RULE MAKING ACTIVITIES

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

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

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

Department of Civil Service

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Department of Civil Service publishes a new notice of proposed rule making in the NYS *Register*.

Jurisdictional Classification

I.D. No.	Proposed	Expiration Date
CVS-11-15-00004-P	March 18, 2015	March 17, 2016

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Supplemental Military Leave Benefits

I.D. No. CVS-14-16-00005-P

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

Proposed Action: This is a consensus rule making to amend sections 21.15 and 28-1.17 of Title 4 NYCRR.

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

Subject: Supplemental military leave benefits.

Purpose: To extend the availability of supplemental military leave benefits for certain New York State employees until December 31, 2016.

Substance of proposed rule: The proposed rule amends sections 21.15 and 28-1.17 of the Attendance Rules for Employees in New York State Departments and Institutions to continue the availability of the single grant of supplemental military leave with pay and further leave at reduced pay through December 31, 2016, and to provide for separate grants of the greater of 22 working days or 30 calendar days of training leave at reduced pay during calendar year 2016. Union represented employees already receive these benefits pursuant to memoranda of understanding (MOUs) negotiated with the Governor's Office of Employee Relations (GOER). The proposed rule merely amends section 21.15 of the Attendance Rules consistent with the current MOUs, and amends section 28-1.17 to extend equivalent benefits to employees serving in positions designated managerial or confidential (m/c).

Under current statute, section 242 of the New York State Military Law provides that public officers and employees who are members of the organized militia or any reserve force or reserve component of the armed forces of the United States may receive the greater of 22 working days or 30 calendar days of leave with pay to perform ordered military duty in the service of New York State or the United States during each calendar year or any continuous period of absence.

Following the events of September 11, 2001, certain State employees have been ordered to extended active military duty, or frequent periods of intermittent active military duty. These employees faced the loss of State salary, with attendant loss of benefits for their dependents, upon exhaustion of the annual grant of Military Law paid leave. Accordingly, supplemental military leave, leave at reduced pay and training leave at reduced pay were made available to such employees pursuant to MOUs negotiated with the employee unions. Corresponding amendments to the Attendance Rules were adopted extending equivalent military leave benefits to employees in m/c designated positions. While these benefits are intended to expire upon a date certain, the benefits described herein have been repeatedly renewed in the wake of the continuing war on terror, including homeland security activities, and the armed conflicts in Afghanistan and Iraq.

With respect to supplemental military leave, eligible State employees federally ordered, or ordered by the Governor, to active military duty (other than for training) in response to the war on terror receive a single, non-renewable grant of the greater of 22 working days or 30 calendar days of supplemental military leave with full pay.

With respect to military leave at reduced pay, upon exhaustion of the military leave benefit conferred by the Military Law, and the single grant of supplemental military leave with pay, and any available accruals (other than sick leave) which an employee elects to use, employees who continue to perform qualifying military duty are eligible to receive military leave at reduced pay. Compensation for such leave is based upon the employee's regular State salary as of his/her last day in full pay status (defined as base pay, plus location pay, plus geographic differential) reduced by military pay (defined as base pay, plus food and housing allowances) received from the United States or New York State for military service, if the former exceeded the latter. While in leave at reduced pay status, employees are eligible to receive leave days due upon his/her personal leave anniversary if such anniversary date falls during a period of military leave at reduced pay, and can accumulate biweekly vacation and sick leave credits for any pay period in which they remain in full pay status for at least seven out of ten days (or a proportionate number of days for employees with work weeks of less than 10 days per bi-weekly pay period.) These leave benefits are available even for employees who do not receive supplemental pay because their military salaries (as defined) exceed their regular State pay.

With respect to training leave at reduced pay, many employees ordered to military duty in response to the war on terror also continue to perform other required military service unrelated to the war on terror. To support employees performing other military duty, including mandatory summer and weekend training and other activation, a new category of leave was established, entitled "training leave at reduced pay." Eligible employees receive the greater of 22 work days or 30 calendar days of training leave at reduced pay following qualifying military duty in response to the war on terror, and after depleting the annual Military Law grant of leave with pay and any leave credits (other than sick leave) that they elect to use. Training leave at reduced pay may then be used for any ordered military duty during the calendar year that is not related to the war on terror. Employees

who have already utilized leave at reduced pay receive the same compensation for any periods of training leave at reduced pay. Employees who have not used leave at reduced pay prior to their initial use of training leave at reduced pay are paid according to the employee's regular State salary as of his or her last day in full pay status reduced by military pay received from the United States or New York State for military service, if the former exceeds the latter. Employees on training leave at reduced pay retain the same leave accrual benefits as apply to leave at reduced pay.

The proposed rule extends the availability of supplemental military leave with pay, leave at reduced pay and training leave at reduced pay through December 31, 2016. Employees must establish eligibility for supplemental military leave (provided they have not already depleted the single grant of such leave), leave at reduced pay and training leave at reduced pay during 2016 by performing qualifying military service.

Employees on leave at reduced pay or training leave at reduced pay on January 1, 2016, have their rate of pay calculated from their base State pay as of January 1, 2016, reduced by the military pay rate applied to their most recent period in either reduced pay category prior to 2012. For employees who have used leave at reduced pay or training leave at reduced pay prior to year 2016, their pay for either type of reduced pay leave at any point between January 1, 2016 and December 31, 2016, will be calculated from their base State pay as of their last day in full pay status after January 1, 2012, prior to their initial use of leave of reduced pay or training leave at reduced pay, offset by the rate of military pay from their most recent period of reduced pay leave, prior to 2016. Employees whose initial use of either reduced pay leave category occurs during 2016 will have their pay rate determined by their base State pay on their last day of full pay status, minus military pay. For all employees receiving leave at reduced pay or training leave at reduced pay in 2016, the initial pay calculation will apply to all subsequent periods of reduced pay leave.

The proposed amendment provides that in no event shall supplemental military leave, leave at reduced pay or training leave at reduced pay be granted for military service performed after December 31, 2016, nor shall such leaves be available to employees who have voluntarily separated from State service or who are terminated for cause.

Text of proposed rule and any required statements and analyses may be obtained from: Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: jennifer.paul@cs.ny.gov

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

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

Consensus Rule Making Determination

Section 6(1) of the Civil Service Law authorizes the State Civil Service Commission to prescribe and amend suitable rules and regulations concerning leaves of absence for employees in the Classified Service of the State.

Since September 11, 2001, certain State employees have been federally ordered, or ordered by the Governor, to active military duty. The New York State Military Law provides for the greater of 22 working days or 30 calendar days of military leave at full (State) pay for ordered service during each calendar year or continuous period of absence. Employees ordered to prolonged active duty, or repeatedly ordered to intermittent periods of active duty, faced exhaustion of the Military Law leave with pay benefit. Further periods of military service would then subject these employees to economic hardship from the loss of their regular State salaries and deprive their dependents of needed benefits derived from State employment.

To support State employees called to military duty after September 11, 2001, the Governor's Office of Employee Relations (GOER) executed memoranda of understanding (MOUs) with the employee unions to provide for a supplemental grant of military leave with pay and leave at reduced pay. Subsequent MOUs established a new benefit entitled training leave at reduced pay. These military leave benefits have been repeatedly renewed in the wake of the ongoing War on Terror, including homeland security activities and military operations in Afghanistan and Iraq.

The Governor's Office of Employee Relations has executed new MOUs with the Classified Service employee unions extending the availability of the single grant of supplemental military leave with pay and leave at reduced pay, and training leave at reduced pay through December 31, 2016. The State Civil Service Commission shall amend the Attendance Rules in accordance with the MOUs and extend equivalent benefits to employees serving in m/c designated positions.

The Civil Service Commission has received no public comments after publication of prior amendments to the Attendance Rules establishing or re-authorizing the benefits now put forward for renewal. Previous readoptions of the proposed amendments have been proposed and adopted as consensus rules. As no person or entity is likely to object to the rule as written, the proposed rule is advanced as a consensus rule pursuant to State Administrative Procedure Act (SAPA) § 202(1)(b)(i).

Job Impact Statement

By amending Title 4 of the NYCRR to extend the availability of supplemental military leave, leave at reduced pay and training leave at reduced pay for eligible employees subject to the Attendance Rules for Employees in New York State Departments and Institutions, these rules will positively impact jobs or employment opportunities for eligible employees, as set forth in section 201-a(2)(a) of the State Administrative Procedure Act (SAPA). Therefore, a Job Impact Statement (JIS) is not required by section 201-a of such Act.

Division of Criminal Justice Services

NOTICE OF ADOPTION

Basic Course for Correction Officers

I.D. No. CJS-52-15-00018-A
Filing No. 341
Filing Date: 2016-03-22
Effective Date: 2016-04-06

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

Action taken: Amendment of sections 6018.3, 6018.6, 6018.7 and 6018.9 of Title 9 NYCRR.

Statutory authority: Executive Law, sections 837-a(9) and 840(2-a)

Subject: Basic Course for Correction Officers.

Purpose: Set forth minimum standards/clear and specific requirements of a basic course for correction officers.

Text or summary was published in the December 30, 2015 issue of the Register, I.D. No. CJS-52-15-00018-P.

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

Text of rule and any required statements and analyses may be obtained from: Natasha M. Harvin, Esq., NYS Division of Criminal Justice Services, Alfred E. Smith Building, 80 South Swan Street, Albany, New York 12210, (518) 457-8420, email: natasha.harvin@dcjs.ny.gov

Initial Review of Rule

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2021, which is no later than the 5th year after the year in which this rule is being adopted.

Assessment of Public Comment

After consultation with the State Commission of Correction (SCOC) pursuant to Executive Law § 837-a(9), the Division of Criminal Justice Services (DCJS) formally proposed amendments of 9 NYCRR § § 6018.3, 6018.6, 6018.7 and 6018.9. A Notice of Proposed Rule Making was published in Issue 52 of the State Register on December 30, 2015 under I.D. No. CJS-52-15-00018-P. DCJS accepted public comments through February 15, 2016. There was one issue raised.

Purpose: Chapter 491 of the Laws of 2010 amended Criminal Procedure Law (CPL) 2.30 to eliminate mandated initial firearms training for peace officers, including correction officers, who are not permitted by their employer to carry or use a firearm on-duty. The proposed rule would conform to CPL 2.30. In addition, the proposal would allow an employer to request a one-year extension for completion of the Basic Course for Correction Officers based on exigent circumstances. This amendment would also be consistent with the language in 9 NYCRR Parts 6020, Basic Course for Police Officers; and 6025, Basic Course for Peace Officers.

Comment: CPL § 2.30(2) provides that "no person appointed as a peace officer shall exercise the powers of a peace officer, unless he or she has received such certification within twelve months of appointment." While Executive Law § 837-a(9) allows the Commissioner [of DCJS] to extend the one year training deadline, it doesn't appear to similarly extend the authority to exercise peace officer powers.

Response: DCJS disagrees. There may be exigent circumstances that prevent an officer from completing the Basic Course for Correction Officers within 12 months of appointment. The proposal would allow an

employer to request a one-year extension for completion of the course based on such exigent circumstances. Illustrative of exigent circumstances are: the correction officer's inability to complete a basic course for health reasons; or the temporary unavailability of a training program within a reasonable distance from the officer's place of employment.

Further, Military Law § 242(4) provides that a public officer or employee who is absent from his or her employment while engaged in the performance of ordered military duty shall not be "subjected, directly or indirectly, to any loss or diminution of time service, increment, vacation or holiday privileges, or any other right or privilege, by reason of such absence, or be prejudiced, by reason of such absence, with reference to continuance in office or employment, reappointment to office, reemployment, reinstatement, transfer or promotion." If an officer is unable to exercise his or her peace officer powers, one can argue that that would diminish his or her employment rights and prejudice his or her continuation in employment in violation of Military Law § 242(4) (see, also, Hogan v. New York State Office of Mental Health, 115 A.D.2d 638, 496 N.Y.S.2d 299 [2 Dept.,1985] ["Military Law § 242[4] proscribes the diminution of a public employee's employment rights by reason of the employee's absence pursuant to ordered military duty."]).

In the alternative, SCOC suggested that DCJS only allow extensions if required by law. However, for consistency, as noted above, DCJS believes that an exigent circumstance should also include health reasons and the unavailability of a training program within a reasonable distance.

Accordingly, and based upon the assessment of the foregoing comments, DCJS will not make any changes to the proposed rule.

Education Department

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Career Development and Occupational Studies (CDOS) Graduation Pathway Option

I.D. No. EDU-14-16-00002-EP

Filing No. 338

Filing Date: 2016-03-22

Effective Date: 2016-03-22

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

Proposed Action: Amendment of sections 100.5 and 100.6 of Title 8 NYCRR.

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

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

Specific reasons underlying the finding of necessity: The proposed amendment expands the Career Development and Occupational Studies (CDOS) graduation pathway option to all students who meet the requirements to earn a CDOS Commencement Credential, meet graduation course and credit requirements, and pass four required Regents Exams. Currently, this option is only available to students with disabilities.

Because the Board of Regents meets at fixed intervals, the earliest the proposed amendment could be presented for regular adoption is the June 13-14, 2016 Regents meeting, after publication of a Notice of Proposed Rule Making in the State Register on April 6, 2016 and expiration of the 45-day public comment period for State agency rule makings. Furthermore, pursuant to the State Administrative Procedure Act (SAPA), the earliest effective date of the proposed amendment, if adopted at the June meeting, would be June 29, 2016, the date a Notice of Adoption would be published in the State Register. However, school districts must start preparations now, in order to timely implement programs leading to a New York State Career Development and Occupational Studies Commencement Credential during the 2015-2016 school year and thereafter.

Emergency action is therefore necessary for the preservation of the general welfare to immediately extend the availability of the CDOS commencement credential and establish criteria for a CDOS graduation pathway option for all students who meet the requirements to earn a this credential, meet graduation course and credit requirements, and pass four required Regents Exams, and thereby ensure timely implementation during the 2015-2016 school year and thereafter.

It is anticipated that the revised proposed amendment will be presented to the Board of Regents for adoption as a permanent rule at their June 13-14, 2016 Regents meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative Procedure Act for State agency rule makings.

Subject: Career development and occupational studies (CDOS) graduation pathway option.

Purpose: To establish a Career Development and Occupational Studies (CDOS) graduation pathway option for all students who meet the requirements to earn a CDOS Commencement Credential, meet graduation course and credit requirements, and pass four required Regents Exams.

Text of emergency/proposed rule: 1. Subdivision (a) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective March 22, 2016, as follows:

(a) General requirements for a Regents or a local high school diploma. Except as provided in clauses (5)(i)(c), (e) and (f) of this subdivision, [paragraph] *paragraphs* (d)(6) *and (11)* and subdivision (g) of this section, the following general requirements shall apply with respect to a Regents or local high school diploma. Requirements for a diploma apply to students depending upon the year in which they first enter grade nine. A student who takes more than four years to earn a diploma is subject to the requirements that apply to the year that student first entered grade nine. Students who take less than four years to complete their diploma requirements are subject to the provisions of subdivision (e) of this section relating to accelerated graduation.

(1) . . .
(2) . . .
(3) . . .
(4) . . .

(5) State assessment system. (i) Except as otherwise provided in clause (f) of this subparagraph and subparagraphs (ii), (iii) and (iv) of this paragraph, all students shall demonstrate attainment of the New York State learning standards:

(a) . . .
(b) . . .
(c) . . .
(d) . . .
(e) . . .
(f) Requirements for pathway assessments:

(1) [In addition to the requirements of clauses (a), (b), (c), (d) and (e) of this subparagraph,] *Except as provided in paragraph (d)(11) of this section,* students who first enter grade nine in September 2011 and thereafter or who are otherwise eligible to receive a high school diploma pursuant to this section in June 2015 and thereafter[,] must *meet the requirements of clauses (a), (b), (c), (d) and (e) of this subparagraph and* also pass any one of the following assessments:

(i) . . .
(ii) . . .
(iii) . . .
(iv) . . .
(v) . . .
(vi) . . .

(ii) . . .
(iii) . . .
(iv) . . .
(v) . . .

(6) . . .
(7) . . .
(8) . . .

2. Subparagraph (iii) of paragraph (7) of subdivision (b) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective March 22, 2016, as follows:

(iii) Earning a Regents or local high school diploma shall be deemed to be equivalent to receipt of a high school diploma pursuant to Education Law, section 3202(1) and shall terminate a student's entitlement to a free public education pursuant to such statute. Earning a high school equivalency diploma [or], an Individualized Education Program diploma, or *either* a skills and achievement commencement credential *or a New York State career development and occupational studies commencement credential* as set forth in section 100.6 of this Part, shall not be deemed to be equivalent to receipt of a high school diploma pursuant to Education Law, section 3202(1) and shall not terminate a student's entitlement to a free public education pursuant to such statute.

3. A new paragraph (11) of subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education is added, effective March 22, 2016, as follows:

(11) Career development and occupational studies pathway. Students who first enter grade nine in September 2012 and thereafter or who are otherwise eligible to receive a high school diploma pursuant to this sec-

tion in June 2016 and thereafter may meet the diploma requirements described in this section by:

(i) completing the applicable credit requirements pursuant to this section; and

(ii) completing the requirements for the New York State career development and occupational studies commencement credential as provided in section 100.6(b) of this Part; and

(iii) passing four assessments, one in each of the four subject areas of English, mathematics, science and social studies (United States history and government or global history and geography), as set forth in clauses (a)(5)(i)(a)-(e) of this section;

4. Subdivision (b) of section 100.6 of the Regulations of the Commissioner of Education is amended, effective March 22, 2016, as follows:

(b) New York State career development and occupational studies commencement credential.

(1) Eligible students. (i) Beginning July 1, 2013 [and thereafter] *but prior to June 2016*, the board of education or trustees of a school district shall, and the principal of a nonpublic school may, issue a New York State career development and occupational studies commencement credential to a student with a disability who meets the requirements of paragraph [(1)] *(3)* of this subdivision to document [preparation] *readiness* for entry-level employment after high school, except for those students deemed eligible for a skills and achievement commencement credential pursuant to subdivision (a) of this section.

(ii) Beginning June 2016 and thereafter, the board of education or trustees of a school district shall, and the principal of a nonpublic school may, issue a New York State career development and occupational studies commencement credential to any student who meets the requirements of paragraph (3) of this subdivision to document readiness for entry-level employment after high school, except for those students with disabilities deemed eligible for a skills and achievement commencement credential pursuant to subdivision (a) of this section.

(2) Consistent with sections 100.2(q)(1) and 100.5 of this Part, the school district or nonpublic school shall ensure that the student has been provided with appropriate opportunities to earn a Regents or local high school diploma, including providing a student with meaningful access to participate and progress in the general curriculum to assist the student to meet the State's learning standards.

[(1)] *(3)* Except as provided in paragraphs [(2), (5) and (6)] *(4), (7) and (8)* of this subdivision, prior to awarding the career development and occupational studies commencement credential, the board of education or trustees of the school district, or the governing body of the nonpublic school, shall ensure that each of the following requirements have been met:

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

(ii) . . .

(iii) . . .

[(2)] *(4)* Notwithstanding the provisions of paragraph [(1)] *(3)* of this subdivision, a board of education or trustees of the school district, or the governing body of the nonpublic school, may award the career development and occupational studies commencement credential to a student who has met the requirements for a nationally-recognized work-readiness credential, including but not limited to SkillsUSA, the National Work Readiness Credential, the National Career Readiness Certificate – (ACT) WorkKeys and the Comprehensive Adult Student Assessment Systems Workforce Skills Certification System.

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

[(4)] *(6)*. . .

[(5)] *(7)* For students with disabilities who exit from high school prior to July 1, 2015, the district or nonpublic school may award the career development and occupational studies commencement credential to a student who has not met all of the requirements in subparagraph [(1)(ii)] *(3)(ii)* of this subdivision, provided that the school principal, in consultation with relevant faculty, has determined that the student has otherwise demonstrated knowledge and skills relating to the commencement level career development occupational studies learning standards.

[(6)] *(8)* For students [with disabilities] who transfer from another school district within the State or another state, the principal shall, after consultation with relevant faculty, evaluate the work-based learning experiences and coursework on the student's transcript or other records to determine if the student meets the requirements in subparagraph (ii) of paragraph [(1)] *(3)* of this subdivision.

[(7)] *(9)*. . .

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 June 19, 2016.

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: Angelica Infante-Green, Deputy Commissioner for P-12 Instructional Support, State Education Department, EBA 875, 89 Washington Ave., Albany, NY 12234, (518) 474-5915, 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

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 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.

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.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to implement Regents policy to establish a Career Development Occupational Studies (CDOS) graduation pathway option for all students who meet the requirements to earn the New York State (NYS) CDOS Commencement Credential, meet graduation course and credit requirements and pass four required Regents Exams.

NEEDS AND BENEFITS:

There is growing public interest in broadening the number of comparably rigorous pathways leading to a high school diploma to ensure that graduation pathways provide a broader group of students with sufficient opportunities to graduate with a regular diploma. These discussions have

led to a comprehensive review of the college- and career-readiness of our students, units of study requirements, assessments of student learning, and support for broadening the criteria needed to earn a high school diploma without lowering the standard of academic excellence that is required. The proposed pathway would allow students to graduate with a regular diploma when they have demonstrated the State's standards for academic achievement in math, English, science and social studies and the State's standards for essential work-readiness knowledge and skills necessary for successful employment after high school.

The proposed amendment would amend:

1. sections 100.5(a), (b) and (d) to add that all students, beginning in June 2016 and thereafter, could graduate with a regular high school diploma if they complete the credit requirements; meet the requirements to earn the CDOS Commencement Credential; and pass four Regents assessments, one in each of the four discipline areas of math, English, science and social studies; and

2. section 100.6(b) to expand the opportunity to all students to earn the CDOS Commencement Credential, except students with severe disabilities who take the New York State Alternate Assessment and graduate from high school with the Skills and Achievement Commencement Credential.

COSTS:

(a) Costs to State government: none.

(b) Costs to local government: There may be costs associated with extending the population of students who can earn the Credential related to record keeping to ensure the student has met the career planning requirements, minimum hours for courses of study and work-based learning, achievement of the standards and to ensure that each student working to meet these requirements has a completed employability profile. These costs are anticipated to be minimal and capable of being absorbed by districts using existing staff and resources.

(c) Costs to private regulated parties: Except for approved private schools for students with disabilities, participation by nonpublic schools is voluntary. For those nonpublic schools that choose to participate, there may be costs associated with issuing students a career development and occupational studies commencement credential if nonpublic schools opt to develop their own forms, in lieu of using the Department's career plan and employability profile model forms. These costs are anticipated to be minimal and capable of being absorbed using existing staff and resources.

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

The proposed amendment does not impose any significant costs on the State, school districts, charter schools, registered nonpublic schools or the State Education Department. The amendment implements Regents policy to establish a CDOS graduation pathway option and expand the opportunity for students to exit with the CDOS Commencement Credential, which recognizes students' work readiness skills for post-school employment. 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 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 MANDATES:

The proposed amendment implements Regents policy to establish a CDOS graduation pathway option and expand the opportunity to all students to graduate with a regular high school diploma by meeting the requirements to demonstrate work-readiness skills through achievement of the CDOS Commencement Credential. The amendment would require school districts to issue a regular high school diploma to any student who meets the requirements to earn the CDOS Commencement Credential, meets graduation course and credit requirements, and passes four required Regents Exams. School districts are already required to provide students with disabilities with the opportunity to earn the CDOS Commencement Credential and there are a number of school districts and BOCES that currently offer technical education programs that would meet the proposed pathway requirements, and many students, including students without disabilities, already take Career and Technical Education (CTE) courses, and engage in work-related activities that would allow them to meet the credential's instructional requirements.

Districts would also be required to ensure that the transcript and permanent records of a student who earns this credential include notation of career and technical education coursework and work-based learning experiences completed by the student and that students are provided with a copy of a form to complete his/her Career Plan. Further, for students who meet the minimum requirements for the CDOS credential, the proposed amendment would require school personnel to complete and maintain a work skills employability profile for the student during his/her last year of school. Currently, an employability profile is only required for students with disabilities working towards a CDOS commencement credential and students participating in an approved career and technical education program pursuant to section 100.5(d)(6).

PAPERWORK:

The proposed amendment will not require any additional paperwork beyond what is necessary to document attainment of the CDOS learning standards, completion of required instructional activities (CTE and/or work-based learning experiences) and employability skills, and to issue the certificate to award the credential to the student.

DUPLICATION:

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

ALTERNATIVES:

There were no significant alternatives to the rule and none were considered.

FEDERAL STANDARDS:

There are no applicable Federal standards.

COMPLIANCE SCHEDULE:

The CDOS graduation pathway option would apply beginning with students who first enter grade nine in September 2012 and thereafter, or who are otherwise eligible to receive a high school diploma in June 2016 or thereafter. Many students are already participating in required instructional activities (CTE and/or work-based learning experiences) and/or working toward a nationally-recognized work readiness credential to meet the requirements for the CDOS Commencement Credential. It is anticipated that regulated parties will be able to achieve compliance with the proposed amendment by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment is necessary to implement Regents policy to establish a Career Development Occupational Studies (CDOS) graduation pathway option for students who meet the requirements to earn the New York State (NYS) CDOS Commencement Credential, meet graduation course and credit requirements and pass four required Regents Exams and to expand the opportunity to all students to earn the CDOS commencement credential.

The proposed amendment relates to State learning standards, State assessments and graduation and diploma requirements, and 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 in the State, and to charter schools and nonpublic schools that are authorized to issue regular high school diplomas with respect to State assessments and high school graduation and diploma requirements. At present, there are 70 charter schools authorized to issue Regents diplomas.

COMPLIANCE REQUIREMENTS:

The proposed amendment implements Regents policy to establish a CDOS graduation pathway option to allow students to graduate with a regular diploma when they have demonstrated the State's standards for academic achievement in math, English, science and social studies and the State's standards for essential work-readiness knowledge and skills necessary for successful employment after high school.

The proposed amendment would require school districts to issue a regular high school diploma to any student who meets the requirements to earn the CDOS Commencement Credential, meets graduation course and credit requirements, and passes four required Regents Exams.

Districts must also ensure that the transcript and permanent records of a student who earns this credential include notation of career and technical education coursework and work-based learning experiences completed by the student and that students are provided with a copy of a form to complete his/her Career Plan. Further, for students who meet the minimum requirements for the CDOS credential, the proposed amendment would require school personnel to complete and maintain a work skills employability profile for the student during his/her last year of school. Currently, an employability profile is only required for students with disabilities working towards a CDOS commencement credential and students participating in an approved career and technical education program pursuant to section 100.5(d)(6).

PROFESSIONAL SERVICES:

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

COMPLIANCE COSTS:

There may be costs associated with extending the population of students who can earn the Credential related to record keeping to ensure the student has met the career planning requirements, minimum hours for courses of study and work-based learning, achievement of the standards and to ensure that each student working to meet these requirements has a completed

employability profile. These costs are anticipated to be minimal and capable of being absorbed by districts using existing staff and resources.

The amendment implements Regents policy to establish a CDOS graduation pathway option and expand the opportunity for students to exit with the CDOS Commencement Credential, which recognizes students' work readiness skills for post-school employment. 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 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 FEASIBILTY:

The proposed amendment does not impose any additional technological requirements on school districts, charter schools or registered nonpublic schools high schools. Economic feasibility is addressed above under compliance costs.

MINIMIZING ADVERSE IMPACT:

The proposed amendment implements Regents policy to establish a CDOS graduation pathway option and expand the opportunity for all students to graduate with a regular high school diploma by meeting the requirements to demonstrate work-readiness skills through achievement of the CDOS Commencement Credential. The amendment would require school districts to issue a regular high school diploma to any student who meets the requirements to earn the CDOS Commencement Credential, meets graduation course and credit requirements, and passes four required Regents Exams. School districts are already required to provide students with disabilities with the opportunity to earn the CDOS Commencement Credential and there are a number of school districts and BOCES that currently offer technical education programs that would meet the proposed pathway requirements, and many students, including students without disabilities, already take CTE courses, and engage in work-related activities that would allow them to meet the credential's instructional requirements.

Districts would also be required to ensure that the transcript and permanent records of a student who earns this credential include notation of career and technical education coursework and work-based learning experiences completed by the student and that students are provided with a copy of a form to complete his/her Career Plan. Further, for students who meet the minimum requirements for the CDOS credential, the proposed amendment would require school personnel to complete and maintain a work skills employability profile for the student during his/her last year of school. Currently, an employability profile is only required for students with disabilities working towards a CDOS commencement credential and students participating in an approved career and technical education program pursuant to section 100.5(d)(6).

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.

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 to establish criteria for multiple, comparably rigorous assessment pathways for high school graduation and college and career readiness. 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 each of the 689 public school districts in the State, charter schools, and registered nonpublic schools in the State, to the extent that they offer instruction in the high school grades, 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. 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 implements Regents policy to establish a CDOS graduation pathway option and expand the opportunity for all students to graduate with a regular high school diploma by meeting the requirements to demonstrate work-readiness skills through achievement of the CDOS Commencement Credential. The amendment would require school districts to issue a regular high school diploma to any student who meets the requirements to earn the CDOS Commencement Credential, meets graduation course and credit requirements, and passes four required Regents Exams.

Districts would also be required to ensure that the transcript and permanent records of a student who earns this credential include notation of career and technical education coursework and work-based learning experiences completed by the student and that students are provided with a copy of a form to complete his/her Career Plan. Further, for students who meet the minimum requirements for the CDOS credential, the proposed amendment would require school personnel to complete and maintain a work skills employability profile for the student during his/her last year of school. Currently, an employability profile is only required for students with disabilities working towards a CDOS commencement credential and students participating in an approved career and technical education program pursuant to section 100.5(d)(6).

3. COMPLIANCE COSTS:

There may be costs associated with extending the population of students who can earn the Credential related to record keeping to ensure the student has met the career planning requirements, minimum hours for courses of study and work-based learning, achievement of the standards and to ensure that each student working to meet these requirements has a completed employability profile.

These costs are anticipated to be minimal and capable of being absorbed by districts using existing staff and resources.

The proposed amendment implements Regents policy to establish a CDOS graduation pathway option and expand the opportunity for all students to graduate with a regular high school diploma by meeting the requirements to demonstrate work-readiness skills through achievement of the CDOS Commencement Credential. 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 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 implements Regents policy to establish a CDOS graduation pathway option and expand the opportunity for all students to graduate with a regular high school diploma by meeting the requirements to demonstrate work-readiness skills through achievement of the CDOS Commencement Credential. The amendment would require school districts to issue a regular high school diploma to any student who meets the requirements to earn the CDOS Commencement Credential, meets graduation course and credit requirements, and passes four required Regents Exams. School districts are already required to provide students with disabilities with the opportunity to earn the CDOS Commencement Credential and there are a number of school districts and BOCES that currently offer technical education programs that would meet the proposed pathway requirements, and many students, including students without disabilities, already take CTE courses, and engage in work-related activities that would allow them to meet the credential's instructional requirements.

Districts would also be required to ensure that the transcript and permanent records of a student who earns this credential include notation of career and technical education coursework and work-based learning experiences completed by the student and that students are provided with a copy of a form to complete his/her Career Plan. Further, for students who meet the minimum requirements for the CDOS credential, the proposed amendment would require school personnel to complete and maintain a work skills employability profile for the student during his/her last year of school. Currently, an employability profile is only required for students with disabilities working towards a CDOS commencement credential and students participating in an approved career and technical education program pursuant to section 100.5(d)(6).

Because the Regents policy upon which the proposed amendment is based applies to all school districts in the State and to charter schools and registered nonpublic high schools authorized to issue Regents diplomas, it is not possible to establish differing compliance or reporting requirements or timetables or to exempt schools in rural areas from coverage by the proposed amendment.

5. RURAL AREA PARTICIPATION:

Comments on the proposed 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 imple-

ment long-range Regents policy to establish criteria for multiple, comparably rigorous assessment pathways for high school graduation and college and career readiness. Accordingly, there is no need for a shorter review period.

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

Job Impact Statement

The proposed amendment is necessary to implement Regents policy to establish a Career Development Occupational Studies (CDOS) graduation pathway option for all students who meet the requirements to earn the New York State (NYS) CDOS Commencement Credential, meet graduation course and credit requirements and pass four required Regents Exams and to expand the opportunity to all students to earn the CDOS commencement credential.

The proposed amendment relates to State learning standards, State assessments and graduation and diploma requirements and 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.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Appeals Process on Regents Exams Passing Score

I.D. No. EDU-14-16-00003-EP

Filing No. 339

Filing Date: 2016-03-22

Effective Date: 2016-03-22

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

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), 305(1), (2), 308(not subdivided), 309(not subdivided) and 3204(3)

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to implement revisions to policy adopted by the Board of Regents to expand by two additional points the existing eligible score band for an appeal of Regents examinations passing scores. Under the proposed amendment, students could appeal scores of 60-64 (expanded from 62-64) on up to two Regents examinations. Students who are granted one appeal by their local superintendent would then earn a Regents diploma. Students who are granted two appeals would earn a local diploma. In addition, the proposed amendment would eliminate the requirement that in order to be eligible to appeal students must meet a minimum attendance requirement of 95%, exclusive of excused absences, in the year they last took the examination under appeal.

Because the Board of Regents meets at fixed intervals, the earliest the proposed amendment could be presented for regular adoption is the June 13-14, 2016 Regents meeting, after publication of the proposed rule in the State Register on April 6, 2016 and expiration of the 45-day public comment period for State agency rule makings. Furthermore, pursuant to the State Administrative Procedure Act (SAPA), the earliest effective date of the proposed amendment, if adopted at the June meeting, would be June 29, 2016, the date a Notice of Adoption would be published in the State Register. However, school districts must start preparations now, in order to timely implement in the 2015-2016 school year the expanded appeals process for Regents examination passing scores.

Emergency action to adopt the proposed amendment is necessary for the preservation of the general welfare in order to immediately expand by two additional points the existing eligible score band for an appeal of Regents examinations passing scores and to eliminate the attendance requirement as an appeal criteria, so that school districts and qualifying students are given sufficient notice to prepare for and timely implement such graduation pathway in the 2015-16 school year.

It is anticipated that the proposed amendment will be presented to the Board of Regents for adoption as a permanent rule at the June 13-14, 2016 meeting of the Board of Regents, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative Procedure Act.

Subject: Appeals process on Regents exams passing score.

Purpose: To expand by two additional points the eligible score band for the appeal process on Regents examinations passing scores and to eliminate the minimum attendance eligibility requirement for such appeals.

Text of emergency/proposed rule: Paragraph (7) of subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective March 22, 2016, as follows:

(7) Appeals process on Regents examinations passing score to meet Regents diploma requirements.

(i) School districts shall provide unlimited opportunities for all students to retake required Regents examinations to improve their scores.

(a) A student who first enters grade nine in September 2005 or thereafter and who fails, after at least two attempts, to attain a score of 65 or above on a required Regents examination for graduation shall be given an opportunity to appeal such score in accordance with the provisions of this paragraph, provided that no student may appeal his or her score on more than two of the five required Regents examinations and provided further that the student:

(1) has scored within [three] *five* points of the 65 passing score 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;

(2) provides evidence that he or she has received academic intervention services by the school in the subject area of the Regents examination under appeal;

[(3) has an attendance rate of at least 95 percent for the school year during which the student last took the required Regents examination under appeal;]

[(4)] *(3)* has attained 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

[(5)] *(4)* 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.

(b) A student who first enters school in the United States (the 50 States and the District of Columbia) in grade 9, 10, 11 or 12 and is otherwise eligible to graduate in January 2015 or thereafter, is identified as an English Language Learner pursuant to Part 154 of this Title, and fails, after at least two attempts, to attain a score of 65 or above on the required Regents examination in English language arts for graduation, shall be given an opportunity to appeal such score in accordance with the provisions of this paragraph, provided that no such student may appeal his or her score on more than two of the five required Regents examinations and provided further that the student:

(1) …

(2) …

[(3) has an attendance rate of at least 95 percent for the school year during which the student last took the required Regents examination in English language arts;]

[(4)] *(3)* …

[(5)] *(4)* …

(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) …

(2) has met the criteria specified in subclauses [(2)-(5)] *(2)-(4)* 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 (b)(7)(vi)(c) 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.

(ii) …

(iii) …

(iv) …

(v) …

(vi) …

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 June 19, 2016.

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: Jhone M. Ebert, Senior 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

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.

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 the State learning standards, State assessments and graduation and diploma requirements.

NEEDS AND BENEFITS:

Pursuant to the appeal process set forth in Commissioner's Regulation § 100.5(d)(7), students may appeal scores of 62-64 on up to two required Regents examinations, provided they meet the following criteria.

Students must:

1. Have taken the Regents examination under appeal at least two times;

2. Present evidence that the student has taken advantage of academic help provided by the school in the subject tested by the Regents Examination under appeal;

3. Have an attendance rate of 95 percent (except for excused absences) for the school year during which the student last took the Regents examination under appeal;

4. Have a course average in the subject under appeal (as evidenced in the official transcript that records grades achieved by the student in each quarter of the school year) that meets or exceeds the required passing grade by the school; and

5. Be recommended for an exemption to the graduation requirement by the student's teacher or Department chairperson in the subject of the Regents examination under appeal.

In January 2015, the Board of Regents amended § 100.5(d)(7) to extend the appeal process to allow eligible English language learners to appeal scores of 55-61 on the English Language Arts Regents Examination. In December 2015, the Board amended the regulation to extend the appeal provision to students with disabilities who were seeking the local diploma through the existing safety net options. These students are able to appeal scores of between 52 and 54 on up to two Regents examinations and earn the local diploma.

Under the proposed amendment, students could appeal scores of 60-64 (expanded from 62-64) on up to two Regents examinations. Students who are granted one appeal by their local superintendent would then earn a Regents diploma. Students who are granted two appeals would earn a local diploma.

In addition, the proposed amendment would eliminate the requirement that in order to be eligible to appeal students must meet a minimum attendance requirement of 95%, exclusive of excused absences, in the year they last took the examination under appeal. The attendance requirement is problematic for a number of reasons. The rate required exceeds the statewide average attendance rate. In addition a student's ability to provide an excuse for an absence may be dependent upon circumstances that are not within the student's control. Finally, a student's attendance in the year they last took the test may not be appropriate or applicable. Often students retake examinations multiple times in an attempt to meet diploma requirements. These attempts can be made long after a student has met course requirements and is no longer attending school. Often a student may be returning to school for the sole purpose of attempting to pass the examination, so class attendance cannot be calculated in the year they last took the exam. No student may submit an appeal unless they have passed the course for which the appeal is being sought. If the student's attendance is adequate to meet course expectations and ultimately pass the course, the appeal should be considered.

COSTS:

(a) Costs to State government: None.

(b) Costs to local government: There may be additional costs to school districts to process a limited number of additional appeals from students who score 60 or 61 on up to two required Regents examinations. Such costs are expected to be minimal and capable of being absorbed using existing district staff and resources.

(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 62-64 on two Regents exams, and the proposed amendment merely expands by two additional points the existing eligible score band for an appeal. Existing diploma requirements allow students to appeal scores of 62-64 on up to two required Regents examinations. Under the proposed amendment, students could appeal scores of 60-64 (rather than 62-64) on up to two Regents examinations. 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.

Existing diploma requirements allow students to appeal scores of 62-64 on up to two required Regents examinations. Under the proposed amendment, students could appeal scores of 60-64 (rather than 62-64) on up to two Regents examinations.

PAPERWORK:

The proposed amendment will not require any additional paperwork beyond what is necessary to process a limited number of additional appeals from students who score 60 or 61 on up to two required Regents examinations. Appeals under the expanded eligibility scores 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 regulations.

ALTERNATIVES:

There were no significant alternatives and none were considered. The proposed amendment is necessary to implement policy enacted by the Board of Regents relating to the State learning standards, State assessments and graduation and diploma requirements. The proposed amendment merely expands by two additional points the existing eligible score band for an appeal of Regents examinations passing scores.

FEDERAL STANDARDS:

There are no related federal standards.

COMPLIANCE SCHEDULE:

It is anticipated that schools and school districts will be able to achieve compliance with the proposed amendment by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment relates to State learning standards, State assessments and graduation and diploma requirements, and merely expands by two additional points the existing eligible score band for an appeal of Regents examinations passing scores. Existing diploma requirements allow students to appeal scores of 62-64 on up to two required Regents examinations. Under the proposed amendment, students could appeal scores of 60-64 (rather than 62-64) on up to two Regents examinations.

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 in the State.

COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any additional compliance requirements on local governments. An appeals process and criteria are already in place for students who score 62-64 on two Regents exams, and the proposed amendment merely expands by two additional points the existing eligible score band for an appeal. Existing diploma requirements allow students to appeal scores of 62-64 on up to two required Regents examinations. Under the proposed amendment, students could appeal scores of 60-64 (rather than 62-64) on up to two Regents examinations. In addition, the proposed amendment would eliminate the requirement that in order to be eligible to appeal students must meet a minimum attendance requirement of 95%, exclusive of excused absences, in the year they last took the examination under appeal. Newly qualifying students under the expanded criteria would merely go through the existing appeals process, and the same personnel who review appeals under the current system would review the additional appeals.

PROFESSIONAL SERVICES:

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

COMPLIANCE COSTS:

There may be additional costs to school districts to process a limited number of additional appeals from students who score 60 or 61 on up to two required Regents examinations. Such costs are expected to be minimal and capable of being absorbed using existing district staff and resources.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

MINIMIZE ADVERSE IMPACT:

The proposed amendment is necessary to implement Regents policy relating to State learning standards, State assessments and graduation and diploma requirements. 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 62-64 on two Regents exams, and the proposed amendment merely expands by two additional points the existing eligible score band for an appeal of Regents examinations passing scores. Under the proposed amendment, students could appeal scores of 60-64 (rather than 62-64) on up to two Regents examinations. In addition, the proposed amendment would eliminate the requirement that in order to be eligible to appeal students must meet a minimum attendance requirement of 95%, exclusive of excused absences, in the year they last took the examination under 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.

LOCAL GOVERNMENT PARTICIPATION:

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

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts and boards of cooperative educational services (BOCES) in the State, including those located in the 44 rural counties with 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 reporting, recordkeeping or other compliance requirements on school districts and BOCES located in rural areas. An appeals process and criteria are already in place for students who score 62-64 on two Regents exams, and the proposed amendment merely expands by two additional points the existing eligible score band for an appeal. Existing diploma requirements allow students to appeal scores of 62-64 on up to two required Regents examinations. Under the proposed amendment, students could appeal scores of 60-64 (rather than 62-64) on up to two Regents examinations. In addition, the proposed amendment would eliminate the requirement that in order to be eligible to appeal students must meet a minimum attendance requirement of 95%, exclusive of excused absences, in the year they last took the examination under appeal. Newly qualifying students under the expanded criteria would merely go through the existing appeals process, and the same personnel who review appeals under the current system would review the additional appeals. The proposed amendment does not impose any additional professional service requirements on local governments.

3. COMPLIANCE COSTS:

There may be additional costs to school districts to process a limited number of additional appeals from students who score 60 or 61 on up to two required Regents examinations. Such costs are expected to be minimal and capable of being absorbed using existing district staff and resources.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement Regents policy relating to State learning standards, State assessments and graduation and diploma requirements. 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 62-64 on two Regents exams, and the proposed amendment merely expands by two additional points the existing eligible score band for an appeal of Regents examinations passing scores. Under the proposed amendment, students could appeal scores of 60-64 (rather than 62-64) on up to two Regents examinations. In addition, the proposed amendment would eliminate the requirement that in order to be eligible to appeal students must meet a minimum attendance requirement of 95%, exclusive of excused absences, in the year they last took the examination under 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.

The proposed amendment is necessary to implement Regents policy relating to State learning standards, State assessments and graduation and diploma requirements. 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.

Job Impact Statement

The proposed amendment merely expands by two additional points the existing eligible score band for an appeal of Regents examinations passing scores and does not impose any additional costs on the State, school districts, students or the State Education Department. Existing diploma requirements allow students to appeal scores of 62-64 on up to two required Regents examinations. Under the proposed amendment, students could appeal scores of 60-64 (rather than 62-64) on up to two Regents examinations.

The proposed amendment relates to State learning standards, State assessments and graduation and diploma requirements and 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.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interest Penalties for Late Annual Assessment Fees Paid by Licensed Private Career Schools

I.D. No. EDU-14-16-00004-EP

Filing No. 342

Filing Date: 2016-03-22

Effective Date: 2016-03-22

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

Proposed Action: Amendment of section 126.14(c) of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 305(1), (2) and 5001(9)

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

Specific reasons underlying the finding of necessity: The proposed

amendment is necessary to implement Regents policy and to properly implement Education Law § 5001(9)(d)by amending subdivision (c) of § 126.14 of the Commissioner's Regulations to reflect current practice relating to interest penalties for late payments of annual assessment fees by licensed private career schools. Section 126.14(c) allows the Department to subject annual assessment fees to interest penalties in the following magnitude:

(1) For payments received within the first 30 days after the due date the interest penalty shall be the product of the amount due multiplied by one twelfth of the sum of one plus the prevailing prime rate of interest on the due date as determined by the commissioner.

(2) For payments received more than 30 days after the due date the interest penalty shall be compounded daily for each day the payment is late at a rate of interest equal to the sum of one plus the prevailing prime rate of interest on the due date as determined by the commissioner.

(3) Interest penalties not paid within 15 days of notification of the amount of the penalty shall be increased in accordance with the method used by the commissioner to compute the interest penalty in the first instance.

The interest penalties in the current regulation are outside the scope of the plain language of Education Law § 5001(9), which provides for the payment of interest at one percent above the prevailing prime rate, and produce exorbitant penalty fees which most proprietary schools are unable to pay. As a result the revenues collected on principal owed the assessment fund are more difficult to collect and the Commissioner's ability to gain payment of amounts in arrears by virtue of the threat of suspension of a school's license loses its leverage. The Department can accomplish collection of due amounts related to the assessment fund through strict adherence to the plain meaning contained in the statute that the Commissioner's regulations are meant to implement.

Because the Board of Regents meets at monthly intervals, the earliest the proposed amendment could be adopted by regular 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) § 202, would be the June 13-14, 2016 Regents meeting, and pursuant to SAPA § 202, the earliest the amendment could take effect if adopted at the June 2016 Regents meeting is after publication of a Notice of Adoption in the State Register on June 29, 2016.

Emergency action is necessary for the preservation of the general welfare in order to immediately conform the Commissioner's Regulations regarding interest penalties for late payments of annual assessment fees by licensed private career schools to reflect current practice in order to prevent exorbitantly high late fees from being calculated, thereby ensuring the State Education Department's Bureau of Proprietary Schools is able to utilize its ability to suspend the licenses of private career schools and private schools to more effectively ensure timely payment of the annual assessment fee.

It is anticipated that the proposed amendment will be presented to the Board of Regents for adoption as a permanent rule at the June 13-14, 2016 meeting of the Board of Regents, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative Procedure Act.

Subject: Interest penalties for late annual assessment fees paid by licensed private career schools.

Purpose: To conform regulations to reflect current practices.

Text of emergency/proposed rule: Subdivision (c) of section 126.14 of the regulations of the Commissioner of Education is amended, effective March 22, 2016, as follows:

(c) Pursuant to section 5001(9) of the Education Law, any annual assessment fees submitted by the schools to the department after the due date shall be subject to an interest penalty. The commissioner shall calculate the amount of the interest penalty as follows:

(1) [For payments received] *For each due date, payments made* within [the first] 30 days [after the] *following such* due date [the interest penalty] shall be [the product of the amount due multiplied by one twelfth of the sum of one plus the prevailing prime rate of interest on the due date as determined by the commissioner] *subject to an interest penalty of one percent above the prevailing prime rate*.

[(2) For payments received more than 30 days after the due date the interest penalty shall be compounded daily for each day the payment is late at a rate of interest equal to the sum of one plus the prevailing prime rate of interest on the due date as determined by the commissioner.]

[(3)] *(2)* Interest penalties not paid within 15 days of notification of the amount of the penalty [shall] *may* be increased in accordance with the method used by the commissioner to compute the interest penalty in the first instance.

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 June 19, 2016.

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: Christopher Ronk, Senior Attorney, NYSED Bureau of Proprietary School Supervision, 116 West 32nd Street, 5th Floor, New York, NY 10001, (212) 643-4760, email: Christopher.Ronk@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 207 grants general rule-making authority to the Regents to carry into effect State educational laws and policies.

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.

Article 101 of the Education Law (Education Law §§ 5001 through 5010) authorizes the State Education Department to license and regulate private career schools. Education Law § 5001 sets forth the requirements for licensure of private career schools. Pursuant to Education Law § 5001(9), the Commissioner is directed to annually assess each school a total percentage of the school's gross tuition based upon the previous year ("annual assessment fee"), which shall be payable in equal quarterly installments due on June 1st, September 1st, December 1st and March 1st. The statute provides that any annual assessment fees submitted by the schools after the due date shall be subject to interest at one percent above the prevailing prime rate. Annual assessment fees and interest penalties are used to fund the Department's supervision and regulation of licensed private schools (Annual Supervision Fund). Payments of such fees and interest penalties are deemed to be a condition of a school's licensure, and the statute authorizes the Commissioner to suspend licensure for late payments.

2. LEGISLATIVE OBJECTIVES:

Consistent with the above authority, the proposed amendment is necessary to implement Regents policy, and to properly implement Education Law § 5001(9)(d), by amending subdivision (c) of § 126.14 of the Commissioner's Regulations to reflect current Department practice relating to interest penalties for late payments of annual assessment fees by licensed private career schools.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to implement Regents policy and to properly implement Education Law § 5001(9)(d) by amending subdivision (c) of § 126.14 of the Commissioner's Regulations to reflect current Department practice relating to interest penalties for late payments of annual assessment fees by licensed private career schools. Section 126.14(c) allows the Department to subject annual assessment fees to interest penalties in the following magnitude:

(1) For payments received within the first 30 days after the due date the interest penalty shall be the product of the amount due multiplied by one twelfth of the sum of one plus the prevailing prime rate of interest on the due date as determined by the commissioner.

(2) For payments received more than 30 days after the due date the interest penalty shall be compounded daily for each day the payment is late at a rate of interest equal to the sum of one plus the prevailing prime rate of interest on the due date as determined by the commissioner.

(3) Interest penalties not paid within 15 days of notification of the amount of the penalty shall be increased in accordance with the method used by the commissioner to compute the interest penalty in the first instance.

The interest penalties in the current regulation are outside the scope of the plain language of Education Law § 5001(9), which provides for the payment of interest at one percent above the prevailing prime rate, and produce exorbitant penalty fees which most proprietary schools are unable to pay. As a result the revenues collected on principal owed the assessment fund are more difficult to collect and the Commissioner's ability to gain payment of amounts in arrears by virtue of the threat of suspension of a school's license loses its leverage. The Department can accomplish collection of due amounts related to the assessment fund through strict adherence to the plain meaning contained in the statute that the Commissioner's regulations are meant to implement.

4. COSTS:

(a) Costs to State government: none.

(b) Costs to local governments: 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 relates to interest penalties for late annual assessment fees paid by licensed private career schools and is necessary to implement Regents policy and properly implement Education Law § 5001(9)(d) by amending subdivision (c) of § 126.14 of the Commissioner's Regulations to reflect current Department practice in order to prevent exorbitantly high late fees from being calculated which most proprietary schools are unable to pay. As a result the revenues collected on principal owed the assessment fund are more difficult to collect and the Commissioner's ability to gain payment of amounts in arrears by virtue of the threat of suspension of a school's license loses its leverage. The Department can accomplish collection of due amounts related to the assessment fund through strict adherence to the plain meaning contained in the statute that the Commissioner's regulations are meant to implement.

5. LOCAL GOVERNMENT MANDATES:

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

6. PAPERWORK:

There are no additional paperwork or recordkeeping requirements beyond those inherent in the statute.

7. DUPLICATION:

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

8. ALTERNATIVES:

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 will be able to achieve compliance with the proposed amendment by its effective date. The proposed amendment relates to interest penalties for late annual assessment fees paid by licensed private career schools and does not impose any additional costs or compliance requirements on such schools. The proposed amendment is necessary to implement Regents policy and properly implement Education Law § 5001(9)(d) by amending subdivision (c) of § 126.14 of the Commissioner's Regulations to reflect current Department practice in order to prevent exorbitantly high late fees from being calculated which most proprietary schools are unable to pay. As a result the revenues collected on principal owed the assessment fund are more difficult to collect and the Commissioner's ability to gain payment of amounts in arrears by virtue of the threat of suspension of a school's license loses its leverage. The Department can accomplish collection of due amounts related to the assessment fund through strict adherence to the plain meaning contained in the statute that the Commissioner's regulations are meant to implement.

Regulatory Flexibility Analysis

(a) Small Businesses:

1. EFFECT OF THE RULE:

The proposed amendment is applicable to all licensed private career schools and certified English as a second language schools in the State. There are 397 such schools in the State. The Department does not keep records on the number of such schools that are small businesses, however it is believed that almost all of the 397 schools are small businesses.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment relates to interest penalties for late annual assessment fees paid by licensed private career schools and does not impose any additional compliance requirements on such schools. Section 126.14(c) allows the Department to subject annual assessment fees to interest penalties in the following magnitude:

(1) For payments received within the first 30 days after the due date the interest penalty shall be the product of the amount due multiplied by one twelfth of the sum of one plus the prevailing prime rate of interest on the due date as determined by the commissioner.

(2) For payments received more than 30 days after the due date the interest penalty shall be compounded daily for each day the payment is late at a rate of interest equal to the sum of one plus the prevailing prime rate of interest on the due date as determined by the commissioner.

(3) Interest penalties not paid within 15 days of notification of the amount of the penalty shall be increased in accordance with the method used by the commissioner to compute the interest penalty in the first instance.

The interest penalties in the current regulation are outside the scope of the plain language of Education Law § 5001(9), which provides for the payment of interest at one percent above the prevailing prime rate, and produce exorbitant penalty fees which most proprietary schools are unable to pay. As a result the revenues collected on principal owed the assessment fund are more difficult to collect and the Commissioner's ability to gain payment of amounts in arrears by virtue of the threat of suspension of a school's license loses its leverage. The Department can accomplish collection of due amounts related to the assessment fund through strict adherence to the plain meaning contained in the statute that the Commissioner's regulations are meant to implement.

3. PROFESSIONAL SERVICES:

The proposed amendment will not require any additional professional services in order to comply.

4. COMPLIANCE COSTS:

The proposed amendment relates to interest penalties for late annual assessment fees paid by licensed private career schools and does not impose any additional costs on such schools. The proposed amendment is necessary to implement Regents policy and properly implement Education Law § 5001(9)(d) by amending subdivision (c) of § 126.14 of the Commissioner's Regulations to reflect current Department practice in order to prevent exorbitantly high late fees from being calculated which most proprietary schools are unable to pay. As a result the revenues collected on principal owed the assessment fund are more difficult to collect and the Commissioner's ability to gain payment of amounts in arrears by virtue of the threat of suspension of a school's license loses its leverage. The Department can accomplish collection of due amounts related to the assessment fund through strict adherence to the plain meaning contained in the statute that the Commissioner's regulations are meant to implement.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional technological requirements on small businesses. Economic feasibility is discussed in the above Costs section.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment relates to interest penalties for late annual assessment fees paid by licensed private career schools and does not impose any additional compliance requirements or costs on such schools. The proposed amendment is necessary to implement Regents policy and properly implement Education Law § 5001(9)(d) by amending subdivision (c) of § 126.14 of the Commissioner's Regulations to reflect current Department practice in order to prevent exorbitantly high late fees from being calculated which most proprietary schools are unable to pay. As a result the revenues collected on principal owed the assessment fund are more difficult to collect and the Commissioner's ability to gain payment of amounts in arrears by virtue of the threat of suspension of a school's license loses its leverage. The Department can accomplish collection of due amounts related to the assessment fund through strict adherence to the plain meaning contained in the statute that the Commissioner's regulations are meant to implement.

7. SMALL BUSINESS PARTICIPATION:

The State Education Department has posted the proposed regulation on its website for comments from interested parties, and has notified two large associations representing the majority of licensed private career schools in the State, so that they can inform their respective members of the proposed amendment.

Local Governments:

The proposed amendment relates to interest penalties for late payment of annual assessment fees by licensed private career schools. It is clear from the nature of the proposed amendment that it does not impose any adverse economic impact, reporting, recordkeeping or other compliance requirements on local governments. No further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for local governments is not required and none has been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment is applicable to all licensed private career schools and certified English as a second language schools in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. Currently, there are 397 such schools. Of these, approximately 15 are located in a rural area of the State.

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

The proposed amendment relates to interest penalties for late annual assessment fees paid by licensed private career schools and does not impose any additional compliance requirements on such schools. Section 126.14(c) allows the Department to subject annual assessment fees to interest penalties in the following magnitude:

(1) For payments received within the first 30 days after the due date the interest penalty shall be the product of the amount due multiplied by one twelfth of the sum of one plus the prevailing prime rate of interest on the due date as determined by the commissioner.

(2) For payments received more than 30 days after the due date the interest penalty shall be compounded daily for each day the payment is late at a rate of interest equal to the sum of one plus the prevailing prime rate of interest on the due date as determined by the commissioner.

(3) Interest penalties not paid within 15 days of notification of the amount of the penalty shall be increased in accordance with the method used by the commissioner to compute the interest penalty in the first instance.

The interest penalties in the current regulation are outside the scope of the plain language of Education Law § 5001(9), which provides for the payment of interest at one percent above the prevailing prime rate, and produce exorbitant penalty fees which most proprietary schools are unable to pay. As a result the revenues collected on principal owed the assessment fund are more difficult to collect and the Commissioner's ability to gain payment of amounts in arrears by virtue of the threat of suspension of a school's license loses its leverage. The Department can accomplish collection of due amounts related to the assessment fund through strict adherence to the plain meaning contained in the statute that the Commissioner's regulations are meant to implement.

The proposed amendment will not require any additional professional services in order to comply.

3. COSTS:

The proposed amendment relates to interest penalties for late annual assessment fees paid by licensed private career schools and does not impose any additional costs on such schools. The proposed amendment is necessary to implement Regents policy and properly implement Education Law § 5001(9)(d) by amending subdivision (c) of § 126.14 of the Commissioner's Regulations to reflect current Department practice in order to prevent exorbitantly high late fees from being calculated which most proprietary schools are unable to pay. As a result the revenues collected on principal owed the assessment fund are more difficult to collect and the Commissioner's ability to gain payment of amounts in arrears by virtue of the threat of suspension of a school's license loses its leverage. The Department can accomplish collection of due amounts related to the assessment fund through strict adherence to the plain meaning contained in the statute that the Commissioner's regulations are meant to implement.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment relates to interest penalties for late annual assessment fees paid by licensed private career schools and does not impose any additional compliance requirements or costs on such schools. The proposed amendment is necessary to implement Regents policy and properly implement Education Law § 5001(9)(d) by amending subdivision (c) of § 126.14 of the Commissioner's Regulations to reflect current Department practice in order to prevent exorbitantly high late fees from being calculated which most proprietary schools are unable to pay. As a result the revenues collected on principal owed the assessment fund are more difficult to collect and the Commissioner's ability to gain payment of amounts in arrears by virtue of the threat of suspension of a school's license loses its leverage. The Department can accomplish collection of due amounts related to the assessment fund through strict adherence to the plain meaning contained in the statute that the Commissioner's regulations are meant to implement.

5. RURAL AREA PARTICIPATION:

The State Education Department has posted the proposed regulation on its website for comments from interested parties, and has notified two large associations representing the majority of licensed private career schools in the State, including some located in rural areas, so that they can inform their respective members of the proposed amendment.

Job Impact Statement

The proposed amendment is necessary to implement Regents policy and to properly implement Education Law § 5001(9)(d) by amending subdivision (c) of § 126.14 of the Commissioner's Regulations to reflect current practice in order to prevent exorbitantly high late fees from being calculated, thereby ensuring the State Education Department's Bureau of Proprietary Schools is able to utilize its ability to suspend the licenses of private career schools and private schools to more effectively ensure timely payment of the annual assessment fee.

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 not have a substantial impact on jobs and 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.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Registration and Continuing Teacher and Leader Education Requirements

I.D. No. EDU-14-16-00009-EP
Filing No. 343
Filing Date: 2016-03-22
Effective Date: 2016-03-22

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

Proposed Action: Addition of Subpart 80-6; amendment of sections 80-3.6 and 100.2(dd) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 210(not subdivided), 212(3), 3004(1), 3006(1), (3), 3006-a(1)-(3) 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 the provisions of Subpart C of Part EE of Chapter 56 of the Laws of 2015 which establishes the registration and continuing teacher and leader education requirements for certain teachers and school leaders.

A Notice of Proposed Rule Making will be published in the State Register on April 6, 2016. 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) would be the June Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the June meeting, would be June 29, 2016, the date a Notice of Adoption would be published in the State Register.

Emergency action is therefore necessary for the preservation of the general welfare to timely implement the provisions of Subpart C of Part EE of Chapter 56 of the Laws of 2015, which becomes effective July 1, 2016. The new law requires, commencing with the 2016-2017 school year, any holder of a teaching certificate in the classroom teaching service, teaching assistant or educational leadership that is valid for life to register with the department every five years. The statute also requires holders of a professional certificate in the classroom teaching service or educational leadership service (i.e., school building leader, school district leader, school district business leader) and holders of a Level III teaching assistant certificate employed in a school district or board of cooperative educational services in New York State to complete certain continuing teacher and leader education requirements beginning on July 1, 2016. Emergency action is needed at the March 2016 meeting in order to provide these teachers and school leaders with sufficient notice of the new registration requirements and to ensure that there are a sufficient amount of approved sponsors by July 1, 2016 so that teachers and leaders can comply with the new continuing teacher and leader education requirements by the statute's stated effective date.

Subject: Registration and continuing teacher and leader education requirements.

Purpose: To implement subpart C of part EE of chapter 56 of the Laws of 2015 by establishing registration requirements for all Permanent, Professional and Teaching Assistant Level III certificate holders and establishing continuing teacher and leader education (CTLE) requirements for Professional and Teaching Assistant Level III certificate holders.

Substance of emergency/proposed rule (Full text is posted at the following State website: http://www.regents.nysed.gov/common/regents/files/316hea1.pdf): The Commissioner of Education proposes to amend Subpart 80-6 and section 100.2(dd) of the Commissioner's Regulations, relating to the registration process for any holder of a certificate in the classroom teaching service or educational leadership service that is valid for life (Permanent, Professional and Teaching Assistant Level III) and the establishment of continuing teacher and leader education (CTLE) requirements for Professional and Teaching Assistant Level III certificate holders. The proposed rule also maintain the requirement in Section 100.2(dd) of the Regulations of the Commissioner of Education for school districts and BOCES to develop a professional development plan, amending the 175 hour requirement to 100 hours to be consistent with the new law. The following is a summary of the substance of the rule.

Section 80-6.1 defines applicable school, certificate holder, CTLE certificate holder, practicing and registration period.

Section 80-6.2 sets forth the registration requirements for all permanent and professional certificate holders in the classroom teaching service and Level III Teaching Assistant certificate holders, commencing with the 2016-2017 school year. This section describes when certificate holders will be required to register and re-register with the Department, as well as how to notify the Department if not practicing in an applicable school (and therefore does not need to register). This section also authorizes the Department to charge a late fee of $10 if a certificate holder fails to register.

Section 80-6.3 describes the mandatory CTLE requirements for all holders of professional certificates in the classroom teaching service, educational leadership service, and Level III Teaching Assistant certificate holders. Beginning with the 2016-17 school year, all CTLE certificate holders must complete 100 hours of acceptable CTLE, including at least 15% of such time devoted to the language acquisition needs of English language learners. If a CTLE certificate holder holds a professional certificate in English to speakers of other languages or a bilingual extension, he/she shall be required to complete 50% of CTLE in language acquisition. There are also provisions for adjustments to the CTLE requirement for documented good cause, for a peer review teacher or principal conducting a classroom observation pursuant to Education Law § 3012-d to obtain credit for time observing, and for candidates who achieve National Board Certification and exemptions from the language acquisition requirements for teachers or leaders employed by a school district with an approved exemption under Part 154 of the Commissioner's regulations.

Section 80-6.4 of the Regulation describes how CTLE is measured for both credit-bearing courses and all other approved CTLE courses.

Section 80-6.5 provides for a conditional registration that may be issued, at the discretion of the Department, to a CTLE certificate holder who attests to noncompliance with the CTLE requirements. Such conditional registration may not exceed one year, and may be granted provided that the certificate holder agrees to remedy the deficiency within the conditional registration period as well as any additional CTLE that the Department may require.

Section 80-6.6 of the Regulation describes the process of renewing registration at the end of each registration period.

Section 80-6.7 describes the recordkeeping requirements of CTLE certificate holders. These requirements include: the title of the program, the total number of hours completed, the number of hours completed in language acquisition addressing the needs of English language learners, the sponsor's name and identifying number, attendance verification, and the date and location of the program. This information must be retained for at least three years from the end of the registration period during which such CTLE was completed.

Section 80-6.8 states how a CTLE certificate holder resumes practice in an applicable school after a period of inactivity.

Section 80-6.9 describes the requirement that acceptable CTLE must be taken from a sponsor approved by the Department.

Section 80-6.10 relates to the sponsor approval requirements. This includes a list of the entities that may become approved sponsors, the requirements for such sponsor, fees (if applicable), and what entities must attest to when applying to become an approved sponsor. Sponsors will be approved by the Department for a period of five years, and at the expiration of such term must reapply for approval.

Lastly, section 100.2(dd) of the Commissioner's regulations is amended to conform to require school districts/BOCES to provide teachers and school leaders with a professional certificate and Level III teaching assistants with opportunities to complete 175 hours of professional development or 100 hours of CTLE, as required under Part 80, to comply with the new 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 June 19, 2016.

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) 474-8806, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Peg Rivers, New York State Education Department, 89 Washington Avenue, EBA Room 979, Albany, New York 12234, (518) 408-1118, email: regcomments@nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law 101(not subdivided) charges the Department with the general management and supervision of the educational work of the State.

Education Law 207(not subdivided) grants general rule-making authority to the Regents to carry into effect State educational laws and policies.

Education Law 210(not subdivided) authorizes the Regents to register domestic and foreign institutions in terms of New York standards.

Education Law 212(3) authorizes the Department to charge fees for costs for certifications or permits in regulations for which fees are not otherwise provided.

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

Education Law 3004(1) authorizes the Commissioner to promulgate regulations governing the certification requirements for teachers.

Education Law 3006 establishes the types of teaching certificates and licenses that the Commissioner may issue and the registration requirements for holders of a certificates in the classroom teaching service, teaching assistant, or educational leadership certificates that are valid for life as prescribed by the commissioner in regulations.

Education Law 3006-a establishes the registration and continuing teacher and leader education (CTLE) requirements for holders of professional certificates in the classroom teaching service, holders of Level III teaching assistant certificates and holders of professional certificates in the educational leadership service.

Education Law 3009 prohibits school district money from being used to pay the salary of an unqualified teacher.

2. LEGISLATIVE OBJECTIVES:

The proposed rule is necessary to implement Subpart C of Part EE of Chapter 56 of the Laws of 2015.

3. NEEDS AND BENEFITS:

Registration

Commencing with the 2016-2017 school year, any holder of a teaching certificate in the classroom teaching service, teaching assistant or educational leadership that is valid for life to register with the department every five years. These certificate holders must be registered in order to engage in the practice of his or her certificate area in New York State.

The proposed amendment provides the following registration periods:

- For teachers and school leaders with a permanent or professional certificate or a Level III Teaching Assistant certificate issued prior to July 1, 2016, they shall apply for initial registration during the 2016-2017 school year during his/her month of birth, beginning on July 1, 2016 and shall renew his/her registration in the last year of each subsequent five-year period thereafter.
- For teachers and school leaders with a permanent or professional certificate or a Level III Teaching Assistant certificate issued on or after July 1, 2016, they shall be automatically registered, and the certificate holder shall re-register during the fifth succeeding birthday month thereafter and during each birthday month in the last year of each subsequent five-year period.

Teachers and school leaders will be required to register and re-register through the TEACH system. The application will allow the certificate holder to either register or notify the Department that he/she is not practicing in New York and does not wish to register.

If a certificate holder does not register before his/her specified registration date, he/she shall not be employed in his/her certificate area and may be subject to late fees of $10 per month.

CTLE

Ed. L. 3006-a requires, commencing with the 2016-2017 school year, holders of a professional certificate in the classroom teaching service or educational leadership service and holders of a Level III Teaching Assistant certificate who are practicing in a New York public school or BOCES to complete 100 hours of CTLE during each five year registration period.

Consistent with the current professional development requirements for teachers and school leaders, which are now being repealed, the proposed amendment