compliance with the requirements of subdivision one of this section would be contrary to the public interest, the agency may dispense with all or part of such requirements and adopt the rule on an emergency basis.

With respect to the adoption of regulations to implement the new Annual Professional Performance Review (APPR) statute, Section 1 of Part E of Subpart EE of Chapter 56 of the Laws of 2015 provides in relevant part as follows:

Section 1. Authority of the commissioner. Notwithstanding any provisions of section 3012-c of the education law to the contrary, the commissioner of the state education department, is hereby authorized and directed to, subject to the provisions of section 207 of the education law, adopt regulations of the commissioner and guidelines no later than June 30, 2015, to implement a statewide annual teacher and principal evaluation system in New York state pursuant to section 3012-d of the education law, as added by this act, after consulting with experts and practitioners in the fields of education, economics and psychometrics.... The commissioner shall also establish a process to accept public comments and recommendations regarding the adoption of regulations pursuant to section 3012-d of the education law and consult in writing with the Secretary of the United States Department of Education on weights, measures and ranking of evaluation categories and subcomponents and shall release the response from the Secretary upon receipt thereof but in any event prior to publication of the regulations hereunder.

The Legislature itself, when it enacted Subpart E of Part EE of Ch. 56 of the Laws of 2015 on April 13, 2015, determined that immediate adoption of the regulations to implement the APPR law (Education Law section 3012-d) was necessary when it required the Department to adopt regulations to implement the requirements of the new law by no later than June 30, 2015, after consultation with experts and practitioners and after seeking comments and recommendations, in writing, from the U.S. Secretary of Education. In addition, APPRs are conducted on a school year basis and subdivision 12 of Education Law § 3012-d requires that collective bargaining agreements entered into on or after April 1, 2015 that relate to the 2015-2016 school year or thereafter comply with new § 3012-d, which would not be possible until implementing regulations are adopted. In order for the Department to provide the full 45 day notice period in advance of the June 15-16 Regents meeting and comply with the legislative directive that regulations be adopted by June 30, 2015, a proposed rulemaking would have needed to be filed by April 7 for publication in the State Register on April 22nd. This was clearly impossible since the statute did not take effect until April 13th and in any case such early publication would not have allowed the Department sufficient time to analyze a complex statute, conduct the statutorily required consultation with experts and practitioners and develop the necessary comprehensive set of implementing regulations. Therefore, the Department believes it acted properly when it enacted regulations on an emergency basis in June, or the Department would be in violation of the provision of Chapter 56 providing for timely of Education Law section 3012-d by June 30, 2015.

This was also clearly stated in the Statement of Facts and Circumstances Justifying the Emergency Adoption of the proposed rule, which was included in the materials presented to the Regents at the June meeting and published in the State Register on July 15, 2015.

The Department also believes that it properly noted the needs and benefits of the rule in its Regulatory Impact Statement (RIS):

Section 202-a(3)(b) of the State Administrative Procedure Act provides that a Regulatory Impact Statement include a Needs and Benefits analysis as follows:

(b) Needs and benefits. A statement setting forth the purpose of, necessity for, and benefits derived from the rule, a citation for and summary, not to exceed five hundred words, of each scientific or statistical study, report or analysis that served as the basis for the rule, an explanation of how it was used to determine the necessity for and benefits derived from the rule, and the name of the person that produced each study, report or analysis;

The Department's RIS clearly provided a description of the needs and benefits of the rule and an analysis of what served as a basis for the rule. The Needs and Benefits section of the Regulatory Impact Statement provides as follows:

The regulations were adopted to implement the new provisions of the new law to implement the evaluation system by June 30, 2015, after consulting with experts and practitioners in the fields of education, economics and psychometrics and provided an analysis of the proposed rule. It also required the Department to establish a process to accept public comments and recommendations regarding the adoption of regulations pursuant to the new law and consult in writing with the Secretary of the United States Department of Education on weights, measures and ranking of evaluation categories and subcomponents. It further required the release of the response from the Secretary upon receipt thereof, but in any event, prior to the publication of the regulations.

By letter dated April 28, 2015, the Department sought guidance from the Secretary of the United States Department of Education on the weights, measures and ranking of evaluation, as required under the new law and the Secretary responded.

In accordance with the requirements of the statute, the Department cre-

ated an email box to accept comments on the new evaluation system (eval2015@nysed.gov). The Department has received and reviewed nearly 4,000 responses and has taken these comments into consideration in formulating the proposed amendments. In addition, the Department held a Learning Summit on May 7, 2015, wherein the Board of Regents hosted a series of panels to provide recommendations to the Board on the new evaluation system. Such panels included experts in education, economics, and psychometrics and State-wide stakeholder groups including but not limited to NYSUT, UFT, School Boards, NYSCOSS and principal and parent organizations. Since the new law was enacted in April, the Department has also been separately meeting with individual stakeholder groups and experts in psychometrics to discuss their recommendations on the new evaluation system.

The proposed amendment reflects areas of consensus among the groups, and in areas where there were varying recommendations, the Department attempted to reconcile those differences to reflect best practices while also taking into consideration recommendations in the Testing Reduction Report regarding the reduction of unnecessary testing.

The Department believes that this description of the needs and benefits of the APPR regulation is consistent with section 202-a(3)(b) of the State Administrative Procedure Act, particularly where the Department was implementing statutory requirements on an emergency basis.

Furthermore, reference to scientific/statistical studies, reports or analyses in the RIS is required only when there are such studies, reports, analyses that serve as the basis for the proposed regulations. As described above, consistent with the statute, the proposed regulations were developed through the over 1,000 comments received and through the submissions and testimony of the panel of stakeholders/experts as part of the May 7, 2015 Learning Summit, which are referenced in the Regulatory Impact Statement. A video recording and the submitted materials for the Learning Summit are available on the Department's website at http://www.nysed.gov/learning- summit. The national experts and the representatives of stakeholder groups who presented at the Learning Summit are listed at http://www.nysed.gov/content/learning-summit-presenter-biographies. The materials submitted by the national experts and stakeholder groups are listed at http://www.nysed.gov/content/learning-summit-submitted- materials.

The Department believes that part of the public's misunderstanding concerning the emergency regulations may result from the fact that in this case the RIS exceeded 2,000 words, so only a Summary of the RIS was published. Where a Regulatory Impact Statement would exceed 2,000 words, SAPA § 202(1)(f)(vi) requires that only a summary of the RIS is published with the Notice of Proposed Rule Making. Such a summary, of necessity, could not include all the information in the full text of the Regulatory Impact Statement. However, the full text is made available to the public upon request, as noted in the Notice published in the State Register.

49. COMMENT:

When creating SLOs, the State specifies one year worth of growth. Can districts decide what one year worth of growth means? For example, based on historical data, can kindergarten one year be a different number than grade six? Also, sub groups, SE and ESL, what would their one year look like? Does one year need to be equivalent to 1.0 GE growth or is one year up to districts? For example, can districts start GE 2.5 and end GE 3.5. Also, can teachers get more points if they go beyond their target for GE growth?

DEPARTMENT RESPONSE:

Sections 30-3.4 and 30-3.5 of the Rules of the Board of Regents require that SLOs include a minimum growth target of one year of expected growth, as determined by the Superintendent or his or her designee. In determining what constitutes one year of expected growth, the regulations allow the Superintendent or his or her designee to take into account poverty, students with disabilities, English language learner status and prior academic history. Thus, targets may vary based on a student's present level of performance and learning needs in order to close achievement gaps or move low-performance towards grade-level expectations.

50. COMMENT:

See Response to Comment #1.

In addition, section 30-3.4(d)(2)(i)(b) provides that an independent trained evaluator may be employed within the district, but may not be assigned to the same school building as the teacher being evaluated. Please note that "school building" shall mean a school or program identified by its Basic Educational Data System (BEDS) code, as determined by the Commissioner.

The evaluator may be a district-wide employee reported to NYSED using the district BEDS code, not the school building BEDS code where the evaluation in taking place. For example, if the staff member is a Director of Special Education in a one-building district or BOCES, the District BEDS code or the overarching BOCES could be used to identify this person as an eligible independent trained evaluator.

In addition, if the staff member is a BOCES employee and is reported to NYSED with a different virtual location code than the school or location BEDS code associated with the educator being evaluated, they too could be identified as an eligible independent trained evaluator.

For more information with regard to the proper use of BEDS codes, LEAs are encouraged to work with their Regional Information Centers (RICs).

51. COMMENT:

Since value-added models have been used as a means for rating teachers, the inadequacies and inequities of the method have come to the forefront. How could any state education system sign on to a method for evaluating teachers through which such flawed results occurred? How could any state Board of Regents endorse such policies?

DEPARTMENT RESPONSE:

The Department disagrees with this comment. There are numerous studies and articles that support the use of student growth models, including value-added models.[1]

52. COMMENT:

With the recent changes to the evaluation system endorsed by this Board of Regents, the only test scores that can be used to assess teachers must come from state standardized tests. In my district (a Long Island district), and many, many more like it, more than 50% of the teachers DO NOT teach subjects whose subject matter is directly tied to a state test. So if you are an elementary school art teacher, a high school music teacher, or a middle school second language teacher, your APPR score is going to depend upon the performance of students on a test which does not cover ANY of the curriculum you teach to the students in your classes, is not exclusive to the specific students you have worked with during the school year, and does is no way, shape or form evaluate the growth of your students in your classroom in your subject. Not to mention the fact that, in many schools, over 50% of the students enrolled are not even taking the state tests in the first place because their parents have elected to opt them out.

DEPARTMENT RESPONSE:

The Department disagrees with this comment. Section 30-3.4(b)(1)(iii) of the proposed amendment provides a district/BOCES with options for constructing SLOs for teachers whose courses do not end in a State assessment. These options include the use of a SLO with an assessment approved by the Department for the grade and subject taught by the teacher. Please also note another option is the use of school-or-BOCES-wide group, team, or linked results based on State/Regents assessments. Linked results on a State assessment would limit the measure to the teacher's own student population.

53. COMMENT:

While the transition is being made from Pearson to Questar to develop valid, curriculum based, developmentally appropriate standardized tests, remove the state growth score completely from any teacher evaluation. Allow districts to continue to perform teacher observations. Use the results from those observations, along with locally developed assessments for a teacher's APPR. Local assessments can itemize specific district performance objectives through an analysis of historical data of the performance of students in those local schools. Teachers can then design instruction specifically to meet the curricular goals and objectives of their unique classroom environments. If the failure of No Child Left Behind has taught us anything, it is that a "one size fits all" approach to setting education goals simply does not meet the needs of any student. If state standardized tests can be created which are valid assessments of student performance, AND, can be utilized by teachers as a means for professional growth, then reintroduce the concept of a state growth score utilizing the data from these tests. However, the data cannot be tabulated through use of a value-added model. Instead, a system must be used which calculates student growth fairly, taking into consideration past levels of achievement of students in the district in question.

DEPARTMENT RESPONSE:

Education Law § 3012-d prescribes the components of the student performance category, which includes a State-provided growth score on State assessments and its impact on a teacher's/principal's overall growth score. The Department does not have authority to change this requirement.

In addition, see response to Comment No. 52 regarding value-added models.

54. COMMENT:

Several comments urge that the proposed APPR rules should be rejected because the legal ''Notice'' doesn't identify ''each scientific or statistical study, report or analysis that served as the basis for the rule... and the name of the person that produced each study, report or analysis,'' as the State Administrative Procedure Act, Section 202-a(3)(b) requires. The commenters also state that, if there are no underlying studies, reports or analyses validating the proposed rules, or if they are inadequate, then the rules must be rejected because of this lack of support.

DEPARTMENT RESPONSE:

See Response to Comment #48.

55. COMMENT:

Comment expressed concern regarding the Value Added Model, stating that it has been proven time and again that VAM are not an effective way to measure teacher performance.

DEPARTMENT RESPONSE:

The Department disagrees with this comment. There are numerous studies and articles that support the use of student growth models, including value-added models.[2]

56. COMMENT:

According to the new summary, a teacher is to be evaluated on what is seen during the actual lesson or pre/post observation discussions. There is so much more to a teacher than that! NYS Teaching Standards #6 and #7 are not ''observable'' in a classroom observation but certainly are part of what makes a teacher effective (or they wouldn't be part of the standards). You have nullified entire portions of every rubric the state has approved. Watching a handful of lessons, an administrator can easily rate a developing teacher as effective because of the small ''observable'' windows they are allowed to judge; what if that teacher never contacted on parent all year? Of course, the opposite can occur as well, where an effective teacher could end as developing because the administrator is not allowed to judge the ''entire'' picture. Our administrators know us, and see much more than those few glimpses now allowed as evidence. All of the rubrics have domains or sections specifically designed for the purpose of rating a teacher on these ''unobservable'' classroom activities, and yet we are to discount that portion of our teaching. The state is ignoring its own standards. Please change this before finalizing the APPR.

DEPARTMENT RESPONSE:

Education Law § 3012-d(6) prohibits the use of artifacts of teacher practice in any subcomponent of a teacher's evaluation. Accordingly, sections 30-3.4(d)(2)(ix) and (x) of the Rules of the Board of Regents limit observations to only those subcomponents of the practice rubric that are observable, while at the same time recognizing that parts of the rubric that are not observable during classroom observations may be incorporated into the observation score where they are observed during any optional pre- or post-observation review or other natural conversations between teachers and their evaluators.

57. COMMENT:

The emergency regulations narrowly define a "growth model" to be a statistical calculation. Very few districts will have the capacity to have their current tests qualify as a statistical growth model for use as an optional supplemental assessment. The definition of growth model should be adjusted to allow calculations of student growth similar to the SLO growth calculation, which is recognized as a comparable growth measure under section 3012-d of the education law, in order to make the optional supplemental assessments available to more districts. If no change is made, most teachers will be evaluated based on one student measure rather than multiple measures. Research indicates that the information generated by growth models is too statistically unreliable to be made into the only measure of student performance used in a teacher's evaluation.

DEPARTMENT RESPONSE:

Education Law § 3012-d makes a clear distinction between SLOs and growth models. Growth models are traditionally known as a statistical measure of performance, while SLO's are a locally determined measure of growth. The regulatory definition is consistent with the traditional definition of "growth model" and the State-provided growth model.

58. COMMENT:

The emergency regulations set the scoring bands for SLOs at unrealistic levels. In small sample size SLOs, one or two students could be the difference between a rating of effective and ineffective due to the lack of range in the scoring bands. NYSUT has proposed and continues to propose fairer scoring bands with more reasonable expectations for students to meet. NYSUT's recommended scoring bands are 0 to 29% of students meeting the target = ineffective; 29 to 54% = developing; 54 to 84% = effective and 84 to 100% = highly effective. While the Regents cannot change the matrix, they can impact the final rating a teacher receives by setting more reasonable scoring bands.

DEPARTMENT RESPONSE:

The Department recognizes that small "n" sizes require a different method for calculating HEDI scores. Therefore, districts shall calculate scores for SLOs in accordance with the tables provided in section 30-3.4 of the Rules of the Board of Regents; provided however that, for teachers with courses with small "n" sizes, districts shall calculate scores for SLOs using the methodology prescribed by the Commissioner in guidance, which can be found in D95 of the APPR guidance document posted at https://www.engageny.org/resource/guidance-on-new-york-s-annual-professional-performance-review-law-and- regulations.

59. COMMENT:

The new statute, unlike 3012-c, does not require an unannounced observation. The Legislature clearly intended to remove this requirement and restore it to the local bargaining table with the other observation procedures. NYSUT is requesting that the decision on whether or not to use unannounced observations be recognized as a matter of procedure that is subject to bargaining.

DEPARTMENT RESPONSE:

Education Law 3012-d(4)(b) requires the Commissioner to determine the minimum amount of observations, including the frequency, duration and parameters of observations. Section 30-3.4(d)(2)(vi) of the proposed amendment requires that at least one of the mandatory observations be unannounced. The Department believes that an unannounced observation is considered to be a parameter of the observations and, therefore, is within the discretion of the Commissioner.

60. COMMENT:

Section 3012-d allowed the Regents to decide whether certain provisions of section 3012-c should remain in effect. In three instances the regulations make changes to the statute. NYSUT is requesting these changes be eliminated in the final regulations. The emergency regulations purport to change the development of Teacher Improvement Plans from a matter of collective bargaining to one of management prerogative. We are requesting continuation of the original requirements of section 3012-c regarding Teacher Improvement Plans. Additionally, the emergency regulations expand the individual teacher data that would be released to parents to include the category scores and ratings. We are requesting continuation of the original requirements of section 3012-c that will provide parents with only the final rating. Finally, the emergency regulations purport to expand SED's authority over corrective action plans to include sending the parties back to the bargaining table. This expansion of power goes beyond what is allowed by section 3012-c and interferes with the collective bargaining process, therefore we are requesting continuation of the original requirements of section 3012-c.

DEPARTMENT RESPONSE:

Pursuant to Education Law § 3012-d(15), the Commissioner shall determine the extent to which Teacher Improvement Plans and/or Principal Improvement plans and the parental ratings and corrective action requirements of § 3012-c apply to § 3012-d. The Department believes that the changes made in the regulation to TIP/PIPs, parental rights to ratings and corrective action were within it statutory authority to change. Nevertheless, in an effort to protect teacher privacy, while at the same time providing parents with the information they need, the Department has revised the regulation to require the privacy provisions in § 3012-c to remain in effect without modification, except there is no composite effectiveness score under Education Law § 3012-d.

61. COMMENT:

The application/approval procedure contemplated by SED for hardship extensions, requiring an initial application in mid-October and re-applications by school districts and BOCES every two months will be burdensome for school districts, BOCES and the department. Implement hardship extension application procedures once. Hardship Extensions should be approved for ALL school districts and BOCES that qualify, without any cap or other restrictions.

DEPARTMENT RESPONSE:

The Department agrees that submission of a hardship waiver every two months would be burdensome on the districts and the regulation therefore only requires re-application every four months. The initial application, required to be submitted in October, will cover the time period from November 2015 through March 2016. Districts will then be required to apply for an extension of the hardship waiver for the period of March 2016 through July 2016. The Department decided on four months in an attempt to balance the needs of districts, while trying to adhere to the intent of Education Law § 3012-d and to ensure the continued negotiation with regard to these issues and continued training of educators and administrators on APPR.

62. COMMENT:

For all students, but especially for subpopulations of students such as English language learners and students with disabilities, the factors, controls and filters used for the comparative function of the state-developed growth score must be publically re-examined and modified if warranted. Additionally, the HEDI cut scores included in the slide deck presented at the Board of Regents meeting should be revised downward. SAANYS supports the following HEDI cut points: H = 85-100%, E = 55-84%, D = 30-54%, I = 0-29%.

DEPARTMENT RESPONSE:

After lengthy discussion and debate at the June Board of Regents meeting, and after taking into account the recommendations from the May Learning Summit and other stakeholder feedback, the Board of Regents chose to adopt the score ranges specified in sections 30-3.4(c)(3) and 30-3.4(d)(1). Although the Ineffective range is now 0-12 points, the percentage of students meeting targets that this corresponds to (0-59%) is similar to the Department's longstanding guidance and recommendations under Education Law § 3012-c. By expanding the number of points to which this

percentage range corresponds, these percentages are being more evenly distributed across the entire 0-20 scoring range.

63. COMMENT:

SAANYS supports the setting of minimum requirements in regard to the number and duration of observations, allowing actual requirements to be set through local level collective bargaining. SAANYS also supports maintaining the availability of all current SED-approved rubrics for local negotiation by teacher collective bargaining units. Classroom visits conducted by the school principal or other administrator should be weighted to the maximum extent practicable – 90 or 95 percent, rather than 80 percent (as presented in the SED slide deck). In a corresponding manner, it is recommended that the class observation conducted by the independent observer receive no more than 5% weighting and that peer review, if collectively bargained, should be weighted at 5%.

DEPARTMENT RESPONSE:

Education Law 3012-d(4)(b) requires the Commissioner to determine the minimum amount of observations, including the frequency, duration and parameters of observations. The Department has provided flexibility in the observation subcomponent through sections 30-3.4 and 30-3.5 of the Rules of the Board of Regents, which require the frequency and duration of observations to be locally determined. Therefore, if a district/BOCES chooses to make the frequency and duration of observations for teachers rated effective and highly effective less than those required for other educators, they may do so. See also Response to Comment #1.

Section 30-3.4(d)(2)(xiii)(b) requires observations conducted by independent impartial observers be weighted at a minimum of 10 percent. Therefore, districts may collectively bargain to have only 10% of the observation category based on independent observers. See also response to Comment #1.

64. COMMENT:

The student performance subcomponent for all principals should be completed based on locally determined measures that are locally negotiated, including the setting of growth targets. At the very least, for all principals, SLOs should be authorized for the student performance category.

DEPARTMENT RESPONSE:

Education Law § 3012-d(14) requires the Commissioner to adopt regulations for principals that aligns to the teacher evaluation system. Education Law § 3012-d(4)(a)(2) requires the Commissioner to set appropriate targets for student growth in the Student Performance Category for teachers. The proposed amendment requires at a minimum one year of expected growth and provides the superintendent and his/her designee with flexibility as to how that one year of growth is calculated and authorizes the superintendent or his/her designee, in the exercise of their pedagogical judgment, to take the following characteristics into account: poverty, students with disabilities, English language learners status and prior academic history. This is statutorily required for teachers by Education Law § 3012-d(4)(a)(1) , as amended by § 3 of Subpart C of Part B of Chapter 20 of the Laws of 2015.

65. COMMENT:

School districts and principals' collective bargaining units should continue to collectively bargain the manner in which observations of school principals shall be conducted by their superintendent/supervisor including the number, frequency and duration of observations. The current requirement for at least one unannounced observation is artificial and inefficient, and it is recommended that such a requirement not be continued through regulation. This subcomponent should be weighted as heavily as possible for school principals.

DEPARTMENT RESPONSE:

The Department agrees that school districts and principals' collective bargaining units should continue to collectively bargain various aspects of principal observations, including the number, frequency and duration of school visits, as reflected in section 30-3.5(d) of the proposed amendment. However, Education Law 3012-d(4)(b) requires the Commissioner to determine the minimum amount of observations. The Department believes that an unannounced observation is considered to be a parameter of the observations and, therefore, is within the discretion of the Commissioner. Unannounced informal observations can often be a more authentic evaluation of a teacher's daily performance in the classroom.

The use of an independent evaluator is prescribed by Education Law § 3012-d(4) for teacher evaluations. Further, Education Law § 3012-d(14) requires the Commissioner to adopt regulations to align the principal evaluation system with the teacher evaluation system set forth in Education Law § 3012-d. Therefore, in order to align the principal evaluation system, the use of independent evaluators for principals is required. See also Response to Comment No. 1.

66. COMMENT:

The independent observer subcomponent should not apply to school principals. Such a provision is problematic for the observation of principals for largely the same reasons it is problematic for teachers – it would be disruptive and reduce the authority of the school superintendent. Implementation of such a procedure would add no value to the evaluation process and would necessarily result in a significant unfunded mandate for school districts. At the department's May 7 APPR meeting, all groups expressed opposition to such a requirement. Regulations should not include such a requirement for the observation of principals. It is not necessary to repeat the mistake made in statute for teachers, in regulation for principals. If, despite our recommendation, there is in fact an individual observer subcomponent, the weighting for the subcomponent should be limited to 5 percent.

DEPARTMENT RESPONSE:

The use of an independent evaluator is prescribed by Education Law § 3012-d(4) for teacher evaluations. Further, Education Law § 3012-d(14) requires the Commissioner to adopt regulations to align the principal evaluation system with the teacher evaluation system set forth in Education Law § 3012-d. Therefore, in order to align the principal evaluation system, the use of independent evaluators for principals is required.

See Response to Comment No. 1.

67. COMMENT:

The optional peer observation subcomponent, involving observation by a school principal within the school district or from another school district, who has been rated Effective or Highly Effective in the most recent APPR evaluation, should be included as a subject for local collective bargaining. If included as a negotiated subcomponent, peer observation should be weighted no more than 5 percent of the category.

DEPARTMENT RESPONSE:

The peer observation subcomponent is optional. If a district/BOCES selects to use the optional third observation subcomponent, then the weighting assigned to the optional observations conducted by peers shall be established locally within the constraints outlined in subparagraphs (i) and (ii) of section 30-3.5(d)(13) of the Rules of the Board of Regents. These weights were established by the Board of Regents at its June meeting after reviewing the recommendations from the May 7 Learning Summit and receiving input from stakeholders.

68. COMMENT:

The listing of SED-approved rubrics for the annual evaluation of principals should be maintained, and school districts should continue to collectively bargain which rubric shall be adopted.

In addition, the prohibited elements applicable to teachers, listed in Section 3012-d(6) should not be prohibited for the evaluation of principals. Several of the prohibited elements, such as lesson plans and artifacts of student performance, are used in the State Education Department's DTSDE protocols that are applicable to all schools – from Priority Schools to Reward Schools.

DEPARTMENT RESPONSE:

The listing of SED-approved rubrics for the annual evaluation of principals will be maintained. It is anticipated that any rubric currently on the approved list for Education Law § 3012-c will remain on the approved list for Education Law § 3012-d (see 30-3.9[e] of Regents Rules).

Several of the prohibited elements for teacher observations may continue to be used for DTSE protocols, however Education Law § 3012-d(14) requires alignment between the standards for teachers and principals, therefore the prohibited elements may only be used in principal evaluations only to the extent allowable in teacher evaluations. See Response to Comment No. 7 relating to prohibited elements.

69. COMMENT:

It is SAANYS' recommendation that the weighting of the observation of performance category should constitute 80 percent of principals' overall APPR scores. Normal rounding should be consistently applied to determine an average score matching the conversion chart numbers when the actual average is between two points on the chart (e.g., 2.44 is rounded down to 2.4 to be within the 1.5 to 2.4 range, resulting in a "Developing" Rating; whereas, 2.45 is rounded up to 2.5 and results in an "Effective" Rating).

DEPARTMENT RESPONSE:

The Department agrees that normal rounding should be consistently applied when the actual average is between two points. The format currently used by the Department allows for rounding to the hundredth decimal place.

70. COMMENT:

With regard to the hardship extension under the regulation, SAANYS recommends that "hardship" be defined as "the unanticipated and significant consumption of time, personnel and fiscal resources necessary for the implementation of the new APPR system (§ 3012-d) prior to the commencement of the 2015-16 school year" and further provides relevant considerations in making the determination of hardship.

DEPARTMENT RESPONSE:

The Department has provided significant guidance on its website as to what constitutes a hardship and the process for reviewing hardship applications. See the Frequently Asked Questions and Answers on Hard-

ship Waiver, which can be found on the Engage NY website at: https://www.engageny.org/resource/hardship-waiver-implementation-education-law- 3012-d.

71. COMMENT:

With regard to § 3012-d(8) and the prohibition on placement of a student with teachers rated ineffective for two consecutive years unless impracticable, SAANYS recommends that "impracticable" be defined as "the expectation of a detrimental impact upon finances, student placement, staff assignments, program quality or scheduling," and states that the overall needs of students and families must be included for consideration and further provides relevant considerations in making the determination of impracticability.

DEPARTMENT RESPONSE:

Section 30-3.14 of the Regents Rules provides that if a district assigns a student to a teacher rated Ineffective in the same subject for two consecutive years, the district must seek a waiver from this requirement for the specific teacher in question. The commissioner may grant a waiver from this requirement if the district cannot make alternative arrangements and/or reassign a teacher to another grade/subject because a hardship exists (for example, too few teachers with higher ratings are qualified to teach such subject in that district); and the district has an improvement and/or removal plan in place for the teacher at issue that meets certain guidelines prescribed by the Commissioner. Therefore, the Department believes that the regulation adequately addresses the concerns in this comment.

72. COMMENT:

Eliminate the new requirement for back-up SLOs. It mandates unnecessary work for most, and everyone already has more than enough to do that is more important to the mission of public education. The opt-out movement, which appears to be the motivation from requiring back-up SLOs, is parent-driven, involving personal choices which are out of the control of principals and teachers. Additionally, the continued impact of this movement is speculative. Even if it is sustained or increases, the impact may equally be on SLOs as any state generated achievement score.

DEPARTMENT RESPONSE:

The Department has previously recommended the setting of back-up SLOs for the State Growth or Other Comparable Measures subcomponent under Education Law § 3012-c and that districts and BOCES consult with their local counsel regarding the implementation of back-up SLOs for APPR purposes. As this is a continuing requirement, the Department does not believe that it requires any additional work on the part of districts and BOCES.

73. COMMENT:

The emergency regulations narrowly define a "growth model" to be a statistical calculation. The definition of growth model should be adjusted to allow calculations of student growth similar to the SLO growth calculation, which is recognized as a comparable growth measure under section 3012-d of the education law, in order to make the optional supplemental assessments available to more districts.

DEPARTMENT RESPONSE:

Education Law § 3012-d makes a clear distinction between SLOs and growth models. Growth models are traditionally known as a statistical measure of performance, while SLO's are a locally determined measure of growth. The regulatory definition is consistent with the traditional definition of "growth model" and the State-provided growth model.

74. COMMENT:

SAANYS proposes fairer scoring bands with more reasonable expectations for students to meet and includes a table of recommended scoring bands based on a scale of 1 through 4.

DEPARTMENT RESPONSE:

After lengthy discussion and debate at the June Board of Regents meeting, and after taking into account the recommendations from the May Learning Summit and other stakeholder feedback, the Board of Regents chose to adopt the scoring ranges specified in sections 30-3.4(c)(3) and 30-3.4(d)(1).

Additionally, the Department does not believe that there is a disproportionate amount of teachers that will receive an ineffective rating under the new regulations. However, the Department is required by law to review the impact annually and will amend the regulations if it finds that there is an unreasonably disproportionate amount of teachers that receive an ineffective rating, if necessary.

75. COMMENT:

SAANYS requests that the decision to use an unannounced observation be the subject of collective bargaining.

DEPARTMENT RESPONSE:

Education Law 3012-d(4)(b) requires the Commissioner to determine the minimum amount of observations, including the frequency, duration and parameters of observations. Section 30-3.4(d)(2)(vi) of the proposed amendment requires that at least one of the mandatory observations be unannounced. The Department believes that it within its authority to require an unannounced observation because it is considered to be a parameter of the observations and, therefore, is within the discretion of the Commissioner.

76. COMMENT:

Section 3012-d allowed the Regents to decide whether certain provisions of section 3012-c should remain in effect. It did not provide SED with the authority to unilaterally change those provisions. In three instances, the regulations make changes to the statute - the moving of TIP from a matter of collective bargaining to a management prerogative; the extent of individual teacher data to be disclosed to parents; and the expansion of SED's authority over corrective action plans to include sending the parties back to the bargaining table. SAANYS requests these changes be eliminated in the final regulations.

DEPARTMENT RESPONSE:

Education Law § 3012-d(15) authorizes the Commissioner to determine "the extent to which" certain provisions of Education Law § 3012-c shall apply to § 3012-d. Thus, it was within the discretion of the Board of Regents to determine the applicability of what portions of certain provisions in § 3012-c relating to TIPs/PIPs, corrective action and teacher data apply to Education Law § 3012-d.

77. COMMENT:

Disaggregate APPR ratings in order to track the impact of the teacher evaluation system on teachers of MLLs and determine if these teachers have disproportionately low ratings due to flaws in the APPR system and its inability to accurately assess true growth in MLL population in NYS. Ensure that every district has a meaningful, locally developed appeals process in place to correct any APPR rating that has been negatively affected by these unintended consequences. Encourage and facilitate the use of portfolio assessment and performance-based assessments and factor these into student performance metrics for schools that implement them.

DEPARTMENT RESPONSE:

The Department did consider various student subgroups, including students with disabilities and English language learners, in developing the regulations. Additionally, Sections 30-3.4 and 30-3.5 of the Rules of the Board of Regents require that SLOs include a minimum growth target of one year of expected growth, as determined by the Superintendent or his or her designee. In determining what constitutes one year of expected growth, the regulations allow the Superintendent or his or her designee to take into account poverty, students with disabilities, English language learner status and prior academic history. Thus, targets may vary based on a student's present level of performance and learning needs in order to close achievement gaps or move low-performance towards grade-level expectations.

Education Law § 3012-d(6) prohibits the use of artifacts of teacher practice in any subcomponent of a teacher's evaluation. Accordingly, sections 30-3.4(d)(2)(ix) and (x) of the Rules of the Board of Regents limit observations to only those subcomponents of the practice rubric that are observable, while at the same time recognizing that parts of the rubric that are not observable during classroom observations may be incorporated into the observation score where they are observed during any optional pre- or post-observation review or other natural conversations between teachers and their evaluators. The intention of the regulatory language is provide flexibility to districts and BOCES to implement observation procedures that provide meaningful feedback to educators on their practice while maintaining fidelity to the requirements of Education Law § 3012-d.

Moreover, performance assessments continue to be an allowable option in the statute. A Request for Qualifications ("RFQ") for allowable assessments has been issued and a list of the performance based assessments approved by the Department for use in evaluations will be posted on our website as they are approved. If your district or BOCES would like to use a performance assessment in its evaluations, it should submit the assessment through the RFQ process for consideration by the Department. The RFQ is available on the Department's website at http://www.p12.nysed.gov/compcontracts/rfq-15-001-assessments/ home.html.

78. COMMENT:

Ensure that all principals and/or evaluators who observe teachers of MLLs have the necessary expertise to do so. If outside evaluators are brought in, limit the weight of the outside observer to no more than 10% of the observation component, with the exact percentage to be determined at the local level. Ensure that any outside evaluators for teachers of MLLs are knowledgeable of the particular approach being used in the school in which teachers work.

DEPARTMENT RESPONSE:

All evaluators receive mandatory training prior to conducting teacher and principal evaluations. Section 30-3.10(b)(9) of the Rules of the Board of Regents requires that evaluators be trained on specific considerations in evaluating teachers and principals of ELLs and students with disabilities. Section 30-3.4(d)(2)(xiii)(b) requires observations conducted by independent impartial observers be weighted at a minimum of 10 percent. Therefore, districts may collectively bargain to have only 10% of the

observation category based on independent observers. See also Response to Comment #1.

79. COMMENT:

Recommend that the state test portion is decreased and that the locally developed assessments have the greatest weight. Recommend that the use of independent evaluators be limited as much as possible and that the weight of that observation be reduced. Ensure continuity the use of the already approved observation rubrics.

DEPARTMENT RESPONSE:

The weightings of the subcomponents within the student performance category were considered and, after lengthy discussion and debate at the May and June Board of Regents meetings, and after taking into account the recommendations from the May Learning Summit and other stakeholder feedback, the Board of Regents chose to adopt the current scores and weightings within the student performance category.

See Response to Comment #1 on use of independent evaluators.

Concerning the list of approved rubrics, section 30-3.9(e) of the Rules of the Board of Regents provides that the Department's lists of approved rubrics established pursuant to section 30-2.7 of the Part shall continue in effect until superseded by a list generated from a new RFQ.

80. COMMENT:

Recommend adding the following specific language regarding observations, "All observations must be followed with timely feedback to improve teacher performance and student learning."

DEPARTMENT RESPONSE:

The Department encourages timely feedback following observations in order to improve teacher performance and student learning. However, at this time, it is not a requirement that feedback be given by a deadline as timing of observation feedback is currently determined at the local level.

81. COMMENT:

In order to clarify communication to the field, the use of the phrase "locally determined" should be explicitly referenced wherever applicable and the Department should develop a guidance document, using clear, concise, and consistent language that will be available to the field prior to the beginning of the 2015-16 school year.

DEPARTMENT RESPONSE:

The Department has not defined locally determined because mandatory subjects of collective bargaining are determined by the Civil Service Law and are not within the jurisdiction of the Department.

82. COMMENT:

Require all observers (including independent evaluators) to demonstrate proficiency according to locally determined evidence based observation metrics to ensure inter-rater reliability and inter-rater agreement. Recommend that dialogue between the observer and the teacher take place prior to the observation, in the observation cycle, to assure the observers (including independent evaluators) understand the instructional context and intent.

DEPARTMENT RESPONSE:

Section 30-3.10(c) of the Rules of the Board Regents requires independent evaluators and peer evaluators to receive training on the teacher and leader standards, evidence-based observation techniques grounded in research and application and use of the State-approved rubric. Section 30-3.10(e) also requires districts to describe in their APPR plan their process for ensuring that all evaluators maintain inter-rater reliability over time and their process for recertifying evaluators. The Department encourages districts/BOCES to train evaluators on any additional information they may need to understand the instructional context and intent and to ensure inter-rater reliability, and such additional training shall be determined at the local.

83. COMMENT:

Recommend that the Department encourages the consideration of differentiated evaluation processes which recognize differences in teacher strengths and development areas which are locally determined, such as: National Board Certification, or participating in the National Board process; New York State Master Teacher; or focus on a target area such as content or instructional strategy, e.g. use of questioning.

DEPARTMENT RESPONSE:

The evaluation system for teachers and principals is prescribed by Education Law § 3012-d. Thus, the Department has no discretion in this regard.

84. COMMENT:

To have the principal or assistant principal out of the building for observations in other buildings, as well as the pre and post meetings that will need to take place will take a significant amount of time and leave our students, teachers and support staff with inadequate access to administration. This will also take away from an administrator's ability to be visible and build a school culture where we are regularly in the classrooms, not just when we have an observation. Overall, if the goal is to have an authentic model of evaluation, where teachers are held to higher standards, their building administrators need to be responsible for that.

DEPARTMENT RESPONSE:

Education Law § 3012-d(4)(b) requires that classroom observations be conducted by independent trained evaluators or other evaluators selected by the district. See response to Comment No. 1 on the use of independent observers.

85. COMMENT:

Remove the requirement in 30-3.5(d)(6) that the Superintendent must do at least one unannounced observation for principals so that the regulations more align with the teacher observations.

DEPARTMENT RESPONSE:

The Department has revised the regulation to allow an independent evaluator or a supervisor to conduct the unannounced observation for principals to make the regulation more aligned with the teacher evaluation system.

86. COMMENT:

It is recommended that, in regards to teacher and principal observation, it should be a superintendent's decision on the 80/20 or 90/10 decisions. For example: If we want to use the 80/20 split, we would want the independent evaluator to do the announced portion at 20% and the principal to do the unannounced portion at 80%. This should not be negotiable; it should be superintendent's decision. One of the biggest challenges for leaders is trying to figure out what is negotiable and what is not. Can you clarify?

DEPARTMENT RESPONSE:

The Public Employee Relations Board and the Civil Service Law are responsible for determining what constitutes a mandatory subject of negotiation. Such decisions are not within the jurisdiction of the Department.

87. COMMENT:

Allowing outside observers is absurd as the principals and assistant principals are the ones that best know the makeup of a class and can use the observations for improving teacher performance.

DEPARTMENT RESPONSE:

See Response to Comment #1.

88. COMMENT:

Could you explain the formula used to create a teacher or principal's growth score used in APPR? How does this benefit children? It doesn't, but you can certainly see how it benefits the myth that public schools are failing. How did you allow this nonsense to become a practice in schools? Why are we destroying our public schools to create a bell curve of accountability performance, which is created when we compare teachers to each other using student test score growth?

DEPARTMENT RESPONSE:

State-provided growth scores for educators in grades 4-8 are based on the Student Growth Percentiles (SGPs) of students in a particular course or school. SGPs are a measure of academic growth compared to similar students. Students enter teachers' classrooms at different levels of proficiency or prior academic achievement. A growth measure, rather than a measure of proficiency, gives all educators a chance to do well regardless of the academic starting points of their students. In addition to prior achievement, a number of other factors have also been demonstrated to impact student achievement, including disability status, economic disadvantage, and English language learner status. These types of characteristics are also included in the growth model when measuring growth compared to similar students in order to better isolate the impact of the educator on student performance. In fact, Education Law § 3012-d(4)(a)(1),as amended by § 3 of Subpart C of Part B of Chapter 20 of the Laws of 2015, now requires that the New York State Growth model include these characteristics. The New York State growth model therefore does not favor certain educators over others on the basis of their classroom make ups. Any teacher has the opportunity to receive any growth rating.

At a high level, student growth is measured by comparing the current year performance of similar students – students with the same prior achievement and other characteristics. The SGP indicates where a particular student falls in a distribution of similar students, that is, what proportion of similar students he or she performed as well as or better than. More specifically, this comparison of current year performance to similar students is done through a linear regression. A covariate adjustment model is used to form the comparison point against which a student's current performance is measured, based on similar students. A comprehensive description of this statistical model is available in the technical report on the growth model released annually. The most recent version, "2013-14 Growth Model for Educator Evaluation" is available here (https://www.engageny.org/resource/technical-report-growth-measures- 2013-14).

SGPs are then aggregated into educator-level Mean Growth Percentiles (MGPs). MGPs indicate what proportion of similar students, on average, an educator's students performed as well as or better than. MGPs are then used to assign particular effectiveness ratings (Highly Effective, Effective, Developing, Ineffective) and scores (0-20) to educators, a process which

also takes into account the level of precision in the MGP in order to ensure statistical certainty in the rating. This process is described more in the technical report referenced above, as well as guides for educators to interpret their State-provided growth scores available on www.engageny.org (the principal guide is available here, and the teacher guide is available here).

Not only does a measure of growth compared to similar students enable all educators to do well on this measure, but it also provides new information that district leaders, principals, and teachers can use to consider instructional practices and areas for development. Educators can look for patterns in growth that may indicate particular groups of students are growing more or less than others. How do MGPs compare across grades or subjects? Are there differences in teachers' MGPs that are surprising? For two teachers whose students demonstrate similar levels of proficiency, does one teacher have a higher MGP, indicating higher growth among his/her students compared to similar students? How might these teachers work together and share practices so that both teachers' students show high levels of growth in the future? Alongside other data about student and teacher performance, educator and student level growth measures provide additional information that schools and districts can use to inform their practices going forward.

89. COMMENT:

How can SED base an educator's performance on a state assessment which the public does not have faith in? More than 20% of students in New York State opted out of the 3 to 8 state tests due to poor quality and the recent firing of Pearson confirms that SED agrees with the general public. Furthermore, the debacle of the Algebra I Common Core Regents, which included material from Algebra II, further supports the notion that the New York assessments are not valid indicators of student performance. It is time to acknowledge a lack of oversight and professionalism, not exacerbate it with 3012-d that acts as if the state assessments are in fact valid measures of teacher performance.

DEPARTMENT RESPONSE:

The current evaluation system is prescribed by Education Law § 3012-d and thus the Department has no discretion in this regard. The Department will publish full technical documentation, including information on opt outs later this fall. Preliminary analysis shows that the model's technical characteristics – specifically, model fit and reliability – are consistent with prior years. In addition, we see no systematic relationships between teacher or school MGPs and the percent of SWD, ELL, or economically disadvantaged students in classrooms or schools. This means that teachers and schools with many and few ELL, SWD, and economically disadvantaged students receive high and low MGPs, also consistent with prior years.

90. COMMENT:

If a 7 - 12 Jr./Sr. High School building adopts a school-wide SLO based on the passing rates for all Regents exams, would grade 7 - 12 teachers, with appropriate Certifications within that building, be allowed to grade Regents exams now that they have a ''vested interest'' in the results? Can a teacher whose course ends in a NYS Assessment or NYS Regents exam, use a school-wide SLO for their student performance measure if the exam is contained within the school-wide SLO?

DEPARTMENT RESPONSE:

Section 30-3.3(b)(3) of the Rules of the Board of Regents requires that the assessment development, security and scoring processes utilized by a school district/BOCES must ensure that any assessments and/or measures used to evaluate teachers and principals are not disseminated to students before administration and that teachers and principals do not have a vested interest in the outcome of the assessments they score. Please see G6 of the § 3012-d APPR guidance document, which can be found on Engage NY at https://www.engageny.org/resource/guidance-on-new-york-s-annual-professional-performance-review-law-and- regulations.

91. COMMENT:

Several comments expressed concern that the Notice of Proposed Rulemaking is fatally defective, as it fails to identify the underlying science and research to support the rules, as required by the State Administrative Procedure Act (SAPA). The Notice's response to the ''Needs and Benefits'' section admits that expert input is required by law -- but then fails entirely to identify any study, report or analysis, or the producers of those reports or the citations, all in violation of the law. Not only is this omission in plain violation of the law -- depriving the public of its statutory right to give meaningful comment -- but the omission goes to the heart of the public's concerns about the rules. The public has been deeply troubled by the apparent arbitrariness and lack of science in prior APPR plans as well as in the new one, so much so that over 25,000 New Yorkers, including our state's most respected educators, signed a petition on this point. The need for the science and research is also imperative -- and legally required -- as some of the most controversial elements of the rules were not decided by the legislature, but instead were specifically delegated by the legislature to SED and the BOR, and their materials are essential to the rules' validity, as well as for public comment. Because of the failure to identify any science, research, analysis, or report, the proposed rule must be revoked.

The failure is against the law; as stated above, SAPA specifically requires this information, and SED chose to ignore that law. The failure also impedes democracy, as the public cannot meaningfully comment without the required information. The public comment is mandatory because the rule makers were appointed, not elected, and the comment is the only input that the public has on these rules. The failure also may indicate that in fact there is no support for these rules, that no science or research supports this. If this is the case, then the rules must be revoked on that basis.

DEPARTMENT RESPONSE:

See Response to Comment #48.

92. COMMENT:

The Westchester Putnam School Boards Association (WPSBA) expressed concerns that the new regulations rely on an untested, opaque, Value-Added Model (VAM); focus on three snapshots in time out of an entire school year (the student assessment and two evaluations - one by a principal and one by an outside evaluator); and, use a basic scoring grid rather than a matrix based on multiple measures. A VAM based on state assessments in a single classroom in a single year is neither research-based nor validated, and to date has not helped to inform instruction, support professional development or enhance student learning. The recent decision to allow school districts to opt to include local assessments does not nullify the VAM issue. The Senate and House versions of a reauthorized Elementary and Secondary Education Act (ESEA) allow for more flexibility in developing State accountability systems than is currently prescribed, with the House version promoting an optional link between standardized test results and accountability and the Senate version linking state tests and accountability at a weighting determined at the State level. NYS's emphasis on the VAM is out of synch with the federal direction.

DEPARTMENT RESPONSE:

The Department disagrees with this comment. There are numerous studies and articles that support the use of student growth models, including value-added models.[3]

93. COMMENT:

It is in the best interest of the students, staff and public education across NYS that we develop and implement an appropriate APPR evaluation system that incorporates the following steps: Board of Regents convenes a task force of qualified practitioners and independent experts to review the reliability, transparency, developmental appropriateness, and length of the state tests and to re-assess the validity of linking the State tests to the proposed evaluation system; move the deadline for school district submission of all modified APPR plans to September 2016; and Board of Regents, Commissioner of Education and State legislators perform a detailed review of the evaluation system, gather input from qualified practitioners and independent experts, and reject the elements of 3012-d which place undue reliance on the state test and two observations.

DEPARTMENT RESPONSE:

Education Law § 3012-d required the Board of Regents to adopt regulations to implement the new statute by June 30, 2015. The Department held a Learning Summit on May 7, 2015, wherein the Board of Regents hosted a series of panels to provide recommendations to the Board on the new evaluation system. Such panels included experts in education, economics, and psychometrics and State-wide stakeholder groups including, but not limited to, New York State United Teachers (NYSUT), the United Federation of Teachers (UFT), the New York State School Boards Association, the New York State Council of School superintendents (NYSCOSS) and principal and parent organizations. Since the new law was enacted in April, the Department has also been separately meeting with individual stakeholder groups to discuss their recommendations on the new evaluation system. Additionally, the Department created an email box (eval2015@nysed.gov) to accept comments on the new evaluation system. In addition, section 30-3.1 of the proposed amendment also provides that the Board will convene workgroup(s) comprised of stakeholders and experts in the field to provide recommendations to the Board on assessments and evaluations that could be used for APPRs in the future. Therefore, experts in the field and stakeholders recommendations were considered in the proposed amendment and they continue to be considered.

Education Law 3012-d(11) provides that APPR plans must be submitted by November 15, 2015 for a district to be eligible for their State aid increase. However, the appropriation language in Chapter 61 of the Laws of 2015 that links increases in school aid in for the 2015-2016 and 2016-2017 school years to submission of documentation that the district has implemented the APPR in accordance with Education Law § 3012-d requires such submission by November 15, 2015 or by September 1, 2016. Accordingly, the Department has, however, provided for a Hardship Waiver. Districts and BOCES that have collectively bargained in good faith but have been unable to meet the November 15th deadline are

required to submit a Hardship Waiver application to the Department between October 1st and October 30th. For districts, this is required in order to extend this deadline without risk of losing their eligibility for a State aid increase. More information on the hardship waiver can be found on the EngageNY website at https://www.engageny.org/resource/hardship-waiver-implementation-education- law-3012-d.

94. COMMENT:

Requested that the Department allow for flexibility in time needed to reach agreement on new teacher evaluations (APPR) and recognize – and provide districts that request "hardship" in this process – with the time and support they require to reach and implement these new requirements. Also requested flexibility in the proposed evaluative matrix that would allow local districts to develop appropriate systems that accurately reflect the effectiveness of its educators.

Further, commenter requested permanent separation of the link between approved evaluation systems under APPR with state aid. State leadership has been critical of the federal government guidelines which hold states hostage to receive federal funding, yet we, as a state, engage in the same extortion of districts.

DEPARTMENT RESPONSE:

Education Law 3012-d(11) provides that APPR plans must be submitted by November 15, 2015 for a district to be eligible for their State aid increase. However, the appropriation language in Chapter 61 of the Laws of 2015 that links increases in school aid in for the 2015-2016 and 2016-2017 school years to submission of documentation that the district has implemented the APPR in accordance with Education Law § 3012-d requires such submission by November 15, 2015 or by September 1, 2016. Accordingly, the Department has, however, provided for a Hardship Waiver. Districts and BOCES that have collectively bargained in good faith but have been unable to meet the November 15th deadline are required to submit a Hardship Waiver application to the Department between October 1st and October 30th. For districts, this is required in order to extend this deadline without risk of losing their eligibility for a State aid increase. More information on the hardship waiver can be found on the EngageNY website at https://www.engageny.org/resource/hardship-waiver-implementation-education- law-3012-d.

95. COMMENT:

To remove the aspects of goal setting and professional development in conjunction with that seems illogical. Some of my BEST discussions with teachers were around goal setting, professional development, and how it impacted learning in the classroom. There may not be a perfect bell curve in overall evaluations. Why must this be forced? This system appears overly punitive in general toward teachers instead of empowering them as the professionals they are. If "we" are talking about the few that just go through the motions etc., can't "we" find a way to get at that cancer instead of killing off the whole?

DEPARTMENT RESPONSE:

Education Law § 3012-d(6) sets forth a list of prohibited elements that can no longer be used in any subcomponent, which includes use of professional goal setting as evidence of teacher or principal effectiveness. The Department does not have authority to change this statutory prohibition.

96. COMMENT:

Policy makers are strongly encouraged to revisit the position papers and comments that preceded the enactment of 3012-c regulations and New York State Education Law 3012-d and its regulations (note: no educators were involved in the enactment of the original law; involvement in designing the regulations was patronizing at best) prior to finalizing regulations for 3012-d.

DEPARTMENT RESPONSE:

Education Law § 3012-d required the Department to promulgate regulations by June 30, 2015. See Response to Comment #3.

97. COMMENT:

Technical parameters alone will not ensure that teachers receive meaningful feedback. This will require extensive communication, transparency, capacity-building, professional development, and a comprehensive approach to talent management by school districts. The evaluation system must be void of technical parameters that inhibit, prohibit, and solely quantify meaningful feedback. Necessary extensive communication, transparency, capacity-building, professional development, and a comprehensive approach to talent management by school districts are neither inherently quantifiable technical actions nor quantifiable means to the ends of quality evaluation. Restrictions in regulations in review of artifacts and exclusive use of a minimum number of "observation cycles" eliminates any "extensive communication, transparency, capacity-building, and professional development are critical."

DEPARTMENT RESPONSE:

Pursuant to Education Law § 3012-d(6)(a), districts/BOCES are prohibited from using artifacts of teacher practice. § 30-3.4(d)(2)(xi) of the Rules of the Board of Regents incorporate this statutory requirement, while allowing some flexibility in cases where artifacts constitute evidence of an otherwise observable rubric subcomponent (e.g., a lesson plan viewed during the course of the observation may constitute evidence of professional planning). Further, the minimum number of observations required by § 30-3.4(d)(2)(i) is not a maximum, and so does not restrict the ability for districts/BOCES to locally determine whether to conduct more observations. Furthermore, § 30-3.4(d)(2)(viii) explicitly states: "Nothing in this Subpart shall be construed to limit the discretion of a board of education or superintendent of schools to conduct observations in addition to those required by this section for non-evaluative purposes."

APPR is one part of educator evaluations. It is important to leverage results from APPR into a comprehensive statewide strategy to support the continuous improvement of every educator with special emphasis on supporting high-need students, improving learning of English language learners and students with disabilities, advancing student learning in STEM (Science, Technology, Engineering, and Mathematics) disciplines, and improving the equitable distribution of highly effective teachers and leaders. This has been done through programs like STLE.

98. COMMENT:

Although emergency adoption occurred in June; no state regulations or local practices should be enacted until all components are deemed valid, reliable, and practical.

DEPARTMENT RESPONSE:

The Department disagrees with this comment and believes that the regulation is valid, reliable and practical and that properly adopted as an emergency action in order to timely implement the provisions of Subpart E of Part EE of Chapter 56 of the Laws of 2015 relating to a new annual evaluation system for classroom teachers and building principals.

99. COMMENT:

Revise the 30-3.7 regarding observations as follows, "Observations should focus on specific observable professional behaviors, while ensuring that all observable teaching standards are assessed each year. Artifacts should be allowed to the extent they constitute evidence of an otherwise observable rubric subcomponent including curriculum development, lesson planning, instruction, and assessments for learning and collected / cover an entire year (not solely an "observation cycle").

DEPARTMENT RESPONSE:

Education Law § 3012-d(6) sets forth a list of prohibited elements that can no longer be used in any subcomponent. This list prohibits the use of artifacts, including student portfolios from being used in any subcomponent of a teacher's evaluation. Accordingly, sections 30-3.4(d)(2)(ix) and (x) of the Rules of the Board of Regents limit observations to only those subcomponents of the practice rubric that are observable, while at the same time recognizing that parts of the rubric that are not observable during classroom observations may be incorporated into the observation score where they are observed during any optional pre- or post-observation review or other natural conversations between teachers and their evaluators. The intention of the regulatory language is provide flexibility to districts and BOCES to implement observation procedures that provide meaningful feedback to educators on their practice while maintaining fidelity to the requirements of Education Law § 3012-d.

100. COMMENT:

Revise the regulations such that multiple observations (principal/supervisor, independent, peer) MAY be combined through a weighted average. Weights should reflect the role of the principal as the instructional leader of a school. Using points for an observation should not be required although law appears to require it.

DEPARTMENT RESPONSE:

The impact of the observation component on a principal's overall evaluation rating is prescribed by Education Law § 3012-d(5). Accordingly, the matrix found in section 30-3.6 of the Rules of the Board of Regents, which is used to determine a principal's overall evaluation rating, conforms to those statutory requirements.

101. COMMENT:

The HEDI ratings for the observation category is an algorithmic conundrum that reduces planning, instruction, and assessment for learning (for example: strategies to motivate students or posing questions which require higher-order thinking) to a metric, quantifiable point system moments. This reduces what surveys show to be the most productive component of 3012-c, dialogue between supervisor and teacher, into a debate over points and scripted performance.

DEPARTMENT RESPONSE:

Education Law § 3012-d(6) sets forth a list of prohibited elements that can no longer be used in any subcomponent. This list prohibits the use of artifacts, including student portfolios from being used in any subcomponent of a teacher's evaluation. Accordingly, sections 30-3.4(d)(2)(ix) and (x) of the Rules of the Board of Regents limit observations to only those subcomponents of the practice rubric that are observable, while at the same time recognizing that parts of the rubric that are not observable during classroom observations may be incorporated into the observation score where they are observed during any optional pre- or post-observation

review or other natural conversations between teachers and their evaluators. The intention of the regulatory language is provide flexibility to districts and BOCES to implement observation procedures that provide meaningful feedback to educators on their practice while maintaining fidelity to the requirements of Education Law § 3012-d.

102. COMMENT:

There is no stipulation in law that the observation 1-4 score be calculated from observation subcomponents with points assigned to each; why is this regulation necessary?

DEPARTMENT RESPONSE:

Education Law 3012-d(4)(b) requires that the Commissioner determine the weights, and/or weighting options and scoring ranges for the subcomponents of the observations category that result in a combined category rating. Therefore, the law requires the Department to prescribe these ranges for the observation category.

103. COMMENT:

How does one write, legislate, and enact this restriction to evaluation over a few days in a 180 day year with any sense of professionalism? "Observation cycle" MUST be defined/interpreted as the annual cycle of evaluation from process review and goal setting to final submission of the evaluation. If "observation cycle" includes only the single observation, approximately 175 days of teacher preparation and examples of those lessons are not admissible in this process.

DEPARTMENT RESPONSE:

Please note that Subpart 30-3 of the Rules of the Board of Regents does not define what constitutes an observation cycle. Pursuant to Education Law § 3012-d(10)(b), the local collective bargaining representative shall negotiate with the district/BOCES how to implement the provisions of paragraph b of subdivision four of this section, which address the requirements for the observation category and associated regulations as established by the Commissioner, in accordance with article fourteen of the civil service law.

104. COMMENT:

The regulation states that teaching Standards/Domains that are part of the rubric but not observable during the classroom observation may be observed during a pre-observation conference or post-observation review or other natural conversations between the teacher and the principal/supervisor and incorporated into the observation score. This component MUST allow the "observation" of an artifact that relates to any component of the rubric any time during the year. It presumed that "points" in this component relate to a classroom observation; not points assigned to components of a rubric. "…other natural conversations between the teacher" must be defined to mean "during the entire school year."

DEPARTMENT RESPONSE:

Sections 30-3.4(d)(2)(ix) and (x) of the Rules of the Board of Regents limit observations to only those subcomponents of the practice rubric that are observable, but allows parts of the rubric that are not observable during classroom observations to be incorporated into the observation score where they are observed during any optional pre- or post-observation review or other natural conversations between teachers and their evaluators. The intention of the regulatory language is provide flexibility to districts and BOCES to implement observation procedures that provide meaningful feedback to educators on their practice while maintaining fidelity to the requirements of Education Law § 3012-d(6).

105. COMMENT:

One half of the statutory matrix is devoted to scoring teachers and principals based upon student performance, however this weight is excessive and reduces the value of classroom observations, which superintendents believe to have greater value in determining teacher effectiveness. It is the recommendation of the NYS Council of School Superintendents that the Department utilize its statutory authority in establishing weights for student performance measures to adjust the scoring ranges so as to lessen the value placed on student performance in relation to measures of observable professional practice.

DEPARTMENT RESPONSE:

The impact of the Student Performance Category on a teacher's overall evaluation rating is prescribed by Education Law § 3012-d(5). Accordingly, the matrix found in section 30-3.6 of the Rules of the Board of Regents, which is used to determine a teacher's or principal's overall evaluation rating, conforms to those statutory requirements and cannot be changed.

106. COMMENT:

The second half of the statutory matrix relies on observable measures of professional practice. Superintendents believe this should be the primary measure of teacher effectiveness. In the previous iteration of APPR, superintendents found the most value in what was referred to as "the other 60%" measures, with more than half of that category derived from principal-led classroom observations. By prohibiting the use of some elements now in the "other 60 percent" measures and by mandating use of independent observers, the new law is likely to damage the one part of APPR that seems to have been working, while creating a complicated and unfunded new mandate for schools to satisfy. With the addition of a scaled score for each observation, the currently beneficial conversations around improving instruction may be diminished to conversations surrounding allocation of points.

DEPARTMENT RESPONSE:

The subcomponents of the observation category are prescribed in statute and the requirement to use an independent evaluator in teacher and principal observations is prescribed by Education Law § 3012-d(4). Therefore the Department has no discretion in this regard. Additionally, Education Law § 3012-d(4)(a) requires that an APPR include a student performance component that is explicitly linked to student test scores. The State Education Department cannot decouple teacher evaluations from test scores because that would conflict with statute. Additionally, Education Law § 3012-d(6) sets forth a list of prohibited elements that can no longer be used in any subcomponent. This list prohibits the use of artifacts, including student portfolios from being used in any subcomponent of a teacher's evaluation. Accordingly, sections 30-3.4(d)(2)(ix) and (x) of the Rules of the Board of Regents limit observations to only those subcomponents of the practice rubric that are observable, while at the same time recognizing that parts of the rubric that are not observable during classroom observations may be incorporated into the observation score where they are observed during any optional pre- or post-observation review or other natural conversations between teachers and their evaluators. The intention of the regulatory language is provide flexibility to districts and BOCES to implement observation procedures that provide meaningful feedback to educators on their practice while maintaining fidelity to the requirements of Education Law § 3012-d.

See also Response to Comment #1 on use of independent observers.

107. COMMENT:

While the use of an independent evaluator is statutorily mandated, the Department has the authority to establish weights to such observations. Within the regulations, the Department has chosen to establish a weight of no less than 10% of the overall observation score and no more than 20% (with principal-led evaluation and peer evaluations to make up the remaining percentage, subject to local negotiation). It is the opinion of the NYS Council of School Superintendents that the weight given to observations by an independent evaluator be minimized to the maximum extent possible. Additionally, the use of independent evaluators should not be required for every teacher or principal every year but rather, should be utilized to differentiate a "fork in the road" where added scrutiny is given to those educators or administrators who have shown below-average scoring in another measure or on a previous evaluation.

DEPARTMENT RESPONSE:

Under Education Law 3012-d(10)(b), the local collective bargaining representative shall negotiate with the district how to implement the provisions of 3012-d(4)(b), i.e., teacher observations, and associated regulations as established by the Commissioner, in accordance with Article 14 of the Civil Service Law. Thus, districts have local discretion to determine what weight, within the constraints set forth by the Commissioner, to use for observations by independent evaluators.

See also Response to Comment #1 on use of independent evaluators.

108. COMMENT:

With respect to weights and scoring of observations, the establishment of statewide scoring bands is supported by NYS Council of School Superintendents, however the ranges to be locally negotiated are not ideal. The Council recommends adoption of scoring ranges that are universal, minimizing the need for local collective bargaining and minimizing potential for future claims of skewed local outcomes.

DEPARTMENT RESPONSE:

Education Law § 3012-d(4)(b) requires that the Commissioner determine the weights, and/or weighting options and scoring ranges for the subcomponents of the observations category that result in a combined category rating. Recognizing that there are over 700 districts and BOCES in New York State, the Department made the decision to provide districts and BOCES will flexibility to locally determine what works best in their unique context, but still defining minimum and maximum ranges of performance. Pursuant to Education Law § 3012-d(10)(b), the local collective bargaining representative shall negotiate with the district how to implement the provisions of § 3012-d(4)(b), i.e., teacher observations, and associated regulations as established by the Commissioner, in accordance with Article 14 of the Civil Service Law. Thus, districts/BOCES have local discretion to determine what weight, within the constraints set forth by the Commissioner, to use for observations by independent evaluators.

109. COMMENT:

While the prohibition from using artifacts of teacher practice within the evaluation is a component of the law itself, the statutory language can be read as narrowly drawn to exclude these elements only as "evidence of student development and performance…" The law contains no prohibition from using them elsewhere, such as evidence of classroom preparation or

good teacher practices. The regulations adopted by the department appear to be more restrictive than the law. The NYS Council of School Superintendents recommends the regulations be amended to expressly allow for use of lesson plans, other artifacts of teacher practice, and student portfolios for any purpose other than evidence of student development and performance.

DEPARTMENT RESPONSE:

Education Law § 3012-d(6) prohibits the use of artifacts of teacher practice in any subcomponent of a teacher's evaluation, except for student portfolios measured by a State approved rubric where permitted by the Department. Accordingly, sections 30-3.4(d)(2)(ix) and (x) of the Rules of the Board of Regents limit observations to only those subcomponents of the practice rubric that are observable, while at the same time recognizing that parts of the rubric that are not observable during classroom observations may be incorporated into the observation score where they are observed during any optional pre- or post-observation review or other natural conversations between teachers and their evaluators.

110. COMMENT:

Within the adopted emergency regulations, the NYS Council of School Superintendents suggests that waivers be created from the independent evaluation requirement for administrators where a school district employs a joint superintendent-principal or where two school districts share a superintendent. Waivers should be created from the independent evaluation requirement for teachers where a school district has a single principal. Flexibility should be provided to school districts to limit or use independent evaluations for both teachers and principals on a periodic or priority basis.

DEPARTMENT RESPONSE:

See Response to Comment #1.

111. COMMENT:

The NYS Council of School Superintendents recommends that the Department limit the use of collective bargaining in determining scoring ranges and observational metrics.

DEPARTMENT RESPONSE:

Pursuant to Education Law § 3012-d(10)(b), local collective bargaining representatives shall negotiate with the district how to implement the provisions of § 3012-d(4)(b), i.e., teacher observations, and associated regulations as established by the Commissioner, in accordance with Article 14 of the Civil Service Law. Thus, consistent with the law, the regulation provides districts/BOCES with local discretion to determine what weight, within the constraints set forth by the Commissioner, to use for observations by independent evaluators.

112. COMMENT:

The NYS Council of School Superintendents requests that the Department's decision to issue four-month waivers (up to September 1, 2016) to school districts unable to meet the November 15 deadline be placed directly within the regulations, along with specific guiding criteria to ensure that school districts are able to determine eligibility and likelihood of waiver approval.

DEPARTMENT RESPONSE:

Since this requirement is only in effect for one year, the Department does not believe it is necessary to put this waiver in regulation. Moreover, the Department has already released guidance and the application for hardship waivers can be found on Engage NY at https://www.engageny.org/resource/hardship-waiver-implementation-education-law- 3012-d.

113. COMMENT:

We are concerned about the impact of using inappropriate measures of student performance for Multilingual Learners (MLLs) and the impact of those measures within the APPR system. To address these concerns, NYSED should take action to disaggregate APPR ratings in order to track the impact of the teacher evaluation system on teachers of MLLs and determine if these teachers have disproportionately low ratings due to flaws in the APPR system and its inability to accurately assess real growth in MLL populations. This data should be made publicly available; ensure that every district has a meaningful, locally determined appeals process in place to correct any APPR rating that has been negatively affected by these unintended consequences; and, encourage and facilitate the use of portfolio assessments and performance-based assessments and factor these into student performance metrics for schools that implement them.

DEPARTMENT RESPONSE:

Section 30-3.4(b)(1)(ii) of the Rules of the Board of Regents requires that all SLOs measure at least one year's worth of academic growth for all students. Further, such targets, as determined by the superintendent or his or her designee, may take the following characteristics into account: poverty, students with disabilities, English language learners status and prior academic history. Further, for teachers who receive a growth score, § 30-3.2(p) and Education Law § 3012-d(4)(a)(1) as amended by § 3 of Subpart C of Part B of Chapter 20 of the Laws of 2015, each require that the growth model control for those same characteristics.

Concerning appeals, the law requires all districts to collectively bargain an appeals process. The criteria and eligibility are to be locally determined by the district (within the parameters set forth in Subpart 30-3 of the Rules of the Board of Regents).

Concerning portfolio assessments, such assessments can be submitted to the Assessment RFQ so long as they are accompanied by a rubric that must also be approved by the State as required by Education Law § 3012-d(6). All assessments used for APPR must be able measure a year's worth of academic growth. See § 30-3.4(b)(1)(ii) of the Rules of the Board of Regents.

114. COMMENT:

For teachers of MLLs, observations must be conducted by evaluators who are knowledgeable about appropriate instructional practices for these students. Outside evaluators may have limited understanding of the best approaches to teaching MLLs and may not be familiar with the schools' particular instructional approach. In order to ensure that teachers of MLLs are fairly and accurately evaluated in ways that promote their growth and the growth of their students, NYSED should limit the weight of the outside observer to no more than 10% of the observation component, if the external evaluator component is required, with the exact percentage to be determined locally; ensure that any outside evaluators for teachers of MLLs have demonstrated expertise in Multilingual Learner instruction and knowledge of best practices in the education of these students; and ensure that any outside evaluators for teachers of MLLs are knowledgeable of the particular research/evidenced-based approached being used in the school in which teachers work.

DEPARTMENT RESPONSE:

Pursuant to Education Law § 3012-d(4)(b)(2) and § 30-3.4(d)(2)(i)(b), independent evaluators are trained and selected by the district/BOCES. Therefore, there is nothing that restricts the ability of districts/BOCES to have those observations conducted by evaluators who are knowledgeable about appropriate instructional practices for particular student populations so long as those evaluators, if employed by the district, work in a different school building (defined by its BEDS Code) as the person being evaluated.

Concerning the weight for independent evaluators, under Education Law 3012-d(10)(b), the local collective bargaining representative shall negotiate with the district how to implement the provisions of 3012-d(4)(b), i.e., teacher observations, and associated regulations as established by the Commissioner, in accordance with Article 14 of the Civil Service Law within the constraints for weightings set forth by the Commissioner. See also Response to Comment #1.

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[1] See, e.g., Chetty, R. Friedman, J., Rockoff, J., Measuring the Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood. Retrieved July 15, 2015, from http://obs.rc.fas.harvard.edu/chetty/w19424.pdf.Chamberlain, G., Predictive effects of teachers and schools on test scores, college attendance and earnings. Retrieved July 15, 2015, from http://www.pnas.org/content/110/43/ 17176.abstract. Kane, T., (2008), National Bureau of Economic Research, Estimating Teacher Impacts on Student Achievement: An Experimental Evaluation. Retrieved July 15, 2015, from http://www.nber.org/papers/ w14607. Gates, B. & M., (2013), The Gates Foundation; The MET Project; Have we Identified Effective Teachers? Validating Measures of Effective Teaching Using Random Assignment, Retrieved July 16, 2015, from http://files.eric.ed.gov/fulltext/ ED540959.pdf. Chetty, R. Friedman, J., Rockoff, J., Measuring the Impacts of Teachers I: Evaluating Bias in Teacher Value-Added Estimates, Retrieved July 15, 2015, from http://obs.rc.fas.harvard.edu/chetty/ w19424.pdf. Bacher-Hicks, Kane, T. Staiger, D. Retrieved July 16, 2015 from https://scholar.harvard.edu/files/andrewbacherhicks/files/bacher-hicks__kane__staiger__validating__teacher__effects.pdf.

[2] See, e.g., Chetty, R. Friedman, J., Rockoff, J., Measuring the Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood. Retrieved July 15, 2015, from http://obs.rc.fas.harvard.edu/chetty/w19424.pdf.Chamberlain, G., Predictive effects of teachers and schools on test scores, college attendance and earnings. Retrieved July 15, 2015, from http://www.pnas.org/content/110/43/ 17176.abstract. Kane, T., (2008), National Bureau of Economic Research, Estimating Teacher Impacts on Student Achievement: An Experimental Evaluation. Retrieved July 15, 2015, from http://www.nber.org/papers/ w14607. Gates, B. & M., (2013), The Gates Foundation; The MET Project; Have we Identified Effective Teachers? Validating Measures of Effective Teaching Using Random Assignment, Retrieved July 16, 2015, from http://files.eric.ed.gov/fulltext/ ED540959.pdf. Chetty, R. Friedman, J., Rockoff, J., Measuring the Impacts of Teachers I: Evaluating Bias in Teacher Value-Added Estimates, Retrieved July 15, 2015, from http://obs.rc.fas.harvard.edu/chetty/ w19424.pdf. Bacher-Hicks, Kane, T. Staiger, D. Retrieved July 16, 2015 from https://scholar.harvard.edu/

files/andrewbacherhicks/files/bacher-hicks__kane__staiger__validating__teacher__effects.pdf.

[3] See, e.g., Chetty, R. Friedman, J., Rockoff, J., Measuring the Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood. Retrieved July 15, 2015, from http://obs.rc.fas.harvard.edu/chetty/w19424.pdf.Chamberlain, G., Predictive effects of teachers and schools on test scores, college attendance and earnings. Retrieved July 15, 2015, from http://www.pnas.org/content/110/43/ 17176.abstract. Kane, T., (2008), National Bureau of Economic Research, Estimating Teacher Impacts on Student Achievement: An Experimental Evaluation. Retrieved July 15, 2015, from http://www.nber.org/papers/ w14607. Gates, B. & M., (2013), The Gates Foundation; The MET Project; Have we Identified Effective Teachers? Validating Measures of Effective Teaching Using Random Assignment, Retrieved July 16, 2015, from http://files.eric.ed.gov/fulltext/ ED540959.pdf. Chetty, R. Friedman, J., Rockoff, J., Measuring the Impacts of Teachers I: Evaluating Bias in Teacher Value-Added Estimates, Retrieved July 15, 2015, from http://obs.rc.fas.harvard.edu/chetty/ w19424.pdf. Bacher-Hicks, Kane, T. Staiger, D. Retrieved July 16, 2015 from https://scholar.harvard.edu/files/andrewbacherhicks/files/bacher-hicks__kane__staiger__validating__teacher__effects.pdf.

Department of Environmental Conservation

NOTICE OF ADOPTION

Regulations Governing the Recreational Harvest of Black Sea Bass

I.D. No. ENV-19-15-00016-A
Filing No. 799
Filing Date: 2015-09-17
Effective Date: 2015-10-07

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

Action taken: Amendment of Part 40 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 13-0105 and 13-0340-f

Subject: Regulations governing the recreational harvest of black sea bass.

Purpose: To reduce recreational black sea bass harvest by 33% by increasing the minimum size limit to 14 inches.

Text or summary was published in the May 13, 2015 issue of the Register, I.D. No. ENV-19-15-00016-P.

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

Text of rule and any required statements and analyses may be obtained from: Stephen W. Heins, New York State Department of Environmental Conservation, 205 North Belle Mead Road, Suite 1, East Setauket, NY 11733, (631) 444-0435, email: steve.heins@dec.ny.gov

Additional matter required by statute: The action is subject to SEQR as an Unlisted action and a Short EAF was completed. The Department has determined that an EIS need not be prepared and has issued a negative declaration. The EAF and negative declaration are available upon request.

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

The Department received 6 comments via e-mail during the 45 day public comment period and they were generally negative with regards to the proposed rule.

Half of the comments focused on the healthy local abundance of black sea bass and the apparent absurdity of further restricting recreational black sea bass harvest in New York.

DEC response: Coast wide catch limits are set according to federal law that relies heavily upon stock assessments and measures of uncertainty surrounding the population size. Recent stock assessments have failed the review process resulting in very conservative catch limits. A new stock assessment is expected to be completed by early 2017 and will hopefully illustrate how abundant the fish are in New York and provide its anglers some relief from restrictions.

One commenter felt that the harvest estimates generated by the Marine Recreational Information Program and used by fishery managers were wrong and lacked realism. In particular they noted the increased landings despite more restrictive regulations and the growing harvest attributed to anglers fishing from private vessels as opposed to party boats which historically took a larger portion of recreational landings.

DEC response: Marine technology, including vessel construction and navigational aids, has improved substantially over the last 20 years allowing smaller private vessels to more effectively fish black sea bass.

A number of comments received also addressed the individual measures (minimum size limit, possession limit, and season) that were used to achieve the required 33% reduction. There were requests for an increased possession limit, both for all anglers, and those only fishing from private vessels. There were also requests for a longer season.

DEC response: Increased season length and possession limit would have to come at the expense of further increases in minimum size which has already been made larger by 1 inch.

The increase in minimum size was worrisome to one commenter who felt that this would result in additional discarded fish and bycatch mortality.

DEC response: The measures adopted in this rulemaking are a result of extensive feedback from the public and New York's Marine Resource Advisory Council. Discard mortality due to the minimum size increase was considered as was the effect that different possession limits and season length would have on private anglers, for-hire vessels and the many businesses associated with the marine recreational fishing industry.

NOTICE OF ADOPTION

Prevent Further Spread of the Emerald Ash Borer (EAB)

I.D. No. ENV-21-15-00010-A
Filing No. 803
Filing Date: 2015-09-18
Effective Date: 2015-10-07

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

Action taken: Addition of section 192.7 to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101(3)(b), (d), 3-0301(1)(b), (d), (2)(m), 9-0105(1), (3) and 9-1303; art. 9, title 13

Subject: Prevent further spread of the Emerald Ash Borer (EAB).

Purpose: To restrict EAB, ash wood and ash products infested with EAB to restricted zones where infestations exist.

Text of final rule: A new section 192.7 is added to 6 NYCRR Part 192 to read as follows:

Section 192.7 Control of the Emerald Ash Borer

(a) Purpose, scope and applicability.

(1) The purpose of this Part is to establish quarantines to protect New York's ash trees, forests, communities, homeowners, forest owners and forest industries from economic, environmental and social harm due to the death of ash trees caused by the invasive, exotic insect, emerald ash borer (Agrilus planipennis). The quarantines restrict the movement of emerald ash borer by regulating movement of host materials to slow the spread of this destructive pest into areas of New York State where it is currently not present, as part of the Department of Environmental Conservation's Forest Insect and Disease Control responsibilities under ECL section 9-1303.

(2) The regulations set forth in this Part are complemented by similar provisions found in New York State Agriculture and Markets regulations, in Part 141 of Title 1 of NYCRR, which establishes the same quarantines under their authority.

(b) Definitions.

For the purpose of this Part, the following words, names and terms shall be construed respectively, to mean:

(1) 'AML' means the Agriculture and Markets Law.

(2) 'Authorized handler' means any person who is granted a limited permit or certificate issued by NYSDAM or enters into a compliance agreement with NYSDAM.

(3) 'Ash' means all Fraxinus species including green ash (Fraxinus pennsylvanica), white ash (Fraxinus americana), black ash (Fraxinus nigra), blue ash (Fraxinus quadrangulata) and any horticultural cultivar of these species.

(4) 'Buffer area' means the zone surrounding the core area of emerald ash borer infestation, which begins at the outside boundary of the core area of infestation and extends outward for a distance of five miles.

(5) 'Certificate of inspection' means a document issued under the authority of NYSDAM certifying the eligibility of products for intrastate movement under the requirements set forth in Part 141 of Title 1 of NYCRR.

(6) 'Commissioner' means the commissioner of the Department of Environmental Conservation as well as meaning the Commissioner's designated agent.

(7) 'Compliance agreement' means a document issued by NYSDAM setting forth the requirements covering the restricted movement, processing, handling or utilization of regulated articles not eligible for certification for intrastate movement, which, if followed, permits the persons or firm executing the document to issue an inspection certificate or a limited permit pursuant to the terms of the document and this Part.

(8) 'Core area' means the location of an EAB infestation, as determined by the department and confirmed by the NYSDAM, based upon the detection of the emerald ash borer and/or evidence of its activity in one or more of its life stages at that location.

(9) 'Department' or 'DEC' means the New York State Department of Environmental Conservation.

(10) 'Emerald ash borer or EAB' means the insect known as the emerald ash borer, Agrilus planipennis, in any stage of development.

(11) 'Firewood' means, only with respect to this section, ash wood, cut or not cut, split or not split, regardless of length, which is either in a form and size appropriate for use as fuel, or intended for use as fuel. Firewood does not include: (1) kiln dried dimensional lumber; (2) wood that has been chipped; and (3) logs or wood being transported to or possessed by the following operations and facilities for use in their primary manufacturing process:

(i) sawmills for dimensional lumber;

(ii) pulp and/or paper mills;

(iii) wood pellet manufacturing facilities;

(iv) plywood manufacturing facilities;

(v) wood biomass-using refineries or power plants;

(vi) re-constituted wood or wood composite product manufacturing plants; and

(vii) facilities treating firewood in accordance with department regulations.

(12) 'Infestation' means the presence of the emerald ash borer in any life stage or as determined by evidence of activity of one or more of the life stages.

(13) 'Inspector' means an inspector of NYSDAM, or cooperator from DEC or the United States Department of Agriculture (USDA), when authorized by NYSDAM to act in that capacity.

(14) 'Limited permit' means a document issued under the authority of NYSDAM permitting the restricted movement of regulated articles from a quarantined area to a specified destination for specified processing, handling or utilization.

(15) 'Local government' means a village, town, city or county.

(16) 'Moved; movement' means shipped, offered or received for shipment, carried, transported, relocated into or through any area of the state.

(17) 'Nursery stock' means all trees, shrubs, plants and vines and parts thereof.

(18) 'NYSDAM' means the New York State Department of Agriculture and Markets.

(19) 'NYSDAM commissioner' means the Commissioner of the Department of Agriculture and Markets.

(20) 'Person' means any individual, firm, co-partnership, association or corporation other than the state or a public corporation, as the latter is defined in Article 2A of section 66 of the General Construction Law. A person will also mean the state, a public corporation or a municipal subdivision when set forth in the terms of a cooperative agreement authorized by ECL section 9-1302(1) providing for the agreement of the aforementioned group to be subject to these regulations.

(21) 'Quarantine map or quarantine maps' means an official map approved by NYSDAM, and promulgated pursuant to Part 141 of Title 1 of NYCRR, which delineates the boundaries of the restricted zones within the state which are subject to the requirements set forth in this section.

(22) 'Regulated article' means any ash material, living, dead, cut or fallen, inclusive of nursery stock, logs, firewood, green lumber, stumps, roots, branches and debris, and any wood material that is commingled and otherwise indistinguishable from the above. Notwithstanding the above, (i) ash bark and mulch are not regulated articles; and (ii) ash chips or chips indistinguishable from ash chips, regardless of size, are regulated articles only during the period commencing on April fifteenth and continuing up to and including May fifteenth.

(23) 'Restricted zone or restricted zones' means a geographic area of the state delineated on the EAB quarantine map, promulgated in Part 141 of Title 1 of NYCRR, which includes a core area of infestation, the buffer area and entire area of any town or city which has thirty (30) percent or more of its total area falling within the respective core area and/or the buffer area.

(c) Establishment and amendment of quarantine maps.

The commissioner shall consult and cooperate with NYSDAM in the preparation of quarantine maps, or any amendment or adjustment thereto. The restricted zones on the quarantine maps shall be subject to confirmation by the NYSDAM and shall be promulgated pursuant to NYSDAM regulations, Part 141 of Title 1 of NYCRR.

(d) Movement of regulated articles within restricted zones.

Regulated articles, including emerald ash borer infested material, may be moved, by any person, at any time, within a restricted zone, for processing, treatment, use or disposal at any other location within that same restricted zone provided the regulated article is eligible for unrestricted movement under all other state plant quarantines and regulations applicable to the regulated article.

(e) Restrictions on intrastate movement of regulated articles originating within or traveling through restricted zones.

(1) No person shall move:

(i) ash nursery stock from any restricted zone;

(ii) chips larger than one inch in two dimensions from the restricted zone during the period commencing on April fifteenth and continuing up to and including May fifteenth of each year; and

(iii) notwithstanding subparagraph (ii) above, regulated articles (other than ash nursery stock) from any restricted zone to or through any point outside the restricted zone, unless: (a) accompanied by a valid certificate of inspection; limited permit authorizing such movement, issued by NYSDAM; or administrative instructions of the NYSDAM Commissioner; or (b) for experimental or scientific purposes, on such conditions and under such safeguards as may be prescribed in writing by NYSDAM.

(2) Notwithstanding the above, regulated articles originating outside the restricted zone may be moved through a restricted zone, provided that:

(i) the points of origin and destination of the regulated articles are indicated on a waybill accompanying the regulated article; and

(ii) regulated articles are moved directly through the restricted zone without stopping, except for refueling and traffic conditions.

(f) Conditions governing compliance agreements for movement of regulated articles out of restricted zones.

(1) Persons engaged in growing, handling, or moving regulated articles intrastate may apply for a compliance agreement with NYSDAM, which agreement will authorize the person executing the agreement to issue certificates of inspection and limited permits without a NYSDAM inspection prior to shipment.

(2) Any person who enters into a compliance agreement with NYSDAM must agree to comply with the provisions of Part 141 of Title 1 of NYCRR, this section and any conditions imposed under a NYSDAM compliance agreement.

(3) A compliance agreement shall be subject to NYSDAM's acceptance in its sole discretion.

(4) Any compliance agreement may be cancelled by NYSDAM either orally or in writing, whenever an inspector determines, in his or her sole discretion, that the person who has entered into the compliance agreement has not complied with Part 141 of Title 1 of NYCRR or the conditions imposed under the compliance agreement. The cancellation shall take effect upon the giving of the oral notice or the delivery of the written notice. If the cancellation is oral, the cancellation and the reasons for the cancellation shall be confirmed in writing.

(g) Conditions governing certificates of inspection and limited permits for the movement of regulated articles out of restricted zones.

(1) An inspector or an authorized holder of a compliance agreement may issue a certificate of inspection for the movement of a regulated article out of a restricted zone, provided that the regulated article:

(i) is apparently free of emerald ash borer, based on an inspection by an inspector; or has been grown, produced, manufactured, treated, stored, or handled in a manner that, in the judgment of the inspector, prevents the regulated article from presenting a risk of spreading emerald ash borer; and

(ii) is eligible for unrestricted movement under all other state plant quarantines and regulations applicable to the regulated articles.

(2) If the regulated article is not eligible for a certificate of inspection, an inspector or authorized holder of a compliance agreement can issue a limited permit for the movement of the regulated article out of a restricted zone upon the following conditions:

(i) the inspector or authorized holder of a compliance agreement determines that the regulated article: ('a') is to be moved intrastate to a specified destination; ('b') for specific processing, handling, or utilization; and (iii) this intrastate movement will not result in the spread of emerald ash borer because emerald ash borer will be destroyed by the specific processing, handling, or utilization;

(ii) the regulated article is eligible for unrestricted movement under all other state plant quarantines and regulations applicable to the regulated article; and

(iii) the destination of the regulated articles and other conditions determined by the inspector are stated in the limited permit.

(3) An inspector or authorized holder of a compliance agreement may provide additional certificates of inspection or limited permits pursuant to the terms of a compliance agreement or authorize, in writing, reproduction of the certificates of inspection on shipping containers, or both, as requested by the person operating under the compliance agreement. These certificates of inspection and limited permits may then be completed and used, as needed, for the movement out of a restricted zone of regulated articles that have met all of the requirements of Part 141 of Title 1 of the NYCRR and this section.

(4) Any certificate of inspection or limited permit may be cancelled orally or in writing by an inspector whenever the inspector determines that the holder of the certificate of inspection or limited permit has not complied with Part 141 of Title 1 of the NYCRR. If the cancellation is oral, the cancellation will become effective immediately, and the cancellation and the reasons for the cancellation will be confirmed in writing.

(h) Shipments for experimental and scientific purposes.

Regulated articles may be moved intrastate for experimental or scientific purposes, on such conditions and under such safeguards as may be prescribed in writing by NYSDAM. The container of articles so moved shall bear, securely attached to the outside thereof, an identifying tag issued by NYSDAM showing compliance with such conditions.

(i) Marking requirements.

Every container of regulated articles intended for intrastate movement shall be plainly marked with the name and address of the consignor and the name and address of the consignee, when offered for shipment, and shall have securely attached to the outside thereof a valid certificate (or limited permit) issued in compliance with Part 141 of Title 1 of the NYCRR, provided, that:

(1) For lot freight shipments, other than by road vehicle, one certificate may be attached to one of the containers and another to the waybill; and for carlot freight or express shipment, either in containers or in bulk, a certificate may be attached to the waybill only and a placard to the outside of the car, showing the number of the certificate accompanying the waybill; and

(2) For movement by road vehicle, the certificate shall accompany the vehicle and be surrendered to consignee upon delivery of shipment.

(j) Assembly of regulated articles for inspection.

(1) Persons intending to move intrastate any regulated articles shall make application for certification as far in advance as possible, and will be required to prepare and assemble materials at such points and in such manner as the inspector shall designate, so that thorough inspection may be made or approved treatments applied. Articles to be inspected as a basis for certification must be free from matter which makes inspection impracticable.

(2) NYSDAM and/or the department will not be responsible for any cost incident to

(3) inspection, treatment, or certification other than the services of the inspector.

(k) Inspection and disposition of shipments.

(1) Any DEC official, authorized agent or law enforcement officer ("official") acting hereunder may investigate any vehicle, package or container which holds ash, nursery stock or other regulated articles which are infested, or which the official reasonably believes may contain an infestation, and such vehicle, package or container may be examined by the official at any time or place. When regulated articles are found to be moving or to have been moved intrastate in violation of this Part, the official may take such action as deemed necessary to eliminate the danger of dissemination of emerald ash borer. If found to be infested, any regulated articles or other materials regulated by this Part must be rendered free of infestation without cost to the state, except that for inspection and supervision. In addition to any other enforcement authority provided by law or regulation, where there is reasonable cause to believe that untreated firewood is moving or may have been moved in violation of any provision set forth in this section or any other provision of Title 6, any law enforcement officer may order that such untreated firewood be returned to its source, or confiscated and destroyed, at the expense of the violator and without cost to the state, in order to control the spread of forest insects in any stage of development and forest tree disease pursuant to ECL section 9-1303.

(2) Disposal of a regulated article shall include the discharge, deposit, dumping or placing of any regulated article into or on any land or water in a manner that prevents the establishment, introduction or spread of EAB within the restricted zone which contained the source of the regulated article. Any such disposal must be in accordance with all applicable laws and regulations.

(l) Other laws and regulations.

No provision of this section relieves any person from the obligation to comply with any other applicable federal, state, county regional or local law or regulation. This section only applies to the intrastate movement of regulated articles. The interstate movement of regulated articles must comply with applicable federal laws and regulations.

(m) Effective date.

This section shall become effective in a particular county on and after the tenth day from the filing of a certified copy in the office of the clerk of that county.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 192.7(b), (c), (e), (e)(1)(ii), (g)(2)(i) and (i)(1).

Text of rule and any required statements and analyses may be obtained from: Bruce Williamson, Chief Bureau of Private Land Services, NYS Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4253, (518) 402-9425, email: bruce.williamson@dec.ny.gov

Additional matter required by statute: A Negative Declaration has been prepared in compliance with Article 8 of the Environmental Conservation Law.

Revised Regulatory Impact Statement

Non-substantive changes were made to the rule that do not necessitate revision to the previously published RIS. The non-substantive revision to the express terms allows for the movement of wood chips from a restricted zone during flight season if they are of a certain size, not larger than one inch in two dimensions.

Revised Regulatory Flexibility Analysis

Non-substantive changes were made to the rule that do not necessitate revision to the previously published RFA statement. The non-substantive revision to the express terms allows for the movement of wood chips from a restricted zone during flight season if they are of a certain size, not larger than one inch in two dimensions. This revision does not result in any impact on small businesses and local governments in the State.

Revised Rural Area Flexibility Analysis

Non-substantive changes were made to the rule that do not necessitate revision to the previously published RAFA. The non-substantive revision to the express terms allows for the movement of wood chips from a restricted zone during flight season if they are of a certain size, not larger than one inch in two dimensions. This revision does not result in any impact on rural communities in the State.

Revised Job Impact Statement

Non-substantive changes were made to the rule that do not necessitate revision to the previously published JIS. The non-substantive revision to the express terms allows for the movement of wood chips from a restricted zone during flight season if they are of a certain size, not larger than one inch in two dimensions. These revisions do not result in any impact on jobs and employment opportunities in the State.

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

The Department received public comments on the addition of a new section 192.7 of Part 192 which would help control the spread of the Emerald Ash Borer (EAB) in New York State. The Department received two comments during the public comment period.

First Comment:

The first comment was submitted by Eric Carlson, President and CEO of the Empire State Forest Products Association. Mr. Carlson raises four issues and concerns in his comments, as follows:

Issue/Concern: Mr. Carlson expresses the view that the past regulatory framework has done very little to slow the spread of EAB and that except for the Adirondacks, EAB is in every region of the State.

Response: The Department disagrees. Surveys reveal that EAB is not in every region of the State and in fact, only approximately 7.3 percent of New York State has been found to be infested with the pest. The Department believes that its EAB quarantine order, coupled with the department's regulations restricting movement of untreated firewood and the New York State Department of Agriculture and Markets (NYSDAM) EAB quarantine regulation, have significantly slowed the spread of EAB in New York State.

Issue/Concern: Mr. Carlson expresses the view that EAB infestations have spread due to local concentrations of ash trees, and expects the pattern to continue under the new regulations. He also indicates that the regulations would impact local wood harvesting entities and consumers, since extra handling to separate ash from other wood species would be necessary and would limit sales of untreated ash firewood. Mr. Carlson says that although the restrictions in the regulations would not be a large factor in firewood availability, the restrictions would contribute to local shortages of firewood in certain regions of New York State. Finally, Mr. Carlson indicates that firewood producers in any of the restricted zones set forth in the regulations would be placed at a competitive disadvantage in supplying local markets.

Response: Notwithstanding local concentrations of ash trees, evidence suggests that the quarantines instituted by both the Department and NYSDAM have slowed the spread of EAB, particularly in the case of human-assisted movement which allows the pest to infest areas far beyond its point of origin. The Department agrees (as Mr. Carlson notes) that market factors other than the restrictions in the regulations have contributed to firewood shortages in some areas. The Department believes that the economic and environmental benefits of the regulation in protecting New York State's natural resources from the spread of EAB outweighs the costs to regulated parties. In any event, these costs to firewood producers are mitigated by the fact that the regulations allow for the sale of ash firewood within a restricted zone; allow for the sale and movement of firewood other than ash outside a restricted zone; and allow any heat-treated firewood to be sold and moved throughout New York State.

Issue/Concern: Mr. Carlson questions the overall benefit of separating logs by species and restricting movement of infested ash wood in more populated areas where expensive trees being used along public roads and in public parks are being impacted. He recommends that the Department reconsider the regulations and possibly eliminate them, while continuing outreach to populated regions to assist communities in understanding measures to consider in implementing practical, cost-effective strategies.

Response: The regulations are but one component of the State's overall response to EAB. Other aspects include ongoing outreach and educational efforts aimed at reducing the human-assisted spread of EAB; technical and financial assistance to communities in preparing for and responding to EAB; and participation in bio-control research. Outreach efforts with communities and regulated parties are ongoing. The Department and NYSDAM are monitoring the status of the EAB infestations as well as new detections. Amendments to the regulations are possible if circumstances so warrant.

Issue/Concern: Mr. Carlson argues that the likelihood of EAB surviving the chipping operations at a mill is very low and urges that the restriction concerning the transport of ash wood chips during EAB flight season be removed. He says that the restriction "imposes serious material handling problems while creating new worker safety concerns." He also says that the restriction diminishes the value of the chips for other wood products.

Response: Section 192.7(e)(1)(ii) of the regulations provides that no person shall move "chips of any size from the restricted zone during the period commencing on April fifteenth and continuing up to and including May fifteenth of each year …" The Department has considered Mr. Carlson's comment as well as applicable federal protocols. In an effort to clarify the regulations, the Department is making a non-substantial change to section 192.7(e)(1)(ii) to read that no person shall move "chips larger than one inch in two dimensions from the restricted zone during the period commencing on April fifteenth and continuing up to and including May fifteenth of each year …"

Chips below this size threshold meet the established Federal and state treatment specifications for preventing spread of EAB and therefore, other provisions notwithstanding, they may be allowed to move without further restriction.

This change eases a regulatory burden and addresses Mr. Carlson's concern at least in part, by allowing movement of very small ('treated") chips (one inch or less in two dimensions) during flight season.

Second Comment:

The second comment was submitted by Thomas Gerow of the Wagner Companies in Owego, New York. He raises the following issue/concern:

Issue/Concern: Like Mr. Carlson, Mr. Gerow questions the need for the prohibition against the movement of wood chips during the EAB flight season (April 15th – May 15th). He believes it is "not impossible, just extremely unlikely" that EAB could survive the chipping process.

Response: As noted above, the Department has changed section 192.7(e)(1)(ii) to allow the movement during flight season of chips which are one inch or less in two dimensions.

Department of Financial Services

EMERGENCY RULE MAKING

Assessment of Entities Regulated by the Banking Division of the Department of Financial Services

I.D. No. DFS-40-15-00002-E
Filing No. 798
Filing Date: 2015-09-16
Effective Date: 2015-09-17

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

Action taken: Addition of Part 501 to Title 3 NYCRR.

Statutory authority: Banking Law, section 17; and Financial Services Law, section 206

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

Specific reasons underlying the finding of necessity: Pursuant to the Financial Services Law ("FSL"), the New York State Banking Department ("Banking Department") and the New York State Insurance Department were consolidated, effective October 3, 2011, into the Department of Financial Services ("Department").

Prior to the consolidation, assessments of institutions subject to the Banking Law ("BL") were governed by Section 17 of the BL; effective on October 3, 2011, assessments are governed by Section 206 of the Financial Services Law, provided that Section 17 continues to apply to assessments for the fiscal year which commenced April 1, 2011.

Both Section 17 of the Banking Law and Section 206 of the Financial Services Law provide that all expenses (compensation, lease costs and other overhead) of the Department in connection with the regulation and supervision (including examination) of any person or entity licensed, registered, incorporated or otherwise formed pursuant to the BL are to be charged to, and paid by, the regulated institutions subject to the supervision of in the Banking Division of the Department (the "Banking Division"). Under both statutes, the Superintendent is authorized to assess regulated institutions in the Banking Division in such proportions as the Superintendent shall deem just and reasonable.

Litigation commenced in June, 2011 challenged the methodology used by the Banking Department to assess mortgage bankers. On May 3, 2012, the Appellate Division invalidated this methodology for the 2010 State Fiscal Year, finding that the former Banking Department had not followed the requirements of the State Administrative Procedures Act.

In response to this ruling, the Department has determined to adopt this new rule setting forth the assessment methodology applicable to all entities regulated by the Banking Division for fiscal years beginning with fiscal year 2011.

The emergency adoption of this regulation is necessary to implement the requirements of Section 17 of the Banking Law and Section 206 of the Financial Services Law in light of the determination of the Court and the ongoing need to fund the operations of the Department without interruption.

Subject: Assessment of entities regulated by the Banking Division of the Department of Financial Services.

Purpose: New Part 501 implements Section 17 of the Banking Law and Section 206 of the Financial Services Law and sets forth the basis for allocating all costs and expenses attributable to the operation of the Banking Division of the Department of Financial Services among and between any person or entity licensed, registered, incorporated or otherwise formed pursuant the Banking Law.

Text of emergency rule: *Part 501*
BANKING DIVISION ASSESSMENTS
§ 501.1 Background.
Pursuant to the Financial Services Law ("FSL"), the New York State Banking Department ("Banking Department") and the New York State Insurance Department were consolidated on October 3, 2011 into the Department of Financial Services ("Department").
Prior to the consolidation, assessments of institutions subject to the Banking Law ("BL") were governed by Section 17 of the BL. Effective October 3, 2011, assessments are governed by Section 206 of the FSL, provided that Section 17 of the BL continues to apply to assessments for the fiscal year commencing on April 1, 2011.

Both Section 17 of the BL and Section 206 of the FSL provide that all expenses (including, but not limited to, compensation, lease costs and other overhead costs) of the Department attributable to institutions subject to the BL are to be charged to, and paid by, such regulated institutions. These institutions ("Regulated Entities") are now regulated by the Banking Division of the Department. Under both Section 17 of the BL and Section 206 of the FSL, the Superintendent is authorized to assess Regulated Entities for its total costs in such proportions as the Superintendent shall deem just and reasonable.

The Banking Department has historically funded itself entirely from industry assessments of Regulated Entities. These assessments have covered all direct and indirect expenses of the Banking Department, which are activities that relate to the conduct of banking business and the regulatory concerns of the Department, including all salary expenses, fringe benefits, rental and other office expenses and all miscellaneous and overhead costs such as human resource operations, legal and technology costs.

This regulation sets forth the basis for allocating such expenses among Regulated Entities and the process for making such assessments.

§ 501.2 Definitions.

The following definitions apply in this Part:

(a) "Total Operating Cost" means for the fiscal year beginning on April 1, 2011, the total direct and indirect costs of operating the Banking Division. For fiscal years beginning on April 1, 2012, "Total Operating Cost" means (1) the sum of the total operating expenses of the Department that are solely attributable to regulated persons under the Banking Law and (2) the proportion deemed just and reasonable by the Superintendent of the other operating expenses of the Department which under Section 206(a) of the Financial Services Law may be assessed against persons regulated under the Banking Law and other persons regulated by the Department.

(b) "Industry Group" means the grouping to which a business entity regulated by the Banking Division is assigned. There are three Industry Groups in the Banking Division:

(1) The Depository Institutions Group, which consists of all banking organizations and foreign banking corporations licensed by the Department to maintain a branch, agency or representative office in this state;

(2) The Mortgage-Related Entities Group, which consists of all mortgage brokers, mortgage bankers and mortgage loan servicers; and

(3) The Licensed Financial Services Providers Group, which consists of all check cashers, budget planners, licensed lenders, sales finance companies, premium finance companies and money transmitters.

(c) "Industry Group Operating Cost" means the amount of the Total Operating Cost to be assessed to a particular Industry Group. The amount is derived from the percentage of the total expenses for salaries and fringe benefits for the examining, specialist and related personnel represented by such costs for the particular Industry Group.

(d) "Industry Group Supervisory Component" means the total of the Supervisory Components for all institutions in that Industry Group.

(e) "Supervisory Component" for an individual institution means the product of the average number of hours attributed to supervisory oversight by examiners and specialists of all institutions of a similar size and type, as determined by the Superintendent, in the applicable Industry Group, or the applicable sub-group, and the average hourly cost of the examiners and specialists assigned to the applicable Industry Group or sub-group.

(f) "Industry Group Regulatory Component" means the Industry Group Operating Cost for that group minus the Industry Group Supervisory Component and certain miscellaneous fees such as application fees.

(g) "Industry Financial Basis" means the measurement tool used to distribute the Industry Group Regulatory Component among individual institutions in an Industry Group.

The Industry Financial Basis used for each Industry Group is as follows:

(1) For the Depository Institutions Group: total assets of all institutions in the group;

(2) For the Mortgage-Related Entities Group: total gross revenues from New York State operations, including servicing and secondary market revenues, for all institutions in the group; and

(3) For the Licensed Financial Services Providers Group: (i.) for budget planners, the number of New York customers; (ii.) for licensed lenders, the dollar amount of New York assets; (iii.) for check cashers, the dollar amount of checks cashed in New York; (iv.) for money transmitters, the dollar value of all New York transactions; (v.) for premium finance companies, the dollar value of loans originated in New York; and (vi.) for sales finance companies, the dollar value of credit extensions in New York.

(h) "Financial Basis" for an individual institution is that institution's portion of the measurement tool used in Section 501.2(g) to develop the Industry Financial Basis. (For example, in the case of the Depository Institutions Group, an entity's Financial Basis would be its total assets.)

(i) "Industry Group Regulatory Rate" means the result of dividing the Industry Group Regulatory Component by the Industry Financial Basis.

(j) "Regulatory Component" for an individual institution is the product of the Financial Basis for the individual institution multiplied by the Industry Group Regulatory Rate for that institution.

§ 501.3 Billing and Assessment Process.

The New York State fiscal year begins April 1 and ends March 31 of the following calendar year. Each institution subject to assessment pursuant to this Part is billed five times for a fiscal year: four quarterly assessments (each approximately 25% of the anticipated annual amount) based on the Banking Division's estimated annual budget at the time of the billing, and a final assessment (or "true-up"), based on the Banking Division's actual expenses for the fiscal year. Any institution that is a Regulated Entity for any part of a quarter shall be assessed for the full quarter.

§ 501.4 Computation of Assessment.

The total annual assessment for an institution shall be the sum of its Supervisory Component and its Regulatory Component.

§ 501.5 Penalties/Enforcement Actions.

All Regulated Entities shall be subject to all applicable penalties, including late fees and interest, provided for by the BL, the FSL, the State Finance law or other applicable laws. Enforcement actions for nonpayment could include suspension, revocation, termination or other actions.

§ 501.6 Effective Date.

This Part shall be effective immediately. It shall apply to all State Fiscal Years beginning with the Fiscal Year starting on April 1, 2011.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 14, 2015.

Text of rule and any required statements and analyses may be obtained from: Hadas A. Jacobi, Esq., Department of Financial Services, One State Street, New York, NY 10004, (212) 480-5890, email: hadas.jacobi@dfs.ny.gov

Regulatory Impact Statement

1. Statutory Authority

Pursuant to the Financial Services Law ("FSL"), the New York State Banking Department (the "Banking Department") and the New York State Insurance Department were consolidated, effective October 3, 2011, into the Department of Financial Services (the "Department").

Prior to the consolidation, assessments of institutions subject to the Banking Law ("BL") were governed by Section 17 of the BL; effective on October 3, 2011, assessments are governed by Section 206 of the Financial Services Law, provided that Section 17 continues to apply to assessments for the fiscal year which commenced April 1, 2011.

Both Section 17 of the BL and Section 206 of the FSL provide that all expenses (compensation, lease costs and other overhead) of the Department in connection with the regulation and supervision of any person or entity licensed, registered, incorporated or otherwise formed pursuant to the BL are to be charged to, and paid by, the regulated institutions subject to the supervision of the Banking Division of the Department (the "Banking Division"). Under both statutes, the Superintendent is authorized to assess regulated institutions in the Banking Division in such proportions as the Superintendent shall deem just and reasonable.

In response to a court ruling, In the Matter of Homestead Funding Corporation v. State of New York Banking Department et al., 944 N.Y.S. 2d 649 (2012) ("Homestead"), that held that the Department should adopt changes to its assessment methodology for mortgage bankers through a formal assessment rule pursuant to the requirements of the State Administrative Procedures Act ("SAPA"), the Department has determined to adopt this new regulation setting forth the assessment methodology applicable to all entities regulated by the Banking Division for fiscal years beginning with fiscal year 2011.

2. Legislative Objectives

The BL and the FSL make the industries regulated by the former Banking Department (and now by the Banking Division of the new Department) responsible for all the costs and expenses of their regulation by the State. The assessments have covered all direct and indirect expenses of the Banking Department, which are activities that relate to the conduct of banking business and the regulatory concerns of the Department, including all salary expenses, fringe benefits, rental and other office expenses and all miscellaneous and overhead costs such as human resource operations, legal and technology costs.

This reflects a long-standing State policy that the regulated industries are the appropriate parties to pay for their supervision in light of the financial benefits it provides to them to engage in banking and other regulated businesses in New York. The statute specifically provides that these costs are to be allocated among such institutions in the proportions deemed just and reasonable by the Superintendent.

While this type of allocation had been the practice of the former Banking Department for many decades, Homestead found that a change to the methodology for mortgage bankers to include secondary market and

servicing income should be accomplished through formal regulations subject to the SAPA process. Given the nature of the Banking Division's assessment methodology - - the calculation and payment of the assessment is ongoing throughout the year and any period of uncertainty as to the applicable rule would be extremely disruptive - - the Department has determined that it is necessary to adopt the rule on an emergency basis so as to avoid any possibility of disrupting the funding of its operations.

3. Needs and Benefits

The Banking Division regulates more than 250 state chartered banks and licensed foreign bank branches and agencies in New York with total assets of over $2 trillion. In addition, it regulates a variety of other entities engaged in delivering financial services to the residents of New York State. These entities include: licensed check cashers; licensed money transmitters; sales finance companies; licensed lenders; premium finance companies; budget planners; mortgage bankers and brokers; mortgage loan servicers; and mortgage loan originators.

Collectively, the regulated entities represent a spectrum, from some of the largest financial institutions in the country to the smallest, neighborhood-based financial services providers. Their services are vital to the economic health of New York, and their supervision is critical to ensuring that these services are provided in a fair, economical and safe manner.

This supervision requires that the Banking Division maintain a core of trained examiners, plus facilities and systems. As noted above, these costs are by statute to be paid by all regulated entities in the proportions deemed just and reasonable by the Superintendent. The new regulation is intended to formally set forth the methodology utilized by the Banking Division for allocating these costs.

4. Costs

The new regulation does not increase the total costs assessed to the regulated industries or alter the allocation of regulatory costs between the various industries regulated by the Banking Division. Indeed, the only change from the allocation methodology used by the Banking Department in the previous state fiscal years is that the regulatory costs assessed to the mortgage banking industry will be divided among the entities in that group on a basis which includes income derived from secondary market and servicing activities. The Department believes that this is a more appropriate basis for allocating the costs associated with supervising mortgage banking entities.

5. Local Government Mandates

None.

6. Paperwork

The regulation does not change the process utilized by the Banking Division to determine and collect assessments.

7. Duplication

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

8. Alternatives

The purpose of the regulation is to formally set forth the process employed by the Department to carry out the statutory mandate to assess and collect the operating costs of the Banking Division from regulated entities. In light of Homestead, the Department believes that promulgating this formal regulation is necessary in order to allow it to continue to assess all of its regulated institutions in the manner deemed most appropriate by the Superintendent. Failing to formalize the Banking Division's allocation methodology would potentially leave the assessment process open to further judicial challenges.

9. Federal Standards

Not applicable.

10. Compliance Schedule

The emergency regulations are effective immediately. Regulated institutions will be expected to comply with the regulation for the fiscal year beginning on April 1, 2011 and thereafter.

Regulatory Flexibility Analysis

1. Effect of the Rule:

The regulation does not have any impact on local governments.

The regulation simply codifies the methodology used by the Banking Division of the Department of Financial Services (the "Department") to assess all entities regulated by it, including those which are small businesses. The regulation does not increase the total costs assessed to the regulated industries or alter the allocation of regulatory costs between the various industries regulated by the Banking Division.

Indeed, the only change from the allocation methodology used by the Banking Department in the previous state fiscal years is that the regulatory costs assessed to the mortgage banking industry will be divided among the entities in that group on a basis which includes income derived from secondary market and servicing activities. The Department believes that this is a more appropriate basis for allocating the costs associated with supervising mortgage banking entities. It is expected that the effect of this change will be that larger members of the mortgage banking industry will pay an increased proportion of the total cost of regulating that industry, while the relative assessments paid by smaller industry members will be reduced.

2. Compliance Requirements:

The regulation does not change existing compliance requirements. Both Section 17 of the Banking Law and Section 206 of the Financial Services Law provide that all expenses (compensation, lease costs and other overhead) of the Department in connection with the regulation and supervision of any person or entity licensed, registered, incorporated or otherwise formed pursuant to the Banking Law are to be charged to, and paid by, the regulated institutions subject to the supervision of the Banking Division. Under both statutes, the Superintendent is authorized to assess regulated institutions in the Banking Division in such proportions as the Superintendent shall deem just and reasonable.

3. Professional Services:

None.

4. Compliance Costs:

All regulated institutions are currently subject to assessment by the Banking Division. The regulation simply formalizes the Banking Division's assessment methodology. It makes only one change from the allocation methodology used by the Banking Department in the previous state fiscal years. That change affects only one of the industry groups regulated by the Banking Division. Regulatory costs assessed to the mortgage banking industry are now divided among the entities in that group on a basis which includes income derived from secondary market and servicing activities. Even within the one industry group affected by the change, additional compliance costs, if any, are expected to be minimal.

5. Economic and Technological Feasibility:

All regulated institutions are currently subject to the Banking Division's assessment requirements. The formalization of the Banking Division's assessment methodology in a regulation will not impose any additional economic or technological burden on regulated entities which are small businesses.

6. Minimizing Adverse Impacts:

Even within the mortgage banking industry, which is the one industry group affected by the change in assessment methodology, the change will not affect the total amount of the assessment. Indeed, it is anticipated that this change may slightly reduce the proportion of mortgage banking industry assessments that is paid by entities that are small businesses.

7. Small Business and Local Government Participation:

This regulation does not impact local governments.

This regulation simply codifies the methodology which the Banking Division uses for determining the just and reasonable proportion of the Banking Division's costs to be charged to and paid by each regulated institution, including regulated institutions which are small businesses. The overall methodology was adopted in 2005 after extensive discussion with regulated entities and industry associations representing groups of regulated institutions, including those that are small businesses.

Thereafter, the Banking Department applied assessments against all entities subject to its regulation. In addition, for fiscal 2010, the Banking Department changed its overall methodology slightly with respect to assessments against the mortgage banking industry to include income derived from secondary market and servicing activities. Litigation was commenced challenging this latter change, and in a recent decision, In the Matter of Homestead Funding Corporation v. State of New York Banking Department et al., 944 N.Y.S. 2d 649 (2012), the court determined that the Department should adopt a change to its assessment methodology for mortgage bankers through a formal assessment rule promulgated pursuant to the requirements of the State Administrative Procedures Act. The challenged change in methodology had the effect of increasing the proportion of assessments against the mortgage banking industry paid by its larger members, while reducing the assessments paid by smaller participants, including those which are small businesses.

Rural Area Flexibility Analysis

Types and Estimated Numbers:

There are entities regulated by the New York State Department of Financial Services (formerly the Banking Department) located in all areas of the State, including rural areas. However, this rule simply codifies the methodology currently used by the Department to assess all entities regulated by it. The regulation does not alter that methodology, and thus it does not change the cost of assessments on regulated entities, including regulated entities located in rural areas.

Compliance Requirements:

The regulation would not change the current compliance requirements associated with the assessment process.

Costs:

While the regulation formalizes the assessment process, it does not change the amounts assessed to regulated entities, including those located in rural areas.

Minimizing Adverse Impacts:

The regulation does not increase the total amount assessed to regulated entities by the Department. It simply codifies the methodology which the Superintendent has chosen for determining the just and reasonable proportion of the Department's costs to be charged to and paid by each regulated institution.

Rural Area Participation:

This rule simply codifies the methodology which the Department currently uses for determining the just and reasonable proportion of the Department's costs to be charged to and paid by each regulated institution, including regulated institutions located in rural areas. The overall methodology was adopted in 2005 after extensive discussion with regulated entities and industry associations representing groups of regulated institutions, including those located in rural areas. It followed the loss of several major banking institutions that had paid significant portions of the former Banking Department's assessments.

Thereafter, the Department applied assessments against all entities subject to its regulation. In addition, for fiscal 2010, the Department changed this overall methodology slightly with respect to assessments against the mortgage banking industry to include income derived from secondary market income and servicing income. This latter change was challenged by a mortgage banker, and in early May, the Appellate Division determined that the latter change should have been made in conformity with the State Administrative Procedures Act. The challenged part of the methodology had the effect of increasing the proportion of assessments against the mortgage banking industry paid by its larger members, while reducing the assessments paid by smaller participants.

Job Impact Statement

The regulation is not expected to have an adverse effect on employment.

All institutions regulated by the Banking Division (the "Banking Division") of the Department of Financial Services are currently subject to assessment by the Department. The regulation simply formalizes the assessment methodology used by the Banking Division. It makes only one change from the allocation methodology used by the former Banking Department in the previous state fiscal years.

That change affects only one of the industry groups regulated by the Banking Division. It somewhat alters the way in which the Banking Division's costs of regulating mortgage banking industry are allocated among entities within that industry. In any case, the total amount assessed against regulated entities within that industry will remain the same.

New York State Gaming Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

To Allow Harness Tracks to Run Races Solely for New York-Bred Horses and Provide That Conditions May be Written for Such Races

I.D. No. SGC-40-15-00003-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 4108.8 of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 103(2), 104(1), (19) and 307-a

Subject: To allow harness tracks to run races solely for New York-bred horses and provide that conditions may be written for such races.

Purpose: To conform current rules to new legislation allowing harness tracks in New York to run races limited to New York bred horses.

Text of proposed rule: Section 4108.8 of 9 NYCRR is amended to read as follows and to add a new subdivision (c):

(a) In presenting a program of racing, the racing secretary shall use the following types of races only:

(1) stakes and futurities;

(2) early closing events;

(3) overnight events:

(i) conditioned races;

(ii) claiming races;

(iii) preferred races limited to the fastest horses at the meeting. These may be open races, free-for-all races, invitational races, conditioned races. Horses to be eligible in such races shall be posted in the declaration room, and listed with the presiding judge. Horses so listed shall not be eligible to conditioned races unless such conditions specifically include horses on the preferred list. Not more than 12 such preferred races may be conducted during a racing week. Purses offered for such preferred races shall be at least 25 percent higher than the highest purse offered for other conditioned races or letter class races scheduled the same racing week. A two or three year old horse may not be used in such races, without the consent of the owner, unless such horse has won three races at the track during the year or has lifetime earnings of $15,000;

(iv) classified races[,] but only with the express written permission of the commission and only if the track offers and schedules sufficient claiming races to give those horses authorized for claiming races and intended to be so raced an equal opportunity to race; and

(v) invitational races for two- or three-year-olds.

(b) Notwithstanding any preference requirements set forth in section 4108.9 of this Part and section 4111.9(a) of this [Title] *Subchapter*, the racing secretary may offer condition races or claiming races that limit entries only to horses that have competed at licensed New York State tracks for the majority of their most recent starts. The racing secretary may establish the limitation for each race. The limitation shall not exceed 75 percent of the most recent starts for an individual race. At least one race must be carded in the same class without the New York limitation on the same or the next race date for each race that is carded with the New York limitation.

(c) Notwithstanding any preference date requirements set forth in section 4108.9 of this Part and section 4111.9(a) of this Subchapter, the racing secretary may offer condition races or claiming races that limit entries only to New York-bred horses, pursuant to Section 307-a of the Racing, Pari-Mutuel Wagering and Breeding Law.

Text of proposed rule and any required statements and analyses may be obtained from: Kristen M. Buckley, New York State Gaming Commission, 1 Broadway Center, PO Box 7500, Schenectady, New York 12301, (518) 388-3407, email: gamingrules@gaming.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: The New York State Gaming Commission ("Commission") is authorized to promulgate this rule by Racing, Pari-Mutuel Wagering and Breeding Law ("Racing Law") Sections 103(2), 104(1, 19), 301, and 307-a.

Racing Law Section 103(2) provides that the Commission is responsible for the supervision, regulation and administration of all horse racing and pari-mutuel wagering activities. Racing Law Section 104(1) provides the Commission with general jurisdiction over all gaming activities within the State and over any person, corporation or association engaged in such activities. Section 104(19) of such law authorizes the Commission to promulgate any rules it deems necessary to carry out its responsibilities. Racing Law Section 301 provides the Commission with the power to supervise generally all harness race meetings in this state at which pari-mutuel betting is conducted and to adopt rules and regulations related to those activities. Racing Law Section 307-a authorized the Commission to promulgate regulations regarding the conduct of harness races where races may be run which are limited to New York-bred horses.

2. Legislative objectives: To maintain the public confidence and trust in the credibility and integrity of legalized gaming activities and ensure that gaming is to be conducted in the most efficient, transparent and effective manner possible. To ensure all gaming activity conducted in this state will be of the highest integrity, credibility and quality and that the best interests of the public, both gaming and non-gaming, will be served.

3. Needs and benefits: This rulemaking is necessary to amend the Commission's harness racing regulations to conform with Section 307-a of the Racing Law, which was amended on August 11, 2014 to allow harness race track operators to conduct races with New York-bred horses. Section 307-a directs that the Commission "shall be authorized to promulgate regulations to effectuate the intent of this section."

The rulemaking will add subdivision (c) to 9 NYCRR 4108.8. Preference races are already included in subdivision (b) of 9 NYCRR 4108.8, which was adopted in September 2010 and authorizes preference races that limit entries to horses that have competed at New York State licensed harness tracks for a majority of their most recent starts.

This rulemaking will also make minor, non-substantive revisions to 4108.8(a)(3)(v) by adding hyphens to the phrase "two- or three-year-olds."

4. Costs:

a. Costs to regulated parties for the implementation and continuing compliance with the rule: There are no costs to the regulated parties. Preference races will be offered as part of a harness race track's regular meet schedule.

b. Costs to the agency, the State, and local governments for the implementation and continuation of the rule: No additional operating costs are anticipated.

c. Sources of cost evaluations: The Commission evaluated the impact of the new rule.

5. Local government mandates: The proposed amendment does not impose any new programs, services, duties or responsibilities upon any country, city, town, village school district, fire district or other special district.

6. Paperwork: There are no changes in paperwork requirements.

7. Duplication: There are no relevant State programs or regulations that duplicate, overlap or conflict with the proposed amendment.

8. Alternatives: No other alternative was considered because this rulemaking is intended to amend the Commission rules to comply with statutory amendments.

9. Federal standards: The proposed amendment does not exceed any minimum standards imposed by the federal government.

10. Compliance schedule: New York-bred preference races may be conducted right now under Section 307-a of the Racing Law. This rule simply conforms to the statute and therefore can be effective on the date that it is published as an adopted rule.

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

A regulatory flexibility analysis for small business and local governments, a rural area flexibility analysis, and a job impact statement are not required for this rulemaking proposal because it will not adversely affect small businesses, local governments, rural areas or jobs.

This proposal allows harness tracks to run races solely for New York-bred horses and further provides that conditions may be written for such races "notwithstanding any preference date requirements." This rule is necessary due to the passage of Chapter 258 of the laws of 2014, which amended Section 307-a of the Racing, Pari-Mutuel Wagering and Breeding Law, to allow harness tracks to run races solely for New York-bred horses and further provides that conditions may be written for such races "notwithstanding any preference date requirements." This rule will have a positive impact on New York State jobs and businesses in that it will promote opportunities for New York bred race horses. This rule will not have an adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas or on employment opportunities.

Department of Health

NOTICE OF ADOPTION

Inpatient Rate for Language Assistance Services

I.D. No. HLT-40-14-00016-A

Filing No. 821

Filing Date: 2015-09-22

Effective Date: 2015-10-07

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

Action taken: Addition of section 86-1.45 to Title 10 NYCRR.

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

Subject: Inpatient Rate for Language Assistance Services.

Purpose: To establish hospital inpatient payment rate to reimburse hospitals for the costs of providing language interpretation services.

Text or summary was published in the October 8, 2014 issue of the Register, I.D. No. HLT-40-14-00016-P.

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

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

Assessment of Public Comment

The Department proposed an amendment to Section 86-1.45 for reimbursement for language assistance in hospital inpatient settings. A comment was received from LanguageLine Solutions concerning the number of billable units and the payment by Managed Care Organizations.

LanguageLine Solutions requests the following:

- The proposed legislation provides for reimbursement for two billable units, per day, per patient. They are recommending that the maximum billable units be increased to five billable units, per day, per patient.
- The regulation only applies to Medicaid patients that are not included in a Medicaid Managed Care Organization (MCO). Since the payment by an MCO to a hospital is determined based on negotiated contracts, this could potentially mean that a hospital may be reimbursed differently between Managed Care and non-Managed Care [fee-for-service] Medicaid patients. They are recommending that a discrete level of reimbursement for the provision of language services be paid to MCOs in addition to their per capita rate.
- In addition, they are also proposing that a discrete payment be made to the hospitals by the MCO for language services based on a limited English proficient patient metric.

RESPONSE:

In reviewing the proposals made by LanguageLine Solutions, the two billable units was determined based on information received from NYS private sector (commercial) providers and NYS MCOs since fee-for-service data is not available. Based on this review, the proposed regulations were determined to be fair and appropriate compensation to hospitals for the costs of providing medical language interpretation services to patients in inpatient hospital settings.

In addition, Managed Care is a health care delivery system organized to manage cost, utilization and quality. Medicaid Managed Care provides for the delivery of Medicaid health benefits and additional services through contracted arrangements. Therefore, hospitals and MCOs negotiate payments which may or may not be identical to the fee-for-service payments for similar services. Since MCOs do reimburse for interpreter services within the contract provisions, the system is working as designed.

Based on the information above, a regulatory change will not be made based on LanguageLine Solutions proposals.

Higher Education Services Corporation

EMERGENCY RULE MAKING

New York State Science, Technology, Engineering and Mathematics Incentive Program

I.D. No. ESC-40-15-00006-E

Filing No. 802

Filing Date: 2015-09-18

Effective Date: 2015-09-18

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

Action taken: Addition of section 2201.13 to Title 8 NYCRR.

Statutory authority: Education Law, sections 653, 655 and 669-e

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

Specific reasons underlying the finding of necessity: This statement is being submitted pursuant to subdivision (6) of section 202 of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's ("HESC") Emergency Rule Making seeking to add a new section 2201.13 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

This regulation implements a statutory student financial aid program providing for awards to be made to students beginning with the fall 2014 term. Emergency adoption is necessary to avoid an adverse impact on the processing of awards to eligible scholarship applicants. The statute provides for tuition benefits to college-going students who, beginning August 2014, pursue an undergraduate program of study in science, technology, engineering, or mathematics at a New York State public institution of higher education. High school students entering college in August must inform the institution of their intent to enroll no later than May 1. Therefore, it is critical that the terms of the program as provided in the regulation be available immediately in order for HESC to process scholarship applications so that students can make informed choices. To accomplish this mandate, the statute further provides for HESC to promulgate emergency regulations to implement the program. For these reasons, compliance with section 202(1) of the State Administrative Procedure Act would be contrary to the public interest.

Subject: New York State Science, Technology, Engineering and Mathematics Incentive Program.

Purpose: To implement the New York State Science, Technology, Engineering and Mathematics Incentive Program.

Text of emergency rule: New section 2201.13 is added to Title 8 of the New York Code, Rules and Regulations to read as follows:

(a) Definitions. The following definitions apply to this section:

(1) "Award" shall mean a New York State Science, Technology, Engineering and Mathematics Incentive Program award pursuant to section 669-e of the New York State education law.

(2) "Employment" shall mean continuous employment for at least thirty-five hours per week in the science, technology, engineering or mathematics field, as published on the corporation's web site, for a public or private entity located in New York State for five years after the completion of the undergraduate degree program and, if applicable, a higher degree program or professional licensure degree program and a grace period as authorized by section 669-e(4) of the education law.

(3) "Grace period" shall mean a six month period following a recipient's date of graduation from a public institution of higher education and, if applicable, a higher degree program or professional licensure degree program as authorized by section 669-e(4) of the education law.

(4) "High school class" shall mean the total number of students eligible to graduate from a high school in the applicable school year.

(5) "Interruption in undergraduate study or employment" shall mean a temporary period of leave for a definitive length of time due to circumstances as determined by the corporation, including, but not limited to, maternity/paternity leave, death of a family member, or military duty.

(6) "Program" shall mean the New York State Science, Technology, Engineering and Mathematics Incentive Program codified in section 669-e of the education law.

(7) "Public institution of higher education" shall mean the state university of New York, as defined in subdivision 3 of section 352 of the education law, a community college as defined in subdivision 2 of section 6301 of the education law, or the city university of New York as defined in subdivision 2 of section 6202 of the education law.

(8) "School year" shall mean the period commencing on the first day of July in each year and ending on the thirtieth day of June next following.

(9) "Science, technology, engineering and mathematics" programs shall mean those undergraduate degree programs designated by the corporation on an annual basis and published on the corporation's web site.

(10) "Successful completion of a term" shall mean that at the end of any academic term, the recipient: (i) met the eligibility requirements for the award pursuant to sections 661 and 669-e of the education law; (ii) completed at least 12 credit hours or its equivalent in a course of study leading to an approved undergraduate degree in the field of science, technology, engineering, or mathematics; and (iii) possessed a cumulative grade point average (GPA) of 2.5 as of the date of the certification by the institution. Notwithstanding, the GPA requirement is preliminarily waived for the first academic term for programs whose terms are organized in semesters, and for the first two academic terms for programs whose terms are organized on a trimester basis. In the event the recipient's cumulative GPA is less than a 2.5 at the end of his or her first academic year, the recipient will not be eligible for an award for the second academic term for programs whose terms are organized in semesters or for the third academic term for programs whose terms are organized on a trimester basis. In such case, the award received for the first academic term for programs whose terms are organized in semesters and for the first two academic terms for programs whose terms are organized on a trimester basis must be returned to the corporation and the institution may reconcile the student's account, making allowances for any other federal, state, or institutional aid the student is eligible to receive for such terms unless: (A) the recipient's GPA in his or her first academic term for programs whose terms are organized in semesters was a 2.5 or above, or (B) the recipient's GPA in his or her first two academic terms for programs whose terms are organized on a trimester basis was a 2.5 or above, in which case the institution may retain the award received and only reconcile the student's account for the second academic term for programs whose terms are organized in semesters or for the third academic term for programs whose terms are organized on a trimester basis. The corporation shall issue a guidance document, which will be published on its web site.

(b) Eligibility. An applicant for an award under this program pursuant to section 669-e of the education law must also satisfy the general eligibility requirements provided in section 661 of the education law.

(c) Class rank or placement. As a condition of an applicant's eligibility, the applicant's high school shall provide the corporation:

(1) official documentation from the high school either (i) showing the applicant's class rank together with the total number of students in such applicant's high school class or (ii) certifying that the applicant is in the top 10 percent of such applicant's high school class; and

(2) the applicant's most current high school transcript; and

(3) an explanation of how the size of the high school class, as defined in subdivision (a), was determined and the total number of students in such class using such methodology. If the high school does not rank the students in such high school class, the high school shall also provide the corporation with an explanation of the method used to calculate the top 10 percent of students in the high school class, and the number of students in the top 10 percent, as calculated. Each methodology must comply with the terms of this program as well as be rational and reasonable. In the event the corporation determines that the methodology used by the high school fails to comply with the term of the program, or is irrational or unreasonable, the applicant will be denied the award for failure to satisfy the eligibility requirements; and

(4) any additional information the corporation deems necessary to determine that the applicant has graduated within the top 10 percent of his or her high school class.

(d) Administration.

(1) Applicants for an award shall:

(i) apply for program eligibility on forms and in a manner prescribed by the corporation. The corporation may require applicants to provide additional documentation evidencing eligibility; and

(ii) postmark or electronically transmit applications for program eligibility to the corporation on or before the date prescribed by the corporation for the applicable academic year. Notwithstanding any other rule or regulation to the contrary, such applications shall be received by the corporation no later than August 15th of the applicant's year of graduation from high school.

(2) Recipients of an award shall:

(i) execute a service contract prescribed by the corporation;

(ii) apply for payment annually on forms specified by the corporation;

(iii) confirm annually their enrollment in an approved undergraduate program in science, technology, engineering, or mathematics;

(iv) receive such awards for not more than four academic years of full-time undergraduate study or five academic years if the program of study normally requires five years, as defined by the commissioner pursuant to article thirteen of the education law, excluding any allowable interruption of study; and

(v) respond to the corporation's requests for a letter from their employer attesting to the employee's job title, the employee's number of hours per work week, and any other information necessary for the corporation to determine compliance with the program's employment requirements.

(e) Amounts.

(1) The amount of the award shall be determined in accordance with section 669-e of the education law.

(2) Disbursements shall be made each term to institutions, on behalf of recipients, within a reasonable time upon successful completion of the term subject to the verification and certification by the institution of the recipient's GPA and other eligibility requirements.

(3) Awards shall be reduced by the value of other educational grants and scholarships limited to tuition, as authorized by section 669-e of the education law.

(f) Failure to comply.

(1) All award monies received shall be converted to a 10-year student loan plus interest for recipients who fail to meet the statutory, regulatory, contractual, administrative or other requirement of this program.

(2) The interest rate for the life of the loan shall be fixed and equal to that published annually by the U.S. Department of Education for undergraduate unsubsidized Stafford loans at the time the recipient signed the service contract with the corporation.

(3) Interest shall begin to accrue on the day each award payment is disbursed to the institution.

(4) Interest shall be capitalized on the day the award recipient violates any term of the service contract or the date the corporation deems the recipient was no longer able or willing to perform the terms of the service contract. Interest on this amount shall be calculated using simple interest.

(5) Where a recipient has demonstrated extreme hardship as a result of a total and permanent disability, labor market conditions, or other such circumstances, the corporation may, in its discretion, postpone converting the award to a student loan, temporarily suspend repayment of the amount owed, prorate the amount owed commensurate with service completed, discharge the amount owed, or such other appropriate action. Where a recipient has demonstrated in-school status, the corporation shall temporarily suspend repayment of the amount owed for the period of in-school status.

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 December 16, 2015.

Text of rule and any required statements and analyses may be obtained from: Cheryl B. Fisher, NYS Higher Education Services Corporation, 99 Washington Avenue, Room 1325, Albany, New York 12255, (518) 474-5592, email: regcomments@hesc.ny.gov

Regulatory Impact Statement

Statutory authority:

The New York State Higher Education Services Corporation's ("HESC") statutory authority to promulgate regulations and administer the New York State Science, Technology, Engineering and Mathematics Incentive Program ("Program") is codified within Article 14 of the Education Law. In particular, Part G of Chapter 56 of the Laws of 2014 created the Program by adding a new section 669-e to the Education Law. Subdivision 5 of section 669-e of the Education Law authorizes HESC to promulgate emergency regulations for the purpose of administering this Program.

Pursuant to Education Law § 652(2), HESC was established for the purpose of improving the post-secondary educational opportunities of eligible students through the centralized administration of New York State financial aid programs and coordinating the State's administrative effort in student financial aid programs with those of other levels of government.

In addition, Education Law § 653(9) empowers HESC's Board of Trustees to perform such other acts as may be necessary or appropriate to carry out the objects and purposes of the corporation including the promulgation of rules and regulations.

HESC's President is authorized, under Education Law § 655(4), to propose rules and regulations, subject to approval by the Board of Trustees, governing, among other things, the application for and the granting and administration of student aid and loan programs, the repayment of loans or the guarantee of loans made by HESC; and administrative functions in support of state student aid programs. Also, consistent with Education Law § 655(9), HESC's President is authorized to receive assistance from any Division, Department or Agency of the State in order to properly carry out his or her powers, duties and functions. Finally, Education Law § 655(12) provides HESC's President with the authority to perform such other acts as may be necessary or appropriate to carry out effectively the general objects and purposes of HESC.

Legislative objectives:

The Education Law was amended to add a new section 669-e to create the "New York State Science, Technology, Engineering and Mathematics Incentive Program" (Program). This Program is aimed at increasing the number of individuals working in the fields of science, technology, engineering and mathematics (STEM) in New York State to meet the increasingly critical need for those skills in the State's economy.

Needs and benefits:

According to a February 2012 report by President Obama's Council of Advisors on Science and Technology, there is a need to add to the American workforce over the next decade approximately one million more science, technology, engineering and mathematics (STEM) professionals than the United States will produce at current rates in order for the country to stay competitive. To meet this goal, the United States will need to increase the number of students who receive undergraduate STEM degrees by about 34% annually over current rates. The report also stated that fewer than 40% of students who enter college intending to major in a STEM field complete a STEM degree. Further, a recent Wall Street Journal article reported that New York state suffers from a shortage of graduates in STEM fields to fill the influx of high-tech jobs that occurred five years ago. At a plant in Malta, about half the jobs were filled by people brought in from outside New York and 11 percent were foreigners. According to the article, Bayer Corp. is due to release a report showing that half of the recruiters from large U.S. companies surveyed couldn't find enough job candidates with four-year STEM degrees in a timely manner; some said that had led to more recruitment of foreigners. About two-thirds of the recruiters surveyed said that their companies were creating more STEM positions than other types of jobs. There are also many jobs requiring a two-year degree. In an effort to deal with this shortage, companies are using more internships, grants and scholarships.

The Program is aimed at increasing the number New York graduates with two and four year degrees in STEM who will be working in STEM fields across New York state. Eligible recipients may receive annual awards for not more than four academic years of undergraduate full-time study (or five years if enrolled in a five-year program) while matriculated in an approved program leading to a career in STEM.

The maximum amount of the award is equal to the annual tuition charged to New York State resident students attending an undergraduate program at the State University of New York (SUNY), including state operated institutions, or City University of New York (CUNY). The current maximum annual award for the 2014-15 academic year is $6,170. Payments will be made directly to schools on behalf of students upon certification of their successful completion of the academic term.

Students receiving a New York State Science, Technology, Engineering and Mathematics Incentive Program award must sign a service agreement and agree to work in New York state for five years in a STEM field and reside in the State during those five years. Recipients who do not fulfill their service obligation will have the value of their awards converted to a student loan and be responsible for interest.

Costs:

a. It is anticipated that there will be no costs to the agency for the implementation of, or continuing compliance with this rule.

b. The maximum cost of the program to the State is $8 million in the first year based upon budget estimates.

c. It is anticipated that there will be no costs to Local Governments for the implementation of, or continuing compliance with, this rule.

d. The source of the cost data in (b) above is derived from the New York State Division of the Budget.

Local government mandates:

No program, service, duty or responsibility will be imposed by this rule upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

This proposal will require applicants to file an electronic application for each year they wish to receive an award up to and including five years of eligibility. Recipients are required to sign a contract for services in exchange for an award. Recipients must submit annual status reports until a final disposition is reached in accordance with the written contract.

Duplication:

No relevant rules or other relevant requirements duplicating, overlapping, or conflicting with this rule were identified.

Alternatives:

The proposed regulation is the result of HESC's outreach efforts to financial aid professionals with regard to this Program. Several alternatives were considered in the drafting of this regulation. For example, several alternatives were considered in defining terms/phrases used in the regulation as well as the academic progress requirement. Given the statutory language as set forth in section 669-e of the Education Law, a "no action" alternative was not an option.

Federal standards:

This proposal does not exceed any minimum standards of the Federal Government, and efforts were made to align it with similar federal subject areas as evidenced by the adoption of the federal unsubsidized Stafford loan rate in the event that the award is converted into a student loan.

Compliance schedule:

The agency will be able to comply with the regulation immediately upon its adoption.

Regulatory Flexibility Analysis

This statement is being submitted pursuant to subdivision (3) of section 202-b of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's ("HESC") Emergency Rule Making, seeking to add a new section 2201.13 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not impose an adverse economic impact on small businesses or local governments. HESC finds that this rule will not impose any compliance requirement or adverse economic impact on small businesses or local governments. Rather, it has potential positive impacts inasmuch as it implements a statutory student financial aid program that provides tuition benefits to college students who pursue their undergraduate studies in the fields of science, technology, engineering, or mathematics at a New York State public institution of higher education. Students will be rewarded for remaining and working in New York, which will provide an economic benefit to the State's small businesses and local governments as well.

Rural Area Flexibility Analysis

This statement is being submitted pursuant to subdivision (4) of section 202-bb of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's Emergency Rule Making, seeking to add a new section 2201.13 to Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not impose an adverse impact on rural areas. Rather, it has potential positive impacts inasmuch as it implements a statutory student financial aid program that provides tuition benefits to college students who pursue their undergraduate studies in the fields of science, technology, engineering, or mathematics at a New York State public institution of higher education. Students will be rewarded for remaining and working in New York, which will benefit rural areas around the State as well.

This agency finds that this rule will not impose any reporting, record keeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

This statement is being submitted pursuant to subdivision (2) of section 201-a of the State Administrative Procedure Act and in support of the New York State Higher Education Services Corporation's Emergency Rule Making seeking to add a new section 2201.13 to Title 8 of the Of-

ficial Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not have any negative impact on jobs or employment opportunities. Rather, it has potential positive impacts inasmuch as it implements a statutory student financial aid program that provides tuition benefits to college students who pursue their undergraduate studies in the fields of science, technology, engineering, or mathematics at New York State public institution of higher education. Students will be rewarded for remaining and working in New York, which will benefit the State as well.

Department of Labor

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Tipped Workers in the Hospitality Industry

I.D. No. LAB-40-15-00015-P

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

Proposed Action: Amendment of section 146-1.3; and addition of section 146-3.12 to Title 12 NYCRR.

Statutory authority: Labor Law, sections 21(11), 652 and 656

Subject: Tipped workers in the hospitality industry.

Purpose: To implement changes to the wages for food service workers and service employees in the hospitality industry.

Text of proposed rule: Paragraph (4) of subdivision (a) of section 146-1.3 of 12 NYCRR Part 146 is amended as follows:

(4) On and after December 31, 2015, a service employee shall receive a wage of at least [$5.65] *$7.50* per hour, and credit for tips shall not exceed [$3.35] *$1.50* per hour, provided that the total of tips received plus wages equals or exceeds $9.00 per hour. FOR RESORT HOTELS ONLY, a service employee shall receive a wage of at least [$4.90] *$7.50* per hour, and credit for tips shall not exceed [$4.10] *$1.50* per hour, if the [weekly average of] tips *received equal or exceed* [is] at least $5.05 per hour.

Paragraph (4) of subdivision (b) of section 146-1.3 of 12 NYCRR Part 146 is amended as follows:

(4) On and after December 31, 2015, a food service worker shall receive a wage of at least [$5.00] *$7.50* per hour, and credit for tips shall not exceed [$4.00] *$1.50* per hour, provided that the total of tips received plus the wages equals or exceeds $9.00 per hour.

A new section 146-3.12 of 12 NYCRR Part 146 is added to read as follows:

§ 146-3.12. Hourly tip rates.

The term tips received, as used in section 146-1.3 of this Part, and the term receives tips, as used in sections 146-3.3 and 146-3.4 of this Part, shall mean the hourly rate that results when the total amount of tips received by a tipped employee during a week of work are divided by the total working time of such worker during that week of work. The total amount of tips received shall be the net amount of tips received after adjustments for tip pooling, tip sharing, and credit card charges pursuant to sections 146-2.14, 146-2.15, 146-2.16 and 146-2.20.

Text of proposed rule and any required statements and analyses may be obtained from: Michael Paglialonga, Department of Labor, Building 12, State Office Campus, Room 509, Albany, NY 12240, (518) 457-4380, email: TippedHospitality@labor.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

Statutory Authority: The statutory authority for the promulgation of this rule is based on the Commissioner's general rulemaking authority under Labor Law § 21(11) and the specific statutory directives at Labor Law §§ 652(6) and 656 to appoint a wage board and take action on the wage board's recommendations.

Legislative Objectives: This rulemaking is the final step in implementing public policy objectives that the legislature sought to advance in enacting Labor Law § 652(6), which expressly established an administrative process for setting rates for hourly cash wages paid to tipped workers in the hospitality industry. Specifically, the legislature mandated that modifications in the minimum hourly cash wage for tipped workers under 12 NYCRR Part 146 "shall be made by a wage order promulgated by the commissioner pursuant to section six hundred fifty six of this article" when the statutory minimum wage for all workers was increased in 2013. Laws of 2013, Chapter 57, Part P, amending Labor Law § 652(1) and adding § 652(6).

Pursuant to the above-referenced objectives and mandate and Labor Law § 656, the Commissioner appointed a wage board comprised of representatives of employers, employees and the public to investigate, hold public hearings around the state, and report back with recommendations on the issues reserved by the legislature for resolution through this process, in accordance with Labor Law § 655. The board met nine times between September 15, 2014 and January 30, 2015, including four public hearings around the state at which 127 persons testified, with an additional 140 persons in attendance, and four deliberative meetings and received 135 written submissions. Each of these nine meetings was publicized in advance, open to the public, videotaped, and subsequently webcast. The notices, webcasts, written submissions, and other materials, including the Commissioner's initial charge to the wage board, are posted on the Department of Labor's website at www.labor.ny.gov/wageboard2014.

Upon receipt and filing of the wage board's report and recommendations, the Commissioner gave public notice of, and solicited public comment on, the wage board's report and recommendations, received over 6,000 and timely issued an order, dated February 24, 2015, accepting certain recommendations and rejecting others, in accordance with Labor Law § 656. The board's report and recommendation, and the Commissioner's order are also posted on the Department's website at the address identified above.

The wage board's recommendations to establish uniform tip amounts and criteria for all tipped workers in the hospitality industry were overwhelmingly supported by the public comments received by the Commissioner: 6,112 in support, 187 in opposition. In adopting those recommendations, the Commissioner found that, "[i]n doing so, we ratify the goal set by the 2009 Wage Board and Commissioner to combine all tipped workers into one class." In accepting the board's recommendation of "an increase in the tipped cash wage amounts from their current rates of $4.90, $5.00 and $5.65, which have not increased since 2011, to $7.50 per hour, effective December 31, 2015," the Commissioner made the following findings:

After receiving testimony divided between those in favor of eliminating the tip credit and those opposed to any change, I believe this recommendation strikes the proper balance. It increases wages for those who have been without a raise for far too long and completes the goal that was postponed in 2009 of establishing a single rate for all tipped workers.

For the reasons set forth above, this rulemaking, which equalizes and increases to $7.50 the minimum hourly wage rate for tipped employees in the hospitality industry, accords with the public policy objectives that the legislature sought to advance in raising the minimum wage and enacting Labor Law § 652(6) while delegating to the Commissioner, upon a wage board recommendation, with public notice and comment, the responsibility for determining such rates.

Needs and Benefits: The purpose of the rule is to provide the rate setting determination that the legislature delegated to the Commissioner, upon recommendation of a wage board, and mandated "shall be made by wage order promulgated by the commissioner." Labor Law § 652(6). The need for the rule is to comply with that legislative mandate. The benefit of the rule is that it "strikes the proper balance" between eliminating the tip credit that benefits employers, and denying the rate increases that benefit tipped workers, and "increases wages for those who have been without a raise for far too long and completes the goal that was postponed in 2009 of establishing a single rate for all tipped workers."

Costs: (a) The cost to regulated parties – employers in the hospitality industry – will be de minimis, according to the testimony and comments provided by, or on behalf of, employers to the wage board and the Commissioner, which indicated that if rates for tipped workers are increased, employers will not absorb those increased costs, but will, instead, pass them along to consumers in the form of higher prices, or offset them by identifying cost savings that will allow them to maintain their overall labor costs at desired levels. While employers suggested that increases in these hourly rates will be offset by employment losses among tipped workers in the hospitality industry, similar suggestions that were made last time that these rates were increased on January 1, 2011, do not appear to have resulted in any measurable losses. In fact, in the intervening years, employment in the hospitality industry in New York actually increased by 14.9 percent, from 589,514 in 2010 to 677,626 in 2013. (Source: Quarterly Census of Employment and Wages). By contrast, hospitality industry employment increases ranged from 6 to 10.4 percent in neighboring states, and by 9.6 percent nationwide, during this same time period. Id. Most of New York's growth in the hospitality industry occurred among tipped oc-

cupations; the growth among untipped occupations was nearly flat. (Source: Occupational Employment Survey).

(b) The costs to the Department, the state and local governments for implementation and continuation of the rule will be de minimus. The Department currently works with employers and employees on outreach and enforcement for the current wage order for the hospitality industry and the proposed rulemaking is not expected to increase the costs for such outreach and enforcement. Because the proposed rulemaking adopts uniform tip amounts and criteria for all tipped workers in the hospitality industry, costs could decrease due to efficiencies associated with such uniformity.

(c) The sources for such information and the methodology are set forth above.

Local Government Mandate: None. Federal, state and municipal governments and political subdivisions thereof are excluded from coverage under Parts 141, 142, 143 and 146 by Labor Law Section 651(5)(n) and 651(5) (last paragraph). They are not covered under Part 143 because it covers only certain non-profit organizations, in accordance with Labor Law § 652(3).

Paperwork: None.

Duplication: This rule exceeds the federal minimum wage requirements, but follows the requirements set by the New York State Legislature.

Alternatives: These amendments made are required by law and thus there are no alternatives to amending these regulations.

Federal Standards: This rule implements the minimum wage and requirements set forth in New York law that exceeds the federal minimum wage. There are no other federal standards relating to this rule.

Compliance Schedule: The regulated community will be required to comply with this regulation on and after December 31, 2015.

Regulatory Flexibility Analysis

Effect of Rule: All small businesses, but no local governments, are potentially affected by the changes in the regulations.

Compliance Requirements: There are no changes in the reporting or record-keeping requirements regarding the minimum wage. Small businesses in the hospitality industry, and small businesses in other industries that employ workers at rates that are near, or below, the new statutory minimum wage rates, will have to review their payrolls in light of the new statutory minimum wage rates and the proposed wage orders to determine whether they will need to increase the amount that they pay to their workers.

Professional Services: No professional services would be required to effectuate the purposes of this rule.

Compliance Costs: These rules do not impose any additional compliance costs separate and apart from the costs imposed under the current rule. Such compliance costs do not exceed the cost of reviewing and increasing pay rates consistent with the increases implemented by this rulemaking.

Economic and Technological Feasibility: Compliance with these regulations will be economically and technologically feasible because these regulations simply adjust existing rates, without imposing new, or altering existing, requirements or procedures for complying with minimum wage requirements.

Minimizing Adverse Impact: Employers who testified and provided comments to the wage board and the Commissioner indicated that if rates for tipped workers are increased, employers will not absorb those increased costs, but will, instead, pass them along to consumers in the form of higher prices, or offset them by identifying cost savings that will allow them to maintain their overall labor costs at desired levels.

Small Business and Local Government Participation: Opportunities to participate in the development of this rulemaking were provided through two stages of notice and comment. At the first stage, a wage board for the hospitality industry met nine times between September 15, 2014 and January 30, 2015, including four public hearings around the state at which 127 persons testified, with an additional 140 persons in attendance, and four deliberative meetings and received 135 written submissions. Each of these nine meetings was publicized in advance, open to the public, videotaped, and subsequently webcast. The notices, webcasts, written submissions, and other materials, including the Commissioner's initial charge to the wage board, are posted on the Department of Labor's website at www.labor.ny.gov/wageboard2014.

At the second stage, upon receipt and filing of the wage board's report and recommendations, the Commissioner gave public notice of, and solicited public comment on, the wage board's report and recommendations, and received over 6,000 submissions.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: These rules apply to all private employers in all areas of the state.

2. Reporting, recordkeeping and other compliance requirements: There are no changes in the reporting or record-keeping requirements regarding the minimum wage. Employers in the hospitality industry, and employers in other industries that employ workers at rates that are near, or below, the new statutory minimum wage rates, will have to review their payrolls in light of the new statutory minimum wage rates and the proposed wage orders to determine whether they will need to increase the amount that they pay to their workers.

3. Professional services: No professional services will be required to comply with this rule.

4. Costs: These rules do not impose any additional compliance costs separate and apart from the costs that exist under the current rule. Such compliance costs do not exceed the cost of reviewing and increasing pay rates consistent with the increases implemented by this rulemaking.

5. Minimizing adverse impact: Employers who testified and provided comments to the wage board and the Commissioner indicated that if rates for tipped workers are increased, employers will not absorb those increased costs, but will, instead, pass them along to consumers in the form of higher prices, or offset them by identifying cost savings that will allow them to maintain their overall labor costs at desired levels.

6. Rural area participation: Opportunities to participate in the development of this rulemaking were provided through two stages of notice and comment. At the first stage, a wage board for the hospitality industry met nine times between September 15, 2014 and January 30, 2015, including four public hearings around the state at which 127 persons testified, with an additional 140 persons in attendance, and four deliberative meetings and received 135 written submissions. Each of these nine meetings was publicized in advance, open to the public, videotaped, and subsequently webcast. The notices, webcasts, written submissions, and other materials, including the Commissioner's initial charge to the wage board, are posted on the Department of Labor's website at www.labor.ny.gov/wageboard2014.

At the second stage, upon receipt and filing of the wage board's report and recommendations, the Commissioner gave public notice of, and solicited public comment on, the wage board's report and recommendations, and received over 6,000 submissions.

Job Impact Statement

1. Nature of impact: This rulemaking equalizes and increases the minimum hourly cash wage rate for all tipped workers in the hospitality industry to conform to the February 24, 2015, order of the Commissioner upon the report of the 2014 hospitality wage board. In doing so, it is not expected to have a substantial impact on jobs or on employment opportunities.

The impact that this rulemaking will have should be positive, for tipped workers who are paid less than $7.50 per hour, without negatively impacting jobs, employers, or the hospitality industry. The purpose of this rulemaking is to provide uniform tip allowances and criteria for all tipped workers in the hospitality industry, so that the same rates apply to food service workers, service employees and service employees in resort hotels, and to increase the minimum hourly tipped cash wage rates from their current rates of $4.90, $5.00 and $5.65, which have not increased since 2011, to $7.50 per hour, effective December 31, 2015.

While there are many studies that examine the impact of minimum wage increases on jobs, the various findings are inconsistent and inconclusive, with some studies suggesting a decrease in employment and others an increase. A United States Department of Labor review of 64 studies on minimum wage increases found no discernible negative effect on employment. www.dol.gov/minwage/mythbuster.htm

On January 1, 2011, rates for tipped workers in New York's Hospitality industry were increased from $4.90 to $5.65 for some workers and $4.65 to $5.00 for others. During the intervening years, employment in the hospitality industry in New York increased by 14.9 percent, from 589,514 in 2010 to 677,626 in 2013. (Source: Quarterly Census of Employment and Wages). By contrast, hospitality industry employment increases ranged from 6 to 10.4 percent in neighboring states, and by 9.6 percent nationwide, during this same time period. Id. Most of New York's growth in the hospitality industry occurred among tipped occupations; the growth among untipped occupations was nearly flat. (Source: Occupational Employment Survey).

The impact of these increases on employers is tempered by the fact that almost half of the labor force in the hospitality industry is comprised of occupations that do not customarily receive tips. For that untipped half of the labor force, as well as for the portion of the remaining tipped minority who are already paid at least $7.50 an hour, no increased costs should result from the increase in the minimum hourly tipped wage rate to $7.50.

2. Categories and numbers affected: Only businesses in the hospitality industry that employ tipped workers and pay them less than $7.50 per hour are affected by this rule. Overall, the entire hospitality industry and workforce consists of approximately 677,538 people employed in 46,901 establishments in New York State in 2013.

No data is available to identify the number, or percentage of tipped employees in the hospitality industry in New York who are paid less than

$7.50 per hour. Occupational Employment Survey results report estimates of overall employment in New York by occupation, and if those numbers are grouped according to whether the occupation customarily receives tips, the following general breakdowns are disclosed. Among the occupations that are prevalent in the hospitality industry (SOC numbers listed below), those that do not customarily receive tips account for almost half of the workforce. Those untipped occupations include various food preparation and cleaning occupations and supervisors (SOC 35-1011, 35-1012, 35-2011, 35-2012, 35-2014, 35-2015, 35-2019, 35-2021, 35-9021, 35-9099, 37-1011, 37-2011 and 43-4081 at labor.ny.gov/stats/lswage2.asp). Tipped occupations that are prevalent in the hospitality industry account for about a quarter of the workforce, with most of those engaged in food service, wait staff, bartenders, and bus persons (SOC 35-3011, 35-3031, 35-3041 and 35-9011 at id.), and the balance engaged in other services, including housekeeping and coat checks (SOC 35-9031, 37-2012, 39-3093, 39-6011 and 39-6012 at id.). The remaining occupations, whose scope is broad enough to cover a mix of tipped and untipped occupations found in and out of the hospitality industry account for about a fifth of the workforce (35-3021, 35-3022).

Fewer workers in food related occupations in these industries work full time compared to workers in all industries. Workers aged 16-24 comprise over one-third of workers in food-related occupations.

3. Regions of adverse impact: These regulations will not have a disproportionate impact upon any area of the State.

4. Minimizing adverse impact: Employers can minimize any negative impact on jobs resulting from the limited increases in labor costs that result in New York's hospitality industry from this rulemaking by increasing sales, efficiencies, or prices, by decreasing costs, or by any combination thereof.

Office of Mental Health

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Visitation and Inspection of Facilities

I.D. No. OMH-40-15-00010-P

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

Proposed Action: Amendment of Part 553 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 7.15, 7.17, 31.02, 31.04, 31.05, 31.07, 31.09, 31.11, 31.13 and 31.19

Subject: Visitation and Inspection of Facilities.

Purpose: Clarification of the term ''facilities under the jurisdiction of the Office of Mental Health'' for purposes of Part 553.

Text of proposed rule: (Statutory Authority: Mental Hygiene Law §§ 7.09, *7.15, 7.17,* 31.02, 31.04, 31.05, 31.07, 31.08, 31.09, 31.11, 31.13, 31.19*, 41.13*)

Section 553.3 of Title 14 NYCRR is amended to read as follows:

§ 553.3 Scope of reviews and inspections.

(a) *For purposes of this Part, "facilities under the jurisdiction of the Office of Mental Health" shall mean facilities required to obtain an operating certificate from the Commissioner pursuant to Article 31 of the Mental Hygiene Law.*

(b) Prior to visiting a facility, the reviewer will study reports of previous reviews and inspections and the following information submitted by the facility:

(1) clinical and statistical data, and

(2) the policies of the facility.

[(b)]*(c)* The onsite review and inspection shall include, as appropriate:

(1) review of program operation in comparison to programs authorized;

(2) private conversation with any person receiving mental health services or employee who so desires;

(3) review of case records of persons currently or previously served;

(4) review of the legal admission documents of persons receiving services and the conformity of the facilities admission procedures with the law and regulations;

(5) review of the records of restraint and seclusion;

(6) review of the qualifications of the staff and the staffing pattern in comparison to those authorized;

(7) inspection of the records and storage of medications, and procedures for prescription and dispensing of medications;

(8) review of the minutes of meetings of the governing body;

(9) inspection of the physical plant and equipment, and review of protective procedures in relation to structural and fire hazards;

(10) identification of any construction or improvements to the premises completed since the last visit; and

(11) review of written reports by local inspectors and other authorized inspection, certifying, or accrediting agencies, and review of conditions about which any recommendations for improvement have been made.

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: regs@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 7.09 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.

Subdivisions (a) and (b) of Section 7.15 of the Mental Hygiene Law authorize the Commissioner to evaluate programs and services of prevention, diagnosis, examination, care, treatment, rehabilitation, training, and research for persons with mental illness, and permits such activities to be undertaken in cooperation and agreement with other departments or agencies of the State, local or Federal government, or with other organizations and individuals.

Section 7.17 of the Mental Hygiene Law establishes and identifies a distinct list of hospitals to be directly operated by the Office of Mental Health. This section directs the Commissioner to establish policies and procedures for the organization, administration and operation of these facilities under his or her jurisdiction.

Sections 31.02 and 31.04 of the Mental Hygiene Law authorize the Commissioner to set standards of quality and adequacy of facilities, equipment, personnel, services, records and programs for the rendition of services for persons diagnosed with mental illness, pursuant to an operating certificate.

Section 31.05 of the Mental Hygiene Law establishes criteria for the issuance of operating certificates.

Section 31.07 of the Mental Hygiene Law gives the Commissioner the power to conduct periodic investigations into the operations of providers of mental health services which are required by Article 31 to have an operating certificate, and to inspect and examine records, including, but not limited to, medical service and financial records, to determine whether such providers are complying with applicable provisions of the Mental Hygiene Law and applicable laws, rules and regulations.

Section 31.09 of the Mental Hygiene Law gives the Commissioner or his or her authorized representative the power to inspect facilities, examine records, conduct examinations and interviews, and obtain such other information as necessary to carry out his or her responsibilities under Article 31. All such investigations and inspections shall be made by persons competent to conduct them.

Section 31.11 of the Mental Hygiene Law requires every holder of an operating certificate to cooperate with the Commissioner in any inspection or investigation, and to permit the Commissioner to inspect its facility, books and records, including records of persons receiving services.

Sections 31.13 and 31.19 of the Mental Hygiene Law further authorize the Commissioner or his or her representatives to examine and inspect such programs to determine their suitability and proper operation.

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.

3. Needs and Benefits: Part 553 of Title 14 NYCRR requires that all facilities under the jurisdiction of the Office of Mental Health (OMH) be visited and inspected by reviewers designated by the Commissioner. Existing regulations further state that unless otherwise specifically stated in the Part, reviewers shall be personnel of OMH who are competent and qualified to conduct such inspections. This proposal will amend Part 553 by clarifying that the term, "facilities under the jurisdiction of the Office of Mental Health," pertains to facilities that are required to obtain an operating certificate from the Commissioner pursuant to Article 31 of the Mental Hygiene Law. This specifically excludes OMH-operated psychiatric centers, which are psychiatric facilities that are run by OMH, not licensed by OMH, and which are subject to OMH policies by operation of law. This amendment will enable an external entity to review and inspect OMH-operated facilities, rather than having the reviews be completed by personnel of the Office. It is believed that this external review will enhance the health, safety and quality of care in OMH-operated psychiatric centers. There will be no impact on OMH-licensed facilities or programs.

4. Costs:
(a) Costs to Local Government: These regulatory amendments will not result in any additional costs to local government.
(b) Costs to State: It is difficult to quantify the cost to State government as a result of this regulatory amendment, but the expense of paying an outside entity to perform reviews may be partially offset by the savings in costs associated with OMH personnel completing the reviews.
(c) Costs to Regulated Parties: These regulatory amendments will not result in any additional costs to regulated parties.
5. Local Government Mandates: These regulatory amendments will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.
6. Paperwork: These amendments will not result in any increase in paperwork requirements of facilities covered by the regulations.
7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements.
8. Alternatives: The only potential alternative would be inaction. As the amendments are intended to enhance health, safety and quality of care in OMH-operated facilities, this alternative was not considered.
9. Federal Standards: The regulatory amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.
10. Compliance Schedule: These regulatory amendments will be effective immediately upon adoption.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis has not been submitted with this notice. The proposed regulatory amendments serve to clarify that, for purposes of Part 553, the term, "facilities under the jurisdiction of the Office of Mental Health," pertains to facilities that are required to obtain an operating certificate from the Commissioner pursuant to Article 31 of the Mental Hygiene Law. This specifically excludes OMH-operated psychiatric centers, which are psychiatric facilities that are run by OMH, and which are subject to policies and procedures established by the Office pursuant to Mental Hygiene Law Section 7.17. This amendment will enable an external entity to review and inspect OMH-operated facilities, rather than having the reviews be completed by personnel of the Office. It is believed that this external review will enhance the health, safety and quality of care in OMH-operated psychiatric centers. There will be no impact on OMH-licensed facilities or programs, nor will there be any adverse economic impact on small businesses or local governments as a result of these amendments; therefore a regulatory flexibility analysis for small businesses and local governments is not required.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis has not been submitted with this notice. The proposed regulatory amendments serve to clarify that, for purposes of Part 553, the term, "facilities under the jurisdiction of the Office of Mental Health," pertains to facilities that are required to obtain an operating certificate from the Commissioner pursuant to Article 31 of the Mental Hygiene Law. This specifically excludes OMH-operated psychiatric centers, which are psychiatric facilities that are run by OMH, and which are subject to policies and procedures established by the Office pursuant to Mental Hygiene Law Section 7.17. This amendment will enable an external entity to review and inspect OMH-operated facilities, rather than having the reviews be completed by personnel of the Office. It is believed that this external review will enhance the health, safety and quality of care in OMH-operated psychiatric centers. There will be no impact on OMH-licensed facilities or programs, nor will the rule impose any adverse economic impact on rural areas; therefore, a Rural Area Flexibility Analysis is not submitted with this notice.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because it is evident from the subject matter that there will be no adverse impact on jobs and employment opportunities as a result of these amendments. The proposed regulatory amendments serve to clarify that, for purposes of Part 553, the term, "facilities under the jurisdiction of the Office of Mental Health," pertains to facilities that are required to obtain an operating certificate from the Commissioner pursuant to Article 31 of the Mental Hygiene Law. This specifically excludes OMH-operated psychiatric centers, which are psychiatric facilities that are run by OMH, and which are subject to policies and procedures established by the Office pursuant to Mental Hygiene Law Section 7.17. This amendment will enable an external entity to review and inspect OMH-operated facilities, rather than having the reviews be completed by personnel of the Office. It is believed that this external review will enhance the health, safety and quality of care in OMH-operated psychiatric centers.

Public Service Commission

NOTICE OF ADOPTION

Increase in Annual Operating Revenue by Hudson Valley Water

I.D. No. PSC-17-15-00008-A
Filing Date: 2015-09-17
Effective Date: 2015-09-17

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

Action taken: On 9/17/15, the PSC adopted an order authorizing Hudson Valley Water Companies, Inc. (Hudson Valley Water) to increase its annual operating revenues by $33,815 or 21.8%, effective October 1, 2015.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1), (10)(a), (b), (e) and (f)

Subject: Increase in annual operating revenue by Hudson Valley Water.

Purpose: To authorize Hudson Valley Water to increase its annual operating revenue.

Substance of final rule: The Commission, on September 17, 2015, adopted an order authorizing Hudson Valley Water Companies, Inc. (Hudson Valley Water) to increase its annual operating revenues by $33,815 or 21.8%, effective October 1, 2015, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Elaine Agresta, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2660, email: elaine.agresta@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(15-W-0209SA1)

NOTICE OF ADOPTION

Revisions to the EDI Standards Documents

I.D. No. PSC-20-15-00007-A
Filing Date: 2015-09-21
Effective Date: 2015-09-21

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

Action taken: On 9/17/15, the PSC adopted an order approving revisions to the Electronic Data Interchange (EDI) Standards documents, filed on April 7, 2015 in the ''Report on EDI Standards Development.''

Statutory authority: Public Service Law, sections 5(1)(b) and 66(1)

Subject: Revisions to the EDI Standards documents.

Purpose: To approve revisions to the EDI Standards documents.

Substance of final rule: The Commission, on September 17, 2015, adopted an order approving revisions to the Electronic Data Interchange (EDI) Standards documents, filed on April 7, 2015 in the ''Report on EDI Standards Development,'' subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Elaine Agresta, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2660, email: elaine.agresta@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(12-M-0476SA10)

NOTICE OF ADOPTION

Central Hudson's Petition to Enter into Multi-Year Committed Credit Agreements and Issue Long-Term Debt

I.D. No. PSC-21-15-00006-A
Filing Date: 2015-09-18
Effective Date: 2015-09-18

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

Action taken: On 9/17/15, the PSC adopted an order approving Central Hudson Gas and Electric Corporation (Central Hudson) to enter into Revolving Credit Agreement(s) not exceeding $200 million and issue long-term debt of up to $350 million.

Statutory authority: Public Service Law, section 69

Subject: Central Hudson's petition to enter into multi-year committed credit agreements and issue long-term debt.

Purpose: To approve Central Hudson's petition to enter into multi-year committed credit agreements and issue long-term debt.

Substance of final rule: The Commission, on September 17, 2015, adopted an order approving Central Hudson Gas and Electric Corporation's (Central Hudson) petition to enter into Revolving Credit Agreement(s) not to exceed $200 million and issue and sell up to $350 million of unsecured debt in one or more transactions, not later than December 31, 2018, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Elaine Agresta, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2660, email: elaine.agresta@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(15-M-0251SA1)

NOTICE OF ADOPTION

Petition of SIPP for Refinancing

I.D. No. PSC-24-15-00010-A
Filing Date: 2015-09-21
Effective Date: 2015-09-21

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

Action taken: On 9/17/15, the PSC adopted an order approving Sithe/Independence Power Partners, L.P.'s (SIPP) financing plan to increase its authorized financing limit from $2.175 billion up to a maximum amount of $8.280 billion.

Statutory authority: Public Service Law, sections 69 and 82

Subject: Petition of SIPP for refinancing.

Purpose: To approve the petition of SIPP for refinancing.

Substance of final rule: The Commission, on September 17, 2015, adopted an order approving Sithe/Independence Power Partners, L.P.'s financing plan to increase its authorized financing limit from $2.175 billion up to a maximum amount of $8.280 billion, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Elaine Agresta, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2660, email: elaine.agresta@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(15-M-0297SA1)

NOTICE OF ADOPTION

Niagara Mohawk's Waiver of Certain Regulations Under Public Service Law Article VII

I.D. No. PSC-27-15-00013-A
Filing Date: 2015-09-18
Effective Date: 2015-09-18

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

Action taken: On 9/17/15, the PSC adopted an order approving a waiver requested by Niagara Mohawk Power Corporation d/b/a National Grid (Niagara Mohawk) of certain regulations under Public Service Law article VII.

Statutory authority: Public Service Law, sections 4 and 122

Subject: Niagara Mohawk's waiver of certain regulations under Public Service Law article VII.

Purpose: To approve Niagara Mohawk's waiver of certain regulations under Public Service Law article VII.

Substance of final rule: The Commission, on September 17, 2015, adopted an order approving a waiver requested by Niagara Mohawk Power Corporation d/b/a National Grid (Niagara Mohawk) for the requirements set forth in 16 NYCRR Section 86.3(b)(2) relating to its pending Article VII application, to permit the use of aerial photographs that were taken more than six months before the filing of the application, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Elaine Agresta, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2660, email: elaine.agresta@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(15-T-0305SA1)

NOTICE OF ADOPTION

Petition of Forever Wild Water to Modify Terms of Order and Escrow Account Statement

I.D. No. PSC-28-15-00005-A
Filing Date: 2015-09-17
Effective Date: 2015-09-17

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

Action taken: On 9/17/15, the PSC adopted an order approving a petition of Forever Wild Water Company, Inc. (Forever Wild Water) to modify the terms of the April 17, 2015 order and the terms of the Escrow Account Statement No. 2 to P.S.C No. 3 — Water.

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

Subject: Petition of Forever Wild Water to modify terms of order and Escrow Account Statement.

Purpose: To approve the petition of Forever Wild Water to modify terms of order and Escrow Account Statement.

Substance of final rule: The Commission, on September 17, 2015, adopted an order approving a petition of Forever Wild Water Company, Inc. (Forever Wild Water) to modify the terms of the April 17, 2015 order and the terms of the Escrow Account Statement No. 2 to P.S.C No. 3 — Water, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Elaine Agresta, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2660, email: elaine.agresta@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(14-W-0307SA2)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Proposed Public Policy Transmission Needs/Public Policy Requirements, As Defined Under the NYISO Tariff

I.D. No. PSC-40-15-00011-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 adopt, modify, or reject, in whole or in part, certain proposals to relieve congestion between Upstate and Downstate New York to be transmission needs driven by Public Policy Requirements.

Statutory authority: Public Service Law, sections 4(1), 5(1)(b), (2), 65(1), 66(1), (2) and (5)

Subject: Proposed Public Policy Transmission Needs/Public Policy Requirements, as defined under the NYISO tariff.

Purpose: To ensure that the bulk electric transmission system is sufficient to serve the public.

Substance of proposed rule: The Public Service Commission (Commission) is considering proposed Public Policy Transmission Needs/Public Policy Requirements, as defined in the New York Independent System Operator, Inc.'s (NYISO) Open Access Transmission Tariff (Attachment Y), which were submitted by the NYISO on October 3, 2014. Some of the documents provided by the NYISO and posted on the Commission's website in Case 14-E-0454 include proposals that the persistent transmission congestion that exists at the Central East and Upstate New York/Southeast New York (UPNY/SENY) electrical interfaces being considered in the Commission's AC Transmission Proceedings (Cases 12-T-0502, 13-E-0488, 13-T-0454, 13-T-0455, 13-T-0456, 13-M-0457 and 13-T-0461) be designated a transmission need driven by Public Policy Requirements. More specifically, Staff of the Department of Public Service in its ''Motion of DPS Trial Staff for Commission to Declare a Public Policy Need & Take Further Action Regarding Alternating Current Transmission Proposals'' dated September 22, 2015 and filed in the AC Transmission Proceedings has made a proposal that the Commission make a finding and determination that there is a transmission need driven by Public Policy Requirements for a specific portfolio of projects designed to address Central East and UPNY/SENY congestion identified as follows:

SEGMENT A

Edic/Marcy to New Scotland; Princetown to Rotterdam

Construction of a new 345 kV line from Edic or Marcy to New Scotland on existing right-of-way (primarily using Edic to Rotterdam right-of-way west of Princetown); construction of two new 345 kV lines or two new 230 kV lines from Princetown to Rotterdam on existing Edic to Rotterdam right-of-way; decommissioning of two 230 kV lines from Edic to Rotterdam; related switching or substation work at Edic or Marcy, Princetown, Rotterdam, and New Scotland.

SEGMENT B

Knickerbocker to Pleasant Valley

Construction of a new double circuit 345 kV/115 kV line from Knickerbocker to Churchtown on existing Greenbush to Pleasant Valley right-of-way; construction of a new double circuit 345 kV/115 kV line or triple circuit 345 kV/115 kV/115 kV line from Churchtown to Pleasant Valley on existing Greenbush to Pleasant Valley right-of-way; decommissioning of a double-circuit 115 kV line from Knickerbocker to Churchtown; decommissioning of one or two double-circuit 115 kV lines from Knickerbocker to Pleasant Valley; related switching or substation work at Greenbush, Knickerbocker, Churchtown and Pleasant Valley.

Upgrades to the Rock Tavern Substation

New line traps, relays, potential transformer upgrades, switch upgrades, system control upgrades and the installation of data acquisition measuring equipment and control wire needed to handle higher line currents that will result as a consequence of the new Edic/Marcy to New Scotland; Princetown to Rotterdam and Knickerbocker to Pleasant Valley lines.

Shoemaker to Sugarloaf

Construction of a new double circuit 138 kV line from Shoemaker to Sugarloaf on existing Shoemaker to Sugarloaf right-of-way; decommissioning of a double circuit 69 kV line from Shoemaker to Sugarloaf; related switching or substation work at Shoemaker, Hartley, South Goshen, Chester, and Sugarloaf.

In accordance with its Policy Statement issued in Case 14-E-0068 on August 15, 2014, the Commission seeks comments on whether the proposals described above should be identified as Public Policy Transmission Needs/Public Policy Requirements that may drive the need for transmission and should be referred to the NYISO to solicit and evaluate potential solutions.

The Commission may address other related matters, including but not limited to, whether the Commission should provide evaluation criteria to the NYISO or require the NYISO to perform specific analyses as part of its project review process, or whether any proposed Public Policy Transmission Needs/Public Policy Requirements should be addressed by transmission or non-transmission solutions. The Commission may also prescribe a cost allocation methodology associated with any identified Public Policy Transmission Needs/Public Policy Requirements. The Commission may approve, modify, or reject, in whole or in part, the relief proposed.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Elaine Agresta, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2660, email: elaine.agresta@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.

(12-T-0502SP5)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Establishment of the Regulatory Regime Applicable to an Approximately 106 MW Electric Generating Facility

I.D. No. PSC-40-15-00012-P

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

Proposed Action: The Commission is considering a petition filed by Greenidge Generation LLC for approval of a lightened regulatory regime in connection with its approximately 106 MW electric generating facility, located in the Town of Torrey, Yates County, New York.

Statutory authority: Public Service Law, sections 2(2-a), (13), 5(1)(b), 18-a, 19, 64-69, 69-a, 70, 71, 72, 72-a, 75, 105-114, 114-a, 115, 117, 118, 119-a, 119-b and 119-c

Subject: Establishment of the regulatory regime applicable to an approximately 106 MW electric generating facility.

Purpose: Consideration of approval of a lightened regulatory regime for an approximately 106 MW electric generating facility.

Substance of proposed rule: The Public Service Commission (Commission) is considering a petition filed by Greenidge Generation LLC on September 10, 2015, and supplemented on September 16, 2015, requesting approval of a lightened regulatory regime in connection with petitioner's approximately 106 megawatt electric generating facility, which is currently retired, located in the Town of Torrey, Yates County, New York. The petitioner requests an order providing that the petitioner will be regulated as an electric corporation under a lightened regulatory regime consistent with that imposed on the owners-operators of other competitive wholesale generators, upon the proposed return to service of such facility. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

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

(15-E-0516SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Issuance by Niagara Mohawk Power Corporation d/b/a National Grid of Long-Term Indebtedness of Up to $2.07 Billion

I.D. No. PSC-40-15-00013-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, modify or reject, in whole or in part, Niagara Mohawk Power Corporation d/b/a National Grid request for authority to issue up to $2.07 billion in debt until March 31, 2020.

Statutory authority: Public Service Law, section 69

Subject: Issuance by Niagara Mohawk Power Corporation d/b/a National Grid of long-term indebtedness of up to $2.07 billion.

Purpose: To consider a petition for authority to issue long-term indebtedness in the amount of up to $2.07 billion until March 31, 2020.

Substance of proposed rule: On August 28, 2015, Niagara Mohawk Power Corporation, d/b/a National Grid (National Grid) filed a petition under Public Service Law (PSL) § 69 seeking authority to issue a maximum of $2.07 billion in long-term debt not later than March 31, 2020. National Grid states that the debt is necessary to finance construction of utility plant, refinancing maturing and/or redeemed issues of debt, refinancing callable debt, refinancing short-term debt with long-term debt, financing the capital needs of National Grid, and other general corporate purposes. The Commission may grant, deny or modify, in whole or in part, the petition and may consider issues related to the proposed long-term debt issuance.

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: Elaine Agresta, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2660, email: Elaine.Agresta@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.

(15-M-0509SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Whether to Permit the Use of the Open Way 3.5 with Cellular Communications

I.D. No. PSC-40-15-00014-P

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

Proposed Action: The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, a petition filed by Itron Incorporated for approval to use the Itron Open Way Centron Meter, Hardware 3.5 with cellular communications.

Statutory authority: Public Service Law, section 67(1)

Subject: Whether to permit the use of the Open Way 3.5 with cellular communications.

Purpose: To consider the use of the Open Way 3.5 electric meter, pursuant to 16 NYCRR Parts 92 and 93.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Itron, Inc. for approval to use the residential Itron OpenWay Centron Meters, Hardware 3.5, with cellular communications, and any other related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Elaine Agresta, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2660, email: Elaine.Agresta@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.

(15-E-0498SP1)

Department of State

EMERGENCY
RULE MAKING

Installation of Carbon Monoxide Detecting Devices in Commercial Buildings

I.D. No. DOS-04-15-00004-E
Filing No. 820
Filing Date: 2015-09-21
Effective Date: 2015-09-21

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

Action taken: Addition of section 1228.4 to Title 19 NYCRR.

Statutory authority: Executive Law, sections 377(1) and 378(5-d)

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

Specific reasons underlying the finding of necessity: This rule is re-adopted as an emergency measure to preserve public safety and public health and because time is of the essence.

This is the first re-adoption of an emergency rule that amends the State Uniform Fire Prevention and Building Code (Uniform Code). The Uniform Code is a fire prevention and building code adopted by the State Fire Prevention and Building Code Council (Code Council) pursuant to Article 18 of the Executive Law. The Uniform Code is applicable in all parts of the State except New York City.

Executive Law § 378 sets forth standards which the Uniform Code shall address. Chapter 541 of the Laws of 2014 amended Executive Law § 378 by adding a new subdivision 5-d. New subdivision 5-d provides that the Uniform Code must include "[s]tandards for installation of carbon monoxide detecting devices requiring that the owner of every building that contains one or more restaurants and the owner of every commercial building in the state shall have installed in such building and shall maintain operable carbon monoxide detecting device or devices of such manufacture, design and installation standards as are established by the [Code Council]. Carbon monoxide detecting devices shall only be required if the restaurant or commercial building has appliances, devices or systems that may emit carbon monoxide or has an attached garage."

This rule amends 19 NYCRR Part 1228 (entitled "Additional Uniform Code Provisions") by adding a new section 1228.4 (entitled "Carbon Monoxide Detection in Commercial Buildings"). New section 1228.4 implements subdivision 5-d of Executive Law § 378. Specifically, section 1228.4 requires the installation of carbon monoxide detecting devices (carbon monoxide alarms or a carbon monoxide detection system) in every commercial building (including every building that contains one or more restaurants) if such building contains a carbon monoxide source, contains a garage or other motor-vehicle-related occupancy and/or is attached to a garage or other motor-vehicle-related occupancy. Section 1228.4 also establishes the manufacture, design, and installation standards for such carbon monoxide detecting devices.

Re-adoption of this rule on an emergency basis is necessary to protect public safety because the absence of carbon monoxide detection devices in nonresidential occupancies has contributed to instances of illness and

death among patrons and employees. The Memorandum in Support of the bill enacting Executive Law § 378 (5-d) states that while New York State one- and two-family homes and apartments are required to be equipped with carbon monoxide detectors, restaurants and other businesses are not. This failure to mandate carbon monoxide detectors in commercial buildings has contributed to cases of illness and death among patrons and employees. The Memorandum in support of the companion bill, which amended the New York City administrative code to require carbon monoxide detection in restaurants and other commercial buildings in New York City, references the 2014 carbon monoxide leak that tragically killed a Long Island restaurant manager and sickened nearly 30 people. The carbon monoxide poisoning in this incident came from a malfunctioning water heater flue pipe in the basement of the establishment.

Carbon monoxide is an invisible, odorless gas that is generated by the incomplete combustion of carbonaceous fuels such as fuel oil, natural gas, kerosene and wood. In non fire situations, elevated carbon monoxide levels may be caused by improperly installed or maintained fuel fired appliances, motor vehicles operated in enclosed garages, or using appliances intended for outdoor use indoors during power failures. As carbon monoxide is not detectable by the senses, its presence and concentration can only be determined by instruments such as carbon monoxide detection systems.

By bringing restaurants and commercial buildings onto an equal footing with residences, the Legislature's objective is to provide a safe experience for customers and employees and to reduce the number of deaths and injuries caused by carbon monoxide poisoning.

A rule amending the State Uniform Fire Prevention and Building Code (Uniform Code) by adding a new section 1228.4 to Part 1228 of Title 19 NYCRR was adopted as an emergency measure and proposed for permanent adoption by Notice of Emergency Adoption and Proposed Rule Making (NEAPRM) filed on June 26, 2015 and published in the State Register on July 15, 2015. New section 1228.4 requires the installation of carbon monoxide detection in all commercial buildings and implements subdivision 5-d of Executive Law § 378, as added by Chapter 541 of the Laws of 2014.

The rule adding new section 1228.4 became effective as an emergency measure on June 27, 2015. The emergency rule will expire on September 23, 2015.

At its meeting held on August 19, 2015, the State Fire Prevention and Building Code Council (Code Council) found and determined that re-adoption of this rule on an emergency basis, as authorized by section 202 of the State Administrative Procedure Act, is required to preserve public safety and general welfare because:

(1) Executive Law § 378(5-d), as added by Chapter 541 of the Laws of 2014, provides that the Uniform Code must contain provisions requiring the installation of carbon monoxide detecting devices in every commercial building and every building that contains one or more restaurants;

(2) Executive Law § 378(5-d) became effective on June 27, 2015;

(3) the initial emergency adoption of this rule became effective on June 27, 2015;

(4) the initial emergency adoption of this rule will expire on September 23, 2015;

(5) the August 19, 2015 meeting of the Code Council is the last meeting of the Code Council scheduled to be held prior to September 23, 2015;

(6) the public comment period on the proposal to adopt this rule as a permanent measure closes on September 13, 2015, and no action to adopt this rule as a permanent measure can be taken any earlier than September 13, 2015; and

(7) re-adopting this rule on an emergency basis at the August 19, 2015 meeting of the Code Council is necessary to assure that the Uniform Code will continue to include the provisions contemplated by subdivision 5-d of Executive Law § 378 between September 23, 2015 and the date on which the rule might be considered for adoption as a permanent rule.

Subject: Installation of carbon monoxide detecting devices in commercial buildings.

Purpose: The purpose of this rule is to amend the State Uniform Fire Prevention and Building Code (Uniform Code) by adding standards requiring the installation of carbon monoxide detecting devices in every commercial building (including but not limited to every building that contains one or more restaurants), if such building has appliances, devices or systems that may emit carbon monoxide or has an attached garage, and to establish manufacture, design and installation standards for such carbon monoxide detecting devices.

Substance of emergency rule: This is the first re-adoption of an emergency rule that adds new section 1228.4 to Part 1228 of 19 NYCRR. New section 1228.4 is part of the State Uniform Fire Prevention and Building Code (the Uniform Code). The provisions of new section 1228.4 (entitled "Carbon Monoxide Detection in Commercial Buildings") are summarized as follows:

Subdivision (a) ("Introduction") introduces the new section, which implements standards and requirements regarding carbon monoxide ("CO") detection in certain new and existing commercial.

Subdivision (b) ("Definitions") defines certain terms used in section 1228.4, including:

CARBON MONOXIDE SOURCE ("any appliance, equipment, device or system that may emit carbon monoxide [including, but not limited to, fuel fired furnaces; fuel fired boilers; space heaters with pilot lights or open flames; kerosene heaters; wood stoves; fireplaces; and stoves, ovens, dryers, water heaters and refrigerators that use gas or liquid fuel], garages, and other motor vehicle related occupancies");

CARBON MONOXIDE-PRODUCING HVAC SYSTEM ("a system that uses ducts to provide heat, ventilation and/or air-conditioning to all or any part of a commercial building, provided that (i) such ducts run from a carbon monoxide source to the classroom(s) and/or detection zone(s) served by such system and/or (ii) such system is supplied with recirculated or makeup air from a classroom or detection zone that contains a carbon monoxide source");

CLASSROOM ("a room or area that [i] is located in a school, [ii] is a place where classes are taught, and [iii] is occupied or capable of being occupied by six or more persons (including students and teachers) at any one time. For the purposes of this definition, the term 'school' means any building used, in whole or in part, for educational purposes, including but not limited to a building classified, in whole or in part, as Educational Group E under Chapter 3 of the 2010 BCNYS. The term 'school' includes public schools and private schools, including but not limited to religious schools. However, the term 'school' does not include a school attended only by students above the 12th grade");

COMMERCIAL BUILDING ("any new or existing building that is not a one-family dwelling, a two-family dwelling, or a building containing only townhouses");

DETECTION ZONE (as a story of a commercial building, subject to the following exceptions: (i) if a story is arranged so that two or more separate carbon monoxide-producing HVAC systems are used to serve separate portions of the story, each such portion of the story shall be deemed to be a separate detection zone; (ii) if a story contains one or more classrooms, each classroom shall be deemed to be a separate detection zone and the portion, if any, of the story that is not a classroom shall be deemed to be a separate detection zone; (iii) if a portion of a story is used as a garage, the portion used as a garage shall not be deemed to be a detection zone and the portion not used as a garage shall be deemed to be a detection zone; and (iv) if an entire story is used as a garage, such story shall not be deemed to be a detection zone);

EXISTING COMMERCIAL BUILDING (a commercial building that was constructed prior to December 31, 2015[1]); and

NEW COMMERCIAL BUILDING (a commercial building that is not an existing commercial building).

Subdivision (c) ("Commercial buildings required to have carbon monoxide detection") provides that as a general rule, CO detection must be provided in every commercial building that (i) contains any CO source and/or (ii) is attached to a garage and/or (iii) is attached to any other motor-vehicle-related occupancy. These requirements shall apply without regard to whether such commercial building is an existing commercial building or a new commercial building and without regard to whether such commercial building shall or shall not have been offered for sale. However, CO detection shall not be required in a (1) commercial building that is classified, in its entirety, in Storage Group S or Utility and Miscellaneous Group U under Chapter 3 of the 2010 Building Code of New York State (the 2010 BCNYS) and occupied only occasionally and only for building or equipment maintenance, or (2) a commercial building that is a "canopy" (as that term is defined in the 2010 Fire Code of New York State).

Subdivision (d) ("Detection zones required to be provided with carbon monoxide detection") specifies the detection zones where carbon monoxide detection must be provided. In general, CO detection is required in each detection zone in which at least one "triggering condition" exists.

"Triggering Condition 1" is the presence of any CO source in the detection zone.

"Triggering Condition 2" is the presence in a detection zone of a duct opening or other outlet from a CO-producing HVAC system (provided, however, that the presence of such a duct opening or outlet in a detection zone is not a "triggering condition" for such detection zone if (a) CO detection is provided in the first room or area served by each main duct leaving the CO source in such CO-producing HVAC system and (b) the signals from the carbon monoxide detection equipment in the first room or area served by each such main duct are automatically transmitted to an approved location).

"Triggering Condition 3" is the presence of a garage or other motor-vehicle-related occupancy in location that is adjacent to a detection zone (subject to certain exceptions stated in the full Text of the rule).

If a detection zone (other than a classroom) that would otherwise require CO detection has ambient conditions that would, under normal conditions

and with all required ventilation and exhaust systems installed and operating properly, activate CO detection devices, CO detection shall not be required in that detection zone provided that an alternative safety plan for the commercial building in which such detection zone is located shall have been approved by the authority having jurisdiction and implemented.

If a detection zone (other than a classroom) that would otherwise require CO detection is "open" (without sidewalls or drops) on 50 percent or more of its perimeter, and there is no occupiable area within such detection zone that is not open on 50 percent or more of its perimeter, CO detection shall not be required in that detection zone.

Subdivision (e) ("Placement of carbon monoxide detection") specifies that places within a detection zone where the CO detection devices must be located. In the case of a detection zone having an area less than 10,000 square feet, the CO detection must be placed in a central location within such detection zone. In the case of a detection zone having an area 10,000 square feet or larger, CO detection must be placed in a central location within such detection zone and at such additional locations within such detection zone as may be necessary to assure that no point in the detection zone is more than 100 feet from CO detection. In certain cases (more fully described in the full Text of the rule), the additional CO detection will not be required in a detection zone that is 10,000 square feet or larger.

Subdivision (f) ("Detection equipment") provides that CO detection shall be provided by CO alarms complying with subdivision (g) or a CO detection system complying with subdivision (h).

Subdivision (g) ("Carbon monoxide alarms") specifies specifications for CO alarms. In general, CO alarms must be hard-wired, with a battery backup. However, battery-powered CO alarms (powered by a 10-year battery) will be allowed in existing commercial building and in commercial buildings without commercial electric power. In either case, CO alarms must be listed in accordance with Underwriters Laboratory (UL) 2034. Combination CO / smoke alarms shall not be deemed to satisfy the requirements of this section 1228.4.

In new commercial buildings, where a CO alarm is installed in a normally unoccupied detection zone, such CO alarm must be interconnected with a CO alarm that is placed in an adjacent and normally occupied detection zone. A sign that identifies and describes the location of each normally unoccupied detection zone that contains any such interconnected CO alarm must be placed in the proximity of each CO alarm installed in a normally occupied detection zone.

CO alarms must be installed in the locations specified in subdivisions (d) and (e) of section 1228.4.

In general, CO alarms must be installed, operated, and maintained in accordance with the manufacturer's instructions. However, in the event of a conflict between the manufacturer's instructions and the provisions of section 1228.4, the provisions of this section 1228.4 shall control.

Subdivision (h), "Carbon monoxide detection systems," specifies requirements for CO detection systems. CO detection systems must comply with National Fire Protection Association (NFPA) 720. CO detectors shall be listed in accordance with UL 2075.

The CO detectors must be installed in the locations specified in subdivisions (d) and (e) of section 1228.4. In the event of a conflict between the CO detector location requirements specified in subdivisions (d) and (e) and the CO detector location requirements specified in NFPA 720, the location requirements specified in subdivisions (d) and (e) of section 1228.4 shall control.

Combination CO / smoke detectors will be permitted in CO detection systems, provided such combination detectors are listed in accordance with UL 2075 and UL 268.

Notification appliances in CO detection systems must comply with NFPA 720. Notification appliances shall be provided in the locations specified in NFPA 720 or, in the alternative, in the locations specified in subdivisions (d) and (e) and paragraph (4) of subdivision (g) of section 1228.4 as the required locations for CO detection.

The power source for CO detection systems must comply with NFPA 720.

Subdivision (i) ("Additional requirement in Group E occupancies") provides that in a new commercial building that (i) has an occupant load of 31 or more and (ii) is classified, in whole or in part, as Educational Group E under Chapter 3 of the 2010 BCNYS, CO alarm signals shall be automatically transmitted to an approved on-site location that is normally staffed by school personnel during normal school hours.

Subdivision (j) ("Maintenance") provides that CO alarms and CO detection systems must be maintained in accordance with NFPA 720, and that CO alarms and CO detectors that become inoperable or begin producing end-of-life signals must be replaced as soon as practicable.

Subdivision (k) ("Connection of carbon monoxide detection systems to control units and off-premises signal transmission") provides that CO detection systems shall be connected to control units and off-premises signal transmission. All CO detection systems installed in accordance with subdivision (h) of section 1228.4 shall have off-premises signal transmission in accordance with NFPA 720. All CO detection systems in new commercial buildings that are required by section 903 or section 907 of the 2010 Fire Code of New York State to have a fire alarm control panel installed shall have off-premises signal transmission in accordance with NFPA 720. CO detection systems shall not activate a fire signal to a fire alarm control panel. CO detection systems shall not activate any notification appliance that announces a fire alarm or any other alarm that is not distinctive from a fire notification as required by NFPA 72. Where notification of CO detection system is permitted to be transmitted to approved locations, at least one approved notification appliance shall be provided within every building that transmits a signal to an approved location.

Subdivision (l) ("Other Uniform Code provisions relating to carbon monoxide detection") provides that section 1228.4 does not repeal, override, modify or otherwise affect any other provision of the Uniform Code (including but not necessarily limited to section R313.4 of the 2010 RCNYS and section 610 of the 2010 FCNYS) that requires CO detection in any class of buildings, and that any building that is or becomes subject to any such other provision must comply with such other provision. Subdivision (l) further provides that in the case of a building that (1) is subject to section R313.4 of the 2010 RCNYS or section 610 of the 2010 FCNYS and (2) is also a "commercial building" that is subject to section 1228.4 (a "mixed use building") must comply with the requirements of section R313.4 of the 2010 RCNYS or section 610 of the 2010 FCNYS, as applicable, and, in addition, shall comply with the requirements of section 1228.4. However, duplicative CO detection shall not be required, and if an area in a mixed use building is provided CO detection in accordance with the requirements of section R313.4 of the 2010 RCNYS or section 610 of the 2010 FCNYS, as applicable, such area need not be provided with additional CO protection under this section 1228.4.

Subdivision (m) ("Interconnection in mixed used buildings") provides that in the case of a new "mixed use building," the CO detection required by section 1228.4 must be interconnected with the CO detection required by section R313.4 of the 2010 RCNYS or section 610 of the 2010 FCNYS, as applicable.

Subdivision (n) ("Incorporation by reference") provides for the incorporation by reference of the 2010 BCNYS, the 2010 FCNYS, and NFPA 720 in section 1228.4.

Subdivision (o) ("Effective date") provides that section 1228.4 will take effect on June 27, 2015.

Subdivision (p) ("Transition period") establishes a transition period (June 27, 2015 to June 27, 2016); provides that owners of existing commercial buildings are encouraged to install carbon monoxide detection as quickly as practicable; provides that the owner of an existing commercial building shall not be deemed to be in violation of section 1228.4 if the owner provides the authority having jurisdiction with a written statement certifying that such owner is attempting in good faith to install carbon monoxide detection that complies with the requirements of this section 1228.4 in such owner's existing commercial building as quickly as practicable; and provides that carbon monoxide detection that satisfies the requirements of section 1228.4 must be installed and must be fully operational in all existing commercial buildings by the end of the transition period.

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[1] A commercial building shall be deemed to have been constructed prior to December 31, 2015 (and, therefore, to be an existing commercial building) if (i) the original construction of such commercial building was completed prior to December 31, 2015 or (ii) the complete application for the building permit for the original construction of such commercial building was filed prior to December 31, 2015.

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. DOS-04-15-00004-EP, Issue of July 15, 2015. The emergency rule will expire November 19, 2015.

Text of rule and any required statements and analyses may be obtained from: Mark Blanke, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-4073, email: Mark.Blanke@dos.ny.gov

Additional matter required by statute:

1. Executive Law § 378(15)(a)

A rule amending the State Uniform Fire Prevention and Building Code (Uniform Code) by adding a new section 1228.4 to Part 1228 of Title 19 NYCRR was adopted as an emergency measure and proposed for permanent adoption by Notice of Emergency Adoption and Proposed Rule Making (NEAPRM) filed on June 26, 2015 and published in the State Register on July 15, 2015. New section 1228.4 requires the installation of carbon monoxide detection in all commercial buildings and implements subdivision 5-d of Executive Law § 378, as added by Chapter 541 of the Laws of 2014.

The rule adding new section 1228.4 became effective as an emergency measure on June 27, 2015. The emergency rule will expire on September 23, 2015.

At its meeting held on August 19, 2015, the State Fire Prevention and Building Code Council (Code Council) found and determined that re-adoption of this rule on an emergency basis, as authorized by section 202 of the State Administrative Procedure Act, is required to preserve public safety and general welfare because:

(1) Executive Law § 378(5-d), as added by Chapter 541 of the Laws of 2014, provides that the Uniform Code must contain provisions requiring the installation of carbon monoxide detecting devices in every commercial building and every building that contains one or more restaurants;

(2) Executive Law § 378(5-d) became effective on June 27, 2015;

(3) the initial emergency adoption of this rule became effective on June 27, 2015;

(4) the initial emergency adoption of this rule will expire on September 23, 2015;

(5) the August 19, 2015 meeting of the Code Council is the last meeting of the Code Council scheduled to be held prior to September 23, 2015;

(6) the public comment period on the proposal to adopt this rule as a permanent measure closes on September 13, 2015, and no action to adopt this rule as a permanent measure can be taken any earlier than September 13, 2015; and

(7) re-adopting this rule on an emergency basis at the August 19, 2015 meeting of the Code Council is necessary to assure that the Uniform Code will continue to include the provisions contemplated by subdivision 5-d of Executive Law § 378 between September 23, 2015 and the date on which the rule might be considered for adoption as a permanent rule.

At its meeting held on August 19, 2015, the Code Council also found and determined that making the re-adoption of this rule effective immediately upon the filing of the Notice of Emergency Adoption, as authorized by Executive Law § 378(15)(a), is required to protect health, safety and security because, in the absence of such a finding and determination, the amendment of the Uniform Code to be implemented by this rule would not become effective until 90 days after publication of the Notice of Emergency Adoption and, for the reasons stated above, this rule must continue to remain on and after the date on which the initial emergency adoption of this rule would otherwise expire (September 23, 2015).

2. Executive Law § 377(1)

Pursuant to Section 377(1) of the Executive Law, the Secretary of State has reviewed the amendment of the Uniform Code to be implemented and continued by the re-adoption of this rule, has found that said amendment effectuates the purposes of Article 18 of the Executive Law, and has approved said amendment.

Summary of Regulatory Impact Statement

This is the first re-adoption of an emergency rule that amends the State Uniform Fire Prevention and Building Code (Uniform Code) by adding a new section 1228.4 to 19 NYCRR Part 1228 (Additional Uniform Code Provisions). New section 1228.4 (entitled "Carbon Monoxide Detection in Commercial Buildings") requires the installation of carbon monoxide detecting devices in every commercial building (including but not limited to every building containing one or more restaurants) if such building has an attached garage or contains any appliance, equipment, device or system that may emit carbon monoxide.

1. STATUTORY AUTHORITY.

This rule is authorized by Executive Law § 377(1), which authorizes the State Fire Prevention and Building Code Council (Code Council) to amend the Uniform Code from time to time, and by new subdivision (5-d) of Executive Law § 378, as added by Chapter 541 of the Laws of 2014. New subdivision (5-d) provides that the Uniform Code must include "standards for installation of carbon monoxide detecting devices requiring that the owner of every building that contains one or more restaurants and the owner of every commercial building in the state shall have installed in such building and shall maintain operable carbon monoxide detecting device or devices of such manufacture, design and installation standards as are established by the [Code Council]. Carbon monoxide detecting devices shall only be required if the restaurant or commercial building has appliances, devices or systems that may emit carbon monoxide or has an attached garage."

Subdivision (p) of new section 1228.4 added by this rule is authorized by Executive Law § 377(1), which provides that the Secretary of State (the Secretary) must review each amendment of the Uniform Code adopted by the Code Council to insure that it effectuates the purposes of Article 18 of the Executive Law, and that the Secretary must approve such amendment prior to its becoming effective; and by Executive Law § 376(5), which authorizes and directs the Secretary to do all things necessary or desirable to further and effectuate the general purposes and specific objectives of Article 18 of the Executive Law.

2. LEGISLATIVE OBJECTIVES.

Under current New York law, one and two family dwellings and apartments must be equipped with carbon monoxide detectors, but no such requirement exists for restaurants and commercial buildings. The absence of detection devices in nonresidential occupancies has contributed to instances of illness and death among patrons and employees. Chapter 541 of the Laws of 2014 amended Executive Law § 378 to require that the Uniform Code include standards for carbon monoxide detection in commercial buildings and every building that contains one or more restaurants. By requiring that restaurants and commercial buildings follow the same standards as residences, the Legislature demonstrates that its objectives are to reduce the number of deaths and injuries caused by carbon monoxide poisoning, and to provide safer environments for customers and employees.

3. NEEDS AND BENEFITS.

Carbon monoxide is an invisible, odorless gas that is generated by the incomplete combustion of carbonaceous fuels such as fuel oil, natural gas, kerosene and wood. In non fire situations, elevated carbon monoxide levels may be caused by improperly installed or maintained fuel fired appliances, motor vehicles operated in enclosed garages, or appliances intended for outdoor use being used indoors during power failures. As carbon monoxide is not detectable by the senses, its presence and concentration can only be determined by instruments such as carbon monoxide detection systems.

According to the United States Consumer Product Safety Commission, "on average, about 170 people in the United States die every year from CO produced by non-automotive consumer products.

According to the Center for Disease Control and Prevention, there were 68,316 non-fire-related CO exposures reported to poison centers between the years 2000 and 2009. (The Center for Disease Control and Prevention, Carbon Monoxide Exposures United States, 2000-2009, August 5, 2011, http://www.cdc.gov/mmwr/ preview/mmwrhtml/mm6030a2.htm.)

The Memorandum in Support of the bill enacting Executive Law § 378(5-d) states that the failure to mandate carbon monoxide detectors in commercial buildings has contributed to cases of illness and death among patrons and employees.

This rule implements Executive Law § 378(5-d) by requiring the installation of CO detecting devices in commercial buildings.

4. COSTS.

Cost to regulated parties.

Regulated parties (owners of new and existing commercial buildings that [1] contain one or more carbon monoxide sources and/or [2] contain a garage or other motor-vehicle related occupancy and/or [3] are attached to a garage or other motor-vehicle-related occupancy) are required to install carbon monoxide detection (carbon monoxide alarms or carbon monoxide detection systems) in the places specified in this rule, to maintain those carbon monoxide alarms or carbon monoxide detection systems, and to replace those carbon monoxide alarms or carbon monoxide detection systems when they cease to operate as intended.

In each commercial building where carbon monoxide detection is required, such detection must be located in each "detection zone" that contains a carbon monoxide source, is served by an HVAC system that includes a carbon monoxide-producing component, or is adjacent to a garage or other motor-vehicle-related occupancy. In general, each story in a commercial building will be a "detection zone."

Costs to regulated parties for compliance with this rule will vary depending on the size of such building, the number of carbon monoxide sources within the buildings, the wiring within the building, and the type of carbon monoxide detection (carbon monoxide alarms or a carbon monoxide detection system) the owner chooses to provide. The Department estimates that battery-powered carbon monoxide alarms cost approximately $50 (including installation costs). When carbon monoxide alarms are installed in new commercial buildings, the alarms must be hard-wired units with battery backup. The Department estimates that the total cost purchasing and installing hard-wired carbon monoxide alarms with battery backup will be approximately $125 per unit. Lastly, this rule will permit installation of a carbon monoxide detection system in lieu of carbon monoxide alarms. The total cost of purchasing and installing one detector and one notification appliance (a necessary component of the carbon monoxide detection system) will be approximately $348. In addition, a carbon monoxide detection system requires a control unit. The Department estimates that the cost of purchasing and installing a carbon monoxide detection system control unit will be approximately $1,100.

This rule provides that carbon monoxide alarms and carbon monoxide detection systems must be maintained in an operative condition at all times, shall be replaced or repaired where defective, and shall be replaced when they cease to operate as intended. The on-going costs of complying with this rule will include the cost of maintaining carbon monoxide alarms and carbon monoxide detection systems in operative condition.

Costs to the Department of State, the State, and Local Governments.

The Department anticipates that neither the Department nor the State nor the local governments in the State will incur any significant costs for

the implementation or continued administration of this rule, except as follows:

First, the Department will provide instruction and technical assistance regarding new section 1228.4 and its requirements to code enforcement officials and to regulated parties. The Department anticipates that it will be able to use its existing staff to perform these functions.

Second, cities, towns, villages, counties, and State agencies responsible for administration and enforcement of the Uniform Code will be required (1) to see that their code enforcement personnel receive training on new section 1228.4 and its requirements, and (2) to enforce these new provisions.

Third, the State, which owns commercial buildings, as well as any local government that owns one or more commercial buildings, will be subject to the new requirements to be imposed by new section 1228.4 and will be required to comply with those requirements. In this context, the State and any local government that owns commercial buildings will be regulated parties, and will incur compliance costs similar to those discussed above for other regulated parties.

5. PAPERWORK.

This rule requires carbon monoxide detection systems to comply with the Standard for the Installation of Carbon Monoxide (CO) Detection and Warning Equipment, published by the National Fire Protection Association (NFPA 720). If a regulated party elects to install a CO detection system in lieu of CO alarms, such system must comply with NFPA 720. A small business or local government that elects to install a CO detection system will be required to comply with the reporting and recordkeeping requirements specified in NFPA 720 Sections 4.5.1.2, 4.5.2.3, 8.3, 8.5, 8.9, and 8.9.2. NFPA 720 provides standardized forms to be used for this recordkeeping.

6. LOCAL GOVERNMENT MANDATES.

This rule imposes no new programs, services, duties and responsibilities upon Local Governments, except as follows:

First, any Local Government that owns any existing commercial building or constructs any new commercial building will be required to install carbon monoxide alarm(s) or a carbon monoxide detection system in such building.

Second, cities, towns, villages, and counties charged by Executive Law Section 381 with the responsibility of administering and enforcing the Uniform Code will be required to enforce the provisions of new section 1228.4. Such cities, towns, villages, and counties will be required to see that their code enforcement personnel receive training on new section 1228.4.

7. DUPLICATION.

This rule does not duplicate, overlap or conflict with any other legal requirement of the Federal or State government known to the Department.

8. ALTERNATIVES.

The rule does not permit the use of plug in units or battery-powered carbon monoxide alarms in new commercial buildings. The Department considered the alternative of allowing the use of battery-powered carbon monoxide alarms in new commercial buildings. This alternative was rejected because the Department determined that the additional cost associated with requiring hard-wired carbon monoxide alarms in new buildings was minimal (compared to the additional cost associated with requiring hard-wired alarms in existing buildings).

The rule permits a building owner to choose between installing carbon monoxide alarms or a carbon monoxide detection system. The Department considered the alternative of requiring the installation of a carbon monoxide detection system in all commercial buildings. This alternative was rejected because it would unnecessarily increase the cost of bringing commercial buildings, particularly existing commercial buildings, into compliance with the new statutory mandate.

The rule requires carbon monoxide detection in each detection zone where at least one of the "triggering conditions" exists. The rule also requires carbon monoxide detection in more than one location in larger (over 10,000 square feet) detection zones. The Department considered alternatives such as requiring carbon monoxide detection only in the vicinity of each carbon monoxide source, allowing plug-in units in new and existing buildings, and allowing alternative listing entities. These alternatives were rejected because the Department determined that such reduced coverage would not have provided the increased level of safety contemplated by the Legislature when it added a new subdivision (5-d) to section 378 of the Executive Law.

9. FEDERAL STANDARDS.

This rule parallels similar federal standards for carbon monoxide exposure. The federal standards apply to buildings consisting of employees who are employed in a business that affects commerce (CFR Title 29, Part 1910, Subpart Z, § 1910.1000: Air contaminants). However, although these standards are similar, they measure carbon monoxide exposures differently from section 1228.4, therefore making it difficult to conclude whether they exceed these standards. For example, CFR Title 29, Part 1910, Subpart Z, § 1910.1000 limits an employee's exposure to 50 ppm over an 8-hour weighted average, comparable to a typical workday. By contrast, carbon monoxide alarms required by section 1228.4 sound an alarm after detecting higher concentrations - 100 ppm or 400 ppm -over a much shorter period of time.

10. COMPLIANCE SCHEDULE.

Regulated parties that own existing commercial buildings will be able to comply with this rule by purchasing and installing battery-operated carbon monoxide alarms of the type currently on the market. The Department anticipates that regulated parties that own existing commercial buildings should be able to comply with this rule by the end of the "transition period" (June 27, 2015 through June 27, 2016) established by this rule.

Regulated parties constructing new commercial buildings will be able to comply with this rule by installing hard-wired carbon monoxide alarms or carbon monoxide detection systems as part of the construction process.

Summary of Regulatory Flexibility Analysis

1. EFFECT OF RULE

This is the first re-adoption of an emergency rule that implements the provisions of subdivision (5-d) of Executive Law § 378, as added by Chapter 541 of the Laws of 2014. Specifically, this rule amends the State Uniform Fire Prevention and Building Code (Uniform Code) by adding a new section 1228.4 (entitled "Carbon Monoxide Detection in Commercial Buildings") to 19 NYCRR Part 1228. New section 1228.4 requires the installation of carbon monoxide (CO) detecting devices in all new and existing commercial buildings.

Types and Estimated Number of Small Businesses and Local Governments Affected

This rule will affect any small business or local government that owns an existing commercial building or constructs a new commercial building. In addition, since landlords typically recover building-related costs by increasing rents, this rule will indirectly affect any small business or local government that rents space in a commercial building. The Department of State (the Department) is not able to estimate the number of small businesses and local governments that will be directly or indirectly affected by this rule; however, the Department anticipates that most small businesses and local governments will be directly or indirectly affected by this rule.

In addition, since this rule adds provisions to the Uniform Code, the activities of each local government that is responsible for administering and enforcing the Uniform Code will be affected by this rule. The Department estimates that approximately 1,604 local governments (mostly cities, towns and villages, as well as several counties) are responsible for administering and enforcing the Uniform Code.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS

Reporting and Recordkeeping Requirements

If a regulated party elects to install a CO detection system in lieu of CO alarms, such system must comply with the Standard for the Installation of Carbon Monoxide (CO) Detection and Warning Equipment, published by the National Fire Protection Association (NFPA 720). A small business or local government that elects to install a CO detection system will be required to comply with the reporting and recordkeeping requirements specified in NFPA 720 Sections 4.5.1.2, 4.5.2.3, 8.3, 8.5, 8.9, and 8.9.2. NFPA 720 provides standardized forms to be used for this recordkeeping.

Other Compliance Requirements

Small businesses and local governments that own a new or existing commercial building that contains a CO source, contains a garage or other motor-vehicle-related occupancy, or is attached to a garage or other motor-vehicle-related occupancy will be required to install CO detection (CO alarms or a CO detection system) in the places specified in this rule, to maintain those CO alarms or CO detection systems, and to replace those CO alarms or CO detection systems when they cease to operate as intended.

In each commercial building where CO detection is required, such detection must be located in each "detection zone" that contains a CO source, is served by an HVAC system that includes a CO-producing component, or is adjacent to a garage or other motor-vehicle-related occupancy.

In general, each story of a commercial building will be a "detection zone." However, if different portions of a story are served by separate HVAC systems, each such portion of the story will be a separate detection zone. In addition, each classroom in a K-12 educational building will be deemed to be a separate detection zone.

As a general rule, when CO detection must be provided in a detection zone, the CO detection must be placed in a central location within the detection zone. However, if the detection zone is larger than 10,000 square feet, additional CO detection must be placed in such additional locations as may be necessary to assure that no point in the detection zone is more than 100 feet from CO detection.

In an existing commercial building (or in a new or existing commercial building without commercial electric power), CO alarms powered by 10-

year batteries are permitted.[1] When CO alarms are installed in new commercial buildings, the alarms must be hard-wired units with battery backup.

This rule also permits installation of a CO detection system in lieu of CO alarms. A CO detection system (1) must comply with NFPA 720, (2) must have a detector at each location where a CO alarm otherwise would have been required, and (3) must have a notification appliance at each location specified in NFPA 720 or, in the alternative, at each location where a CO alarm otherwise would have been required.

There are several additional compliance requirements. For example:

(1) When a CO alarm is installed in a normally unoccupied detection zone in a new commercial building, that alarm must be interconnected with a CO alarm that is placed in an adjacent and normally occupied detection zone; and

(2) In the case of a new commercial building that (i) has an occupant load of 31 or more and (ii) is classified, in whole or in part, as Educational Group E under Chapter 3 of the 2010 Building Code of New York State (BCNYS), this rule provides that CO alarm signals must be automatically transmitted to an approved on-site location that is normally staffed by school personnel during normal school hours.

(3) CO detection systems shall be connected to control units and off-premises signal transmission in accordance with the requirements of the BCNYS.

3. PROFESSIONAL SERVICES

If a small business or local government elects to install a CO detection system (in lieu of CO alarms), the small business or local government must hire service personnel with the qualifications and experience listed in NFPA 720 Section 8.3 in order to install and maintain the CO detection system.

In addition, in certain situations a small business or local government that elects to install a CO detection system may be required to hire a person holding an appropriate license under General Business Law Article 6-D to install, service or maintain such CO detection system.

4. COMPLIANCE COSTS

Initial Costs of Compliance

The initial capital costs of complying with the rule will include the cost of purchasing and installing the CO alarms or CO detection systems. Costs to regulated parties for compliance with this rule will vary depending on the size of such building, the number of CO sources within the buildings, the wiring within the building, and the type of CO detection (CO alarms or a CO detection system) the owner chooses to provide.[2]

In an existing commercial building (or in a new or existing commercial building without commercial electric power), CO alarms powered by 10-year batteries are permitted. The Department estimates that the cost of purchasing and installing such battery-powered CO alarms is approximately $50.

When CO alarms are installed in new commercial buildings, the alarms must be hard-wired units with battery backup. The Department estimates that total cost purchasing and installing hard-wired CO alarms with battery backup will be approximately $125 per unit.

This rule permits installation of a CO detection system in lieu of CO alarms. A CO detection system (1) must comply with NFPA 720, (2) must have a detector at each location where a CO alarm otherwise would have been required, and (3) must have a notification appliance at each location specified in NFPA 720 or, in the alternative, at each location where a CO alarm otherwise would have been required. The Department estimates that (1) the cost of each detector in a CO detection system will be approximately $55, (2) the cost of each notification appliance used in a CO detection system will be approximately $78, (3) the cost of installing one detector and one notification appliance will be approximately $215, and (4) the total cost of purchasing and installing one detector and one notification appliance will be approximately $348. In addition, a CO detection system requires a control unit. The Department estimates that the cost of purchasing and installing a CO detection system control unit will be approximately $1,100.[3] The estimated installation costs specified in this paragraph include the cost of installing the components and the cost of interconnecting the components.

In certain situations, a CO alarm installed in a new commercial building must be a "multiple station" alarm (i.e., must be interconnected with at least one other CO alarm in the building). The Department estimates that (1) the median price of multiple station CO alarms that are hard-wired and have battery backup to be approximately $38 per unit, (2) the cost of installing such alarms will be approximately $90 per unit, and (3) the cost of providing interconnection between an alarm in a normally unoccupied detection zone and an alarm in an adjacent, normally occupied detection zone will be approximately $150.

In the case of a new commercial building classified, in whole or in part, as Educational Group E under Chapter 3 of the 2010 BCNYS, CO alarm signals must be automatically transmitted to an approved on-site location that is normally staffed by school personnel during normal school hours. The Department estimates that the median price of multiple station CO alarms that are hard-wired and have battery backup will be approximately $38 per unit; (2) the cost of installing such alarms will be approximately $90 per unit; and (3) the cost of providing interconnection between the detection zone (classroom) to an on-site location up to 100 feet away will be approximately $250.

This rule provides that CO detection systems must be "monitored" (i.e., connected to control units and off-premises signal transmission). If a CO detection system is installed in a building that does not have a fire alarm system, the Department estimates that the cost of purchasing and installing the control unit required to provide "monitoring" of the CO detection system will be approximately $1,100.

On-going Costs of Compliance

This rule provides that CO alarms and CO detection systems must be maintained in an operative condition at all times, shall be replaced or repaired where defective, and shall be replaced when they cease to operate as intended.

In the case of a battery-powered CO alarm, such maintenance would include vacuuming the alarm cover to remove accumulated dust (typically one a month) and replacing the alarm at the conclusion of its 10-year lifespan.

In the case of a hard-wired CO alarm with battery backup, the required maintenance would include vacuuming the alarm cover to remove accumulated dust (typically one a month) and replacing the backup battery as required (although it is anticipated that backup batteries in such alarms should not need to be replaced during the anticipated life of the alarm).

In addition, most manufacturers recommend that their CO alarms (whether battery-powered or hard-wired) be checked using the alarm's "test" button on a periodic basis (typically once a week) and replaced on a periodic basis (typically once every five years).

Regulated parties constructing new commercial buildings will be able to comply with this rule by installing hard-wired CO alarms or CO detection systems as part of the construction process. This rule will require CO detection systems to comply with NFPA 720.

Variations in Costs

Any variation in compliance costs for small businesses or local governments is likely to depend more on the number and size of commercial buildings owned by the small business or local government, not on the type or size of the small business or local government.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

It is economically and technologically feasible for small businesses and local governments to comply with new section 1228.4.

Regulated parties that own existing commercial buildings will be able to comply with this rule by purchasing and installing battery-operated CO alarms of the type currently on the market. The Department anticipates that regulated parties that own existing commercial building should be able to comply with this rule by the end of the "transition period" (June 27, 2015 through June 27, 2016) established by this rule.

Regulated parties constructing new commercial buildings will be able to comply with this rule by installing hard-wired CO alarms or CO detection systems as part of the construction process.

No new technology need be developed for compliance.

6. MINIMIZING ADVERSE IMPACT

The rule minimizes potential adverse economic impacts on regulated parties by providing several alternative means of compliance, including the option of installing battery powered carbon monoxide alarms in existing commercial buildings and in commercial buildings with no commercial electric power; providing exemptions for commercial buildings classified as Storage Group S or Utility and Miscellaneous Group U and occupied only occasionally for building or equipment maintenance and for commercial buildings that are "canopies" (as defined in the 2010 Fire Code of New York State); providing a number of exceptions for certain detection zones that would otherwise require CO detection; and establishing a "transition period" to provide owners of existing commercial buildings with additional time to achieve full compliance.

Providing exemptions from coverage by the rule, or any part thereof, for commercial buildings owned by small businesses or local governments would not be consistent with legislative objectives and would endanger public health, safety, and general welfare.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The Department notified interested parties throughout the State of the proposed adoption of this rule by means of notices posted on the Department's website and notices published in "Building New York", a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry.

8. VIOLATIONS AND PENALTIES ASSOCIATED WITH VIOLATIONS

The rule includes a subdivision that provides, in effect, a "cure period or other opportunity for ameliorative action, the successful completion of

which will prevent the imposition of penalties on the party or parties subject to enforcement" in this rule. Subdivision (p) of new section 1228.4 provides that during the "transition period" (June 27, 2015 to June 27, 2016), the owner of an existing commercial building shall not be deemed to be in violation of section 1228.4 if the owner provides the authority having jurisdiction with a written statement certifying that such owner is attempting in good faith to install carbon monoxide detection that complies with the requirements of new section 1228.4 in such owner's existing commercial building as quickly as practicable.

All owners of existing commercial buildings will be required to have such carbon monoxide detection fully installed and operational by the end of the transition period.

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[1] An "existing commercial building" is defined in this rule as a commercial building constructed before December 31, 2015 (meaning either that the original construction of the building was completed on or before December 31, 2015, or that the application for the building permit for the original construction of the building was filed on or before December 31, 2015). A "new commercial building" is defined in this rule as any commercial building that is not an existing commercial building.

[2] Cost estimates set forth in this section are based on prices quoted on the websites of several manufacturers of carbon monoxide alarms and carbon monoxide detection systems. See, for example, http://www.homedepot.com/p/Kidde-120-Volt-Hardwire-Inter-Connectable-Carbon-Monoxide-Alarm-with-Battery-Backup-KN-COB-IC/202281774?N=5yclvZbmgkZlzOuzse. Estimated installation costs are based on the time estimated to perform an installation multiplied by an assumed hourly rate of $70.

[3] In many situations, a single control panel can control both a carbon monoxide detection system and a fire alarm system. Therefore, in a building where a fire alarm system is required by other provisions of the Uniform Code, there should be little or no additional cost associated with providing a control panel for the carbon monoxide detection system.

Summary of Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS

This is the first re-adoption of an emergency rule that implements the provisions of new subdivision (5-d) of Executive Law § 378, as added by Chapter 541 of the Laws of 2014. Specifically, this rule amends the State Uniform Fire Prevention and Building Code (Uniform Code) by adding a new section 1228.4 (entitled "Carbon Monoxide Detection in Commercial Buildings") to 19 NYCRR Part 1228. New section 1228.4 requires the installation of carbon monoxide (CO) detecting devices in all new and existing commercial buildings. Since the Uniform Code applies in all areas of the State (other than New York City), this rule applies in all rural areas of the State.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS

Reporting and Recordkeeping Requirements

If a regulated party elects to install a CO detection system in lieu of CO alarms, such system must comply with the Standard for the Installation of Carbon Monoxide (CO) Detection and Warning Equipment, published by the National Fire Protection Association (NFPA 720). A small business or local government that elects to install a CO detection system will be required to comply with the reporting and recordkeeping requirements specified in NFPA 720 Sections 4.5.1.2, 4.5.2.3, 8.3, 8.5, 8.9, and 8.9.2. NFPA 720 provides standardized forms to be used for this recordkeeping.

Other Compliance Requirements.

The owner of a new or existing commercial building that contains a CO source, contains a garage or other motor-vehicle-related occupancy, or is attached to a garage or other motor-vehicle-related occupancy will be required to install CO detection (CO alarms or a CO detection system) in the places specified in this rule, to maintain those CO alarms or CO detection systems, and to replace those CO alarms or CO detection systems when they cease to operate as intended.

In each commercial building where CO detection is required, such detection must be located in each "detection zone" that contains a CO source, is served by an HVAC system that includes a CO-producing component, or is adjacent to a garage or other motor-vehicle-related occupancy.

In general, each story of a commercial building will be a "detection zone." However, if different portions of a story are served by separate HVAC systems, each such portion of the story will be a separate detection zone. In addition, each classroom in a K-12 educational building will be deemed to be a separate detection zone.

As a general rule, when CO detection must be provided in a detection zone, the CO detection must be placed in a central location within the detection zone. However, if the detection zone is larger than 10,000 square feet, additional CO detection must be placed in such additional locations as may be necessary to assure that no point in the detection zone is more than 100 feet from CO detection.

In an existing commercial building (or in a new or existing commercial building without commercial electric power), CO alarms powered by 10-year batteries are permitted.[1] When CO alarms are installed in new commercial buildings, the alarms must be hard-wired units with battery backup.

This rule also permits installation of a CO detection system in lieu of CO alarms. A CO detection system (1) must comply with NFPA 720, (2) must have a detector at each location where a CO alarm otherwise would have been required, and (3) must have a notification appliance at each location specified in NFPA 720 or, in the alternative, at each location where a CO alarm otherwise would have been required.

There are several additional compliance requirements. For example:

(1) When a CO alarm is installed in a normally unoccupied detection zone in a new commercial building, that alarm must be interconnected with a CO alarm that is placed in an adjacent and normally occupied detection zone; and

(2) In the case of a new commercial building that (i) has an occupant load of 31 or more and (ii) is classified, in whole or in part, as Educational Group E under Chapter 3 of the 2010 Building Code of New York State (BCNYS), this rule provides that CO alarm signals must be automatically transmitted to an approved on-site location that is normally staffed by school personnel during normal school hours.

(3) CO detection systems shall be connected to control units and off-premises signal transmission in accordance with the requirements of the BCNYS.

3. PROFESSIONAL SERVICES

If the owner of a commercial building elects to install a CO detection system (in lieu of CO alarms), the building owner must hire service personnel with the qualifications and experience listed in NFPA 720 Section 8.3 in order to install and maintain the CO detection system.

In addition, in certain situations an owner of a commercial building who elects to install a CO detection system may be required to hire a person holding an appropriate license under General Business Law Article 6-D to install, service or maintain such CO detection system.

4. COMPLIANCE COSTS

Initial Costs of Compliance

The initial capital costs of complying with the rule will include the cost of purchasing and installing the CO alarms or CO detection systems. Costs to regulated parties for compliance with this rule will vary depending on the size of such building, the number of CO sources within the building, the wiring within the building, and the type of CO detection (CO alarms or a CO detection system) the owner chooses to provide.[2]

In an existing commercial building (or in a new or existing commercial building without commercial electric power), CO alarms powered by 10-year batteries are permitted. The Department of State (DOS) estimates that the cost of purchasing and installing such battery-powered CO alarms is approximately $50.

When CO alarms are installed in new commercial buildings, the alarms must be hard-wired units with battery backup. DOS estimates that total cost purchasing and installing hard-wired CO alarms with battery backup will be approximately $125 per unit.

This rule permits installation of a CO detection system in lieu of CO alarms. A CO detection system (1) must comply with NFPA 720, (2) must have a detector at each location where a CO alarm otherwise would have been required, and (3) must have a notification appliance at each location specified in NFPA 720 or, in the alternative, at each location where a CO alarm otherwise would have been required. DOS estimates that (1) the cost of each detector in a CO detection system will be approximately $55, (2) the cost of each notification appliance used in a CO detection system will be approximately $78, (3) the cost of installing one detector and one notification appliance will be approximately $215, and (4) the total cost of purchasing and installing one detector and one notification appliance will be approximately $348. In addition, a CO detection system requires a control unit. DOS estimates that the cost of purchasing and installing a CO detection system control unit will be approximately $1,100.[3] The estimated installation costs specified in this paragraph include the cost of installing the components and the cost of interconnecting the components.

In certain situations, a CO alarm installed in a new commercial building must be a "multiple station" alarm (i.e., must be interconnected with at least one other CO alarm in the building). DOS estimates that (1) the median price of multiple station CO alarms that are hard-wired and have battery backup to be approximately $38 per unit, (2) the cost of installing such alarms will be approximately $90 per unit, and (3) the cost of providing interconnection between an alarm in a normally unoccupied detection zone and an alarm in an adjacent, normally occupied detection zone will be approximately $150.

In the case of a new commercial building classified, in whole or in part, as Educational Group E under Chapter 3 of the 2010 BCNYS, CO alarm

signals must be automatically transmitted to an approved on-site location that is normally staffed by school personnel during normal school hours. DOS estimates that the median price of multiple station CO alarms that are hard-wired and have battery backup will be approximately $38 per unit; (2) the cost of installing such alarms will be approximately $90 per unit; and (3) the cost of providing interconnection between the detection zone (classroom) to an on-site location up to 100 feet away will be approximately $250.

This rule provides that CO detection systems must be "monitored" (i.e., connected to control units and off-premises signal transmission). If a CO detection system is installed in a building that does not have a fire alarm system, DOS estimates that the cost of purchasing and installing the control unit required to provide "monitoring" of the CO detection system will be approximately $1,100.

On-going Costs of Compliance

This rule provides that CO alarms and CO detection systems must be maintained in an operative condition at all times, shall be replaced or repaired where defective, and shall be replaced when they cease to operate as intended.

In the case of a battery-powered CO alarm, such maintenance would include vacuuming the alarm cover to remove accumulated dust (typically one a month) and replacing the alarm at the conclusion of its 10-year lifespan.

In the case of a hard-wired CO alarm with battery backup, the required maintenance would include vacuuming the alarm cover to remove accumulated dust (typically one a month) and replacing the backup battery as required (although it is anticipated that backup batteries in such alarms should not need to be replaced during the anticipated life of the alarm).

In addition, most manufacturers recommend that their CO alarms (whether battery-powered or hard-wired) be checked using the alarm's "test" button on a periodic basis (typically once a week) and replaced on a periodic basis (typically once every five years).

Regulated parties constructing new commercial buildings will be able to comply with this rule by installing hard-wired CO alarms or CO detection systems as part of the construction process. This rule will require CO detection systems to comply with NFPA 720.

Variations in Costs

Any variation in compliance costs for public and private entities in rural areas is likely to depend on the number and size of commercial buildings owned by a public or private entity, and not on differences between types of public and private entities in rural areas.

5. MINIMIZING ADVERSE IMPACT

The rule minimizes potential adverse economic impacts on regulated parties by providing several alternative means of compliance (including the option of installing battery powered carbon monoxide alarms in existing commercial buildings and in commercial buildings with no commercial electric power); providing exemptions for commercial buildings classified as Storage Group S or Utility and Miscellaneous Group U and occupied only occasionally for building or equipment maintenance and for commercial buildings that are "canopies" (as defined in the 2010 FCNYS); providing a number of exceptions for certain detection zones that would otherwise require CO detection; and establishing a "transition period" to provide owners of existing commercial buildings with additional time to achieve full compliance.

Executive Law § 378(5-d) requires the owners of every commercial building and the owner of every building containing one or more restaurants to install operable CO detecting devices if such buildings contains any appliance, equipment, device or system that may emit CO or has an attached garage. Executive Law § 378(5-d) makes no distinction between commercial buildings located in rural areas and commercial buildings located in other areas of the State. Executive Law § 378(5-d) does not authorize the establishment of differing compliance requirements or timetables for commercial buildings located in rural areas. Providing exemptions from coverage by the rule, or any part thereof, for commercial buildings located in rural areas would not be consistent with legislative objectives and would endanger public health, safety, and general welfare.

6. RURAL AREA PARTICIPATION

DOS notified interested parties throughout the State, including interested parties in rural areas, of the proposed adoption of this rule by means of notices posted on the Department's website and notices published in Building New York, a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry.

[1] An "existing commercial building" is defined in this rule as a commercial building constructed before December 31, 2015 (meaning either that the original construction of the building was completed on or before December 31, 2015, or that the application for the building permit for the original construction of the building was filed on or before December 31, 2015). A "new commercial building" is defined in this rule as any commercial building that is not an existing commercial building.

[2] Cost estimates set forth in this section are based on prices quoted on the websites of several manufacturers of carbon monoxide alarms and carbon monoxide detection systems. See, for example, http://www.homedepot.com/p/Kidde-120-Volt-Hardwire-Inter-Connectable-Carbon-Monoxide-Alarm-with-Battery-Backup-KN-COB-IC/202281774?N=5yclvZbmgkZlzOuzse. Estimated installation costs are based on the time estimated to perform an installation multiplied by an assumed hourly rate of $70.

[3] In many situations, a single control panel can control both a carbon monoxide detection system and a fire alarm system. Therefore, in a building where a fire alarm system is required by other provisions of the Uniform Code, there should be little or no additional cost associated with providing a control panel for the carbon monoxide detection system.

Job Impact Statement

The Department of State has concluded after reviewing the nature and purpose of the rule that it will not have a "substantial adverse impact on jobs and employment opportunities" (as that term is defined in section 201-a of the State Administrative Procedures Act) in New York.

This rule amends the State Uniform Fire Prevention and Building Code (the Uniform Code) to require that the installation of carbon monoxide detecting devices (carbon monoxide alarms or carbon monoxide detection systems) in all commercial buildings that contain a carbon monoxide source, contain a garage or other motor-vehicle-related occupancy and/or are attached to a garage or other motor-vehicle-related occupancy. This amendment is required to satisfy the requirements of subdivision (5-d) of section 378 of the Executive Law, as added by Chapter 541 of the Laws of 2014.

This rule requires the installation of carbon monoxide detecting devices in "existing commercial buildings" (defined in this rule as a commercial building constructed prior to January 1, 2016). However, potential adverse economic impact on regulated parties is minimized by the provisions of the rule that allow the use of battery powered carbon monoxide alarms in existing commercial buildings. (The rule also permits the use of battery powered carbon monoxide alarms in new and existing commercial buildings without a commercial electric power.)

This rule also requires the installation of carbon monoxide detecting devices in new commercial buildings. However, potential adverse economic impact on regulated parties is minimized by the provisions of the rule that permit the installation of carbon monoxide alarms even in new commercial buildings (although carbon monoxide alarms installed in new commercial buildings must be hard-wired, with battery backup). Regulated parties are permitted to install carbon monoxide detection systems; in the case of a building that is required by other, already existing provisions of the Uniform Code to have a fire alarm system, the additional cost of adding a carbon monoxide detection system is expected to be modest. In any event, whether an owner chooses to install hard-wired carbon monoxide alarms with battery backup or a carbon monoxide detection system in a new commercial building, the costs of purchasing, installing and maintaining the carbon monoxide detecting devices required by this rule is expected to be insignificant in comparison to the total cost of construction. Therefore, this rule should have no substantial adverse impact on construction of new commercial buildings and, consequently, this rule should have no substantial adverse impact on jobs and employment opportunities related to the construction of new commercial buildings.

The Uniform Code has contained provisions requiring installation of carbon monoxide alarms in residential buildings since 2002. The current requirements relating to installation of alarms in residential buildings are not changed by this rule. Therefore, this rule should have no substantial adverse impact on jobs and employment opportunities related to the construction of new residential buildings.

Susquehanna River Basin Commission

INFORMATION NOTICE

Notice of Proposed Rule Making

18 CFR Part 806

Review and Approval of Projects

SUMMARY: This document contains proposed rules that would amend the regulations of the Susquehanna River Basin Commission (Commission) to simplify and clarify the process for transferring approvals and to add sections dealing with general permits and modifications to approvals. These rules are designed to improve the Commission's administrative processes and add regulatory clarity.

DATES: Comments on the proposed rulemaking may be submitted to the Commission on or before November 9, 2015. The Commission has scheduled a public hearing on the proposed rulemaking, to be held October 29, 2015, in Grantville, Pennsylvania. The location of the public hearing is listed in the ADDRESSES section of this document.

ADDRESSES: Comments may be mailed to: Jason E. Oyler, Esq., General Counsel, Susquehanna River Basin Commission, 4423 N. Front Street, Harrisburg, PA 17110-1788, or by e-mail to regcomments@srbc.net.

The public hearing will be held on October 29, 2015, at 7:00 p.m., at the East Hanover Township Municipal Building, Main Hall, 8848 Jonestown Road, Grantville, Pa. Those wishing to testify are asked to notify the Commission in advance, if possible, at the regular or electronic addresses given below.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, Esq., General Counsel, telephone: 717-238-0423, ext. 1312; fax: 717-238-2436; e-mail: joyler@srbc.net. Also, for further information on the proposed rulemaking, visit the Commission's website at www.srbc.net.

SUPPLEMENTARY INFORMATION: The Commission is proposing to make regulatory changes to improve its administrative processes and add regulatory clarity. The major focus of these changes is to revise and simplify the Commission's transfer regulation, explicitly add provisions for the modification of a Commission approved project, and establish a process for the Commission to develop general permits.

1. 18 CFR 806.6. Transfer of approvals. The Commission proposes to delete the current section and replace it with simplified and easier to understand regulatory language. This revision still allows the Executive Director to approve transfers of approvals. For approvals greater than 10 years old, the current regulation requires the project sponsor to submit entirely new applications in order to transfer the project. The Commission has received complaints that this requirement is onerous and has the effect of cutting short the term of the approval solely because ownership is changing, despite no changes to the project itself or the use of the water. The revised language will allow the transfer to occur conditioned on the submission of an updated metering and monitoring plan consistent with 18 CFR 806.30. For projects undergoing a change of ownership that have an unapproved withdrawal, consumptive use and/or diversion associated with them, usually referred to as grandfathered aspects of the project, the current requirement to submit applications for these grandfathered aspects contained in 18 CFR 806.6(c) and 18 CFR 806.4(a)(1)(iv), (a)(2)(v) and (a)(3)(iv) is retained. However, the revised language removes the requirement that these applications must be made within 90 days of the date of a change in ownership. The Commission found that it was difficult for project sponsors to meet this deadline. The revised language will allow the Executive Director to approve the transfer with a condition requiring these applications to be made. This will allow the Commission to consider the complexity and number of grandfathered sources that will be subject to the application requirements and establish an appropriate and realistic timeframe in the condition for these applications to be submitted. Due to the revision of the language in 18 CFR 806.6, a corresponding revision was required to 18 CFR 806.4(c).

2. 18 CFR 806.15. Notice of Application. In paragraph (a), the Commission proposes to amend the time for notices to be published from 10 days to 20 days. The Commission has received feedback that the 10 days is not always sufficient, especially when newspaper notices are required. Extending this time frame allows project sponsors more time to complete the notices without compromising the public's opportunity to provide comment. New paragraphs (h) and (i) were added to provide specific requirements for the newly proposed 18 CFR 806.17 (regarding general permits) and 18 CFR 806.18 (regarding minor modifications), respectively.

3. New 18 CFR 806.17. General Permits. Currently, the Commission does not have a process to establish general permits. The Commission is proposing a new section that would provide the Commission the ability to develop, issue and administer general permits. The new regulation provides procedures for issuance and administration of permits, as well as standards for denial of coverage and when an individual approval would be required. In crafting this regulation, the Commission looked to similar regulations of its member jurisdictions for guidance. In addition, changes to 18 CFR 806.4 and 806.14 were necessary to accommodate the addition of this new section.

4. New 18 CFR 806.18. Approval modifications. The Commission is proposing to add a section specific to modifications of approvals. The Commission currently accepts applications for modification, but does not have a clear process set forth in the regulations. The proposed section also establishes the concept of minor and major modifications. The process for minor modifications provides a process for minor changes to approval conditions that are more likely to be administrative in nature and have a low degree of controversy, and therefore can appropriately be authorized by the Executive Director. In addition, a change to 18 CFR 806.14 is necessary to provide specific application requirements for minor modifications. Minor modifications are specifically listed. All modifications that are not specifically listed as a minor modification are major modifications. As a part of the rulemaking, the Commission has included a non-exhaustive list of common major modifications to provide guidance to the public and the regulated community.

List of Subjects in 18 CFR Part 806

Administrative practice and procedure, Water resources.

Accordingly, for the reasons set forth in the preamble, the Susquehanna River Basin Commission proposes to amend 18 CFR Part 806 as follows:

PART 806—REVIEW AND APPROVAL OF PROJECTS

1. The authority citation for Part 806 continues to read as follows:

Authority: Secs. 3.4, 3.5(5), 3.8, 3.10 and 15.2, Pub. L. 91-575, 84 Stat. 1509 et seq.

2. Amend § 806.4 by adding paragraph (a)(9) and revising paragraph (c) to read as follows:

§ 806.4 Projects requiring review and approval.

(a) * * *

(9) Any project subject to coverage under a general permit issued under § 806.17.

* * * * *

(c) Any project that did not require Commission approval prior to January 1, 2007, and not otherwise exempt from the requirements of paragraph (a)(1)(iv), (a)(2)(v), or (a)(3)(iv) pursuant to paragraph (b) of this section, may be undertaken by a new project sponsor upon a change of ownership pending action on a transfer application under § 806.6.

3. Revise § 806.6 to read as follows:

§ 806.6 Transfer of approvals.

(a) An existing Commission approval may be transferred to a new project sponsor by the Executive Director provided:

(1) The application for transfer is submitted within 90 days of a transfer or change in ownership of a project.

(2) The new project sponsor operates the project subject to the same terms and conditions of the existing approval pending approval of the transfer application.

(3) Any noncompliance by the existing project sponsor associated with the project or by the new project sponsor associated with other projects is resolved to the Commission's satisfaction.

(4) If the existing approval is greater than 10 years old, the transfer shall be conditioned to require the submission of an updated metering and monitoring plan consistent with the requirements of § 806.30.

(5) If the existing project has an unapproved withdrawal, consumptive use and/or diversion listed in paragraph (b), the transfer shall be conditioned to require the submission of a new application for review and approval of the unapproved withdrawal, consumptive use and/or diversion consistent with §§ 806.4 and 806.14.

(6) Any modifications proposed by the new project sponsor shall be subject to a separate application and review process under §§ 806.14.and 806.18.

(b) Previously unapproved activities associated with a project subject to transfer under paragraph (a) of this section include:

(1) The project has an associated pre-compact consumptive water use that has not been subject to approval or had mitigation approved by the Commission.

(2) The project has an associated diversion that was initiated prior to January 23, 1971.

(3) The project has an associated groundwater withdrawal that was initiated prior to July 13, 1978 and that has not been approved by the Commission.

(4) The project has an associated surface water withdrawal that was initiated prior to November 11, 1995 and that has not been approved by the Commission.

(5) The project has a consumptive water use approval and has an associated withdrawal that has not been approved by the Commission.

(c) Upon undergoing a change of name that does not affect ownership or control of the project, the project sponsor must request a reissuance of the project's approval by the Executive Director within 90 days from the date of the change.

4. Amend § 806.14 by revising paragraph (a) introductory text and adding paragraph (d) to read as follows:

§ 806.14 Contents of applications.

(a) Except with respect to applications to renew an existing Commission approval and Notices of Intent for approvals by rule and general permits, applications shall include, but not be limited to, the

following information and, where applicable, shall be submitted on forms and in the manner prescribed by the Commission. Renewal applications shall include such information that the Commission determines to be necessary for the review of same, shall be subject to the standards set forth in Subpart C—Standards for Review and Approval of this part, and shall likewise be submitted on forms and in the manner prescribed by the Commission.

* * * * *

(d) Applications for minor modifications must be complete and will be on a form and in a manner prescribed by the Commission. Applications for minor modifications must contain the following:

(1) Description of the project;

(2) Description of all sources, consumptive uses and diversions related to the project;

(3) Description of the requested modification;

(4) Statement of the need for the requested modification;

(5) Demonstration that the anticipated impact of the requested modification will not adversely impact the water resources of the basin; and

(6) Any other information that the Commission or Executive Director deems necessary.

5. Amend § 806.15 by revising paragraph (a) and adding paragraphs (h) and (i) to read as follows:

§ 806.15 Notice of application.

(a) Any project sponsor submitting an application to the Commission shall provide notice thereof to the appropriate agency of the member State, each municipality in which the project is located, and the county planning agency of each county in which the project is located. The project sponsor shall also publish notice of submission of the application at least once in a newspaper of general circulation serving the area in which the project is located. The project sponsor shall also meet any of the notice requirements set forth in paragraphs (b) through (f) of this section, if applicable. All notices required under this section shall be provided or published no later than 20 days after submission of the application to the Commission and shall contain a description of the project, its purpose, the requested quantity of water to be withdrawn obtained from for sources other than withdrawals or consumptively used, and the address, electronic mail address, and phone number of the project sponsor and the Commission. All such notices shall be in a form and manner as prescribed by the Commission.

* * * * *

(h) For Notices of Intent (NOI) seeking coverage under a general permit, the project sponsor shall provide the NOI to the appropriate agency of the member State and each municipality and county planning agency in which the project is located and any additional notice identified in the general permit.

(i) For applications for minor modifications, the project sponsor shall provide notice of the application to the appropriate agency of the member State and each municipality and county planning agency in the which the project is located.

6. Add § 806.17 to read as follows:

§ 806.17 General permits.

(a) Coverage and purpose. The Commission may issue a general permit, in lieu of issuing individual approvals, for a specifically described category of diversions, water withdrawals and consumptive uses that:

(1) Involve the same or substantially similar types of operations or activities,

(2) Require the same limitations or operating conditions, or both,

(3) Require the same or similar monitoring and reporting, and

(4) Will result in minimal adverse impacts.

(b) Procedure for issuance. (1) At least 30 days prior to the issuance of a general permit, the Commission shall publish notice in the Federal Register and the member jurisdiction administrative bulletins of the intent to issue a general permit.

(2) At least 30 days shall be provided for interested members of the public and Federal, State and local agencies to provide written comments on a proposed general permit.

(3) The Commission or Executive Director may, in its discretion, hold a public hearing on a proposed general permit.

(4) The issuance of a general permit adopted by the Commission will be published in the Federal Register and the member jurisdiction administrative bulletins. This notice shall set forth the effective date of the general permit.

(c) Administration of general permits. General permits may be issued, amended, suspended, revoked, reissued or terminated under this section.

(1) Any general permit issued under this section shall set forth the applicability of the permit and the conditions that apply to any diversion, withdrawal or consumptive use authorized by such general permit.

(2) The Commission may fix a term to any general permit issued.

(3) A project sponsor shall obtain permission to divert, withdraw or consumptively use water in accordance with a general permit by filing a Notice of Intent (NOI) with the Commission, in a form and manner determined by the Commission.

(4) Approval of coverage under a general permit shall be determined by the Executive Director or by any other manner that the Commission shall establish for any general permit.

(5) The Commission may set a fee for NOIs to any general permit.

(6) A project sponsor shall provide notice for NOIs in accordance with § 806.15(h) and any additional notice requirements that the Commission may adopt for any general permit.

(7) The requirements of § 806.16 apply to the review of NOIs to any general permit.

(8) Upon reissuance or amendment of a general permit, all project sponsors permitted to divert, withdraw or consumptively use water in accordance with the previous general permit shall be permitted to continue to operate with the renewed or modified general permit unless otherwise notified by the Commission.

(d) Denial of coverage. The Executive Director will deny or revoke coverage under a general permit when one or more of the following conditions exist:

(1) The project or project sponsor does not or can no longer meet the criteria for coverage under a general permit.

(2) The diversion, withdrawal or consumptive use, individually or in combination with other similar Commission regulated activities, is causing or has the potential to cause adverse impacts to water resources or competing water users.

(3) The project does not meet the requirements of § 806.21(a) or (b).

(4) The project includes other diversions, withdrawals or consumptive uses that require an individual approval and the issuance of both an individual approval and a general permit for the project would constitute an undue administrative burden on the Commission.

(5) The Executive Director determines that a project cannot be effectively regulated under a general permit and is more effectively regulated under an individual approval.

(e) Requiring an individual approval. If coverage is denied or revoked under paragraph (d) of this section, the project sponsor shall be notified in writing. The notice will include a brief statement for the reasons for the decision. If coverage under a general permit was previously granted, the notice will also include a deadline for submission of an application for an individual approval. Timely submission of a complete application will result in continuation of coverage of the applicable withdrawal, consumptive use or diversion under the general permit, until the Commission takes final action on the pending individual approval application.

(f) Action of the commission. Action by the Executive Director denying or revoking coverage under a general permit under paragraph (d) of this section, or requiring an individual approval under paragraph (e) of this section, is not a final action of the Commission until the project sponsor submits and the Commission takes final action on an individual approval application.

7. Add § 806.18 to read as follows:

§ 806.18 Approval modifications.

(a) General. A project sponsor shall submit an application for modification of a current approval prior to making a change in the design, operational plans, or use as presented in the application upon which the approval was originally issued, and that will affect the terms and conditions of the current approval.

(b) Applications for modification. (1) A project sponsor may apply for a modification of a current approval by submitting an application for modification to the Commission.

(c) Minor modifications. The following are considered minor modifications:

(1) Correction of typographical errors;

(2) Changes to monitoring or metering conditions;

(3) Addition of sources of water for consumptive use;

(4) Changes to the authorized water uses;

(5) Changes to conditions setting a schedule for developing, implementing, and/or reporting on monitoring, data collection and analyses;

(6) Changes to the design of intakes;

(7) Increases to total system limits that were established based on the projected demand of the project; and

(8) Modify approval to allow the modification of extraction well network used for groundwater remediation systems.

(d) Major modifications. Major modifications are changes not

considered to be minor modifications. Major modifications may include, but are not limited to:

(1) Increases in the quantity of water withdrawals, consumptive uses or diversions;

(2) Increases to peak day consumptive water use;

(3) Increases to the instantaneous withdrawal rate or changes from a single withdrawal rate to a varied withdrawal rate;

(4) Changes affecting passby flows requirements; and

(5) Changes that have the potential for adverse impacts to water resources or competing water users.

(e) Notice and approval. (1) Applications for modifications are subject to the notice requirements of § 806.15.

(2) The Commission or Executive Director may approve, approve with conditions or deny an application for minor modification, or direct that an application for major modification be made.

(3) The Commission may approve, approve with conditions or deny an application for major modification.

Dated: September 17, 2015.

Stephanie L. Richardson

Secretary to the Commission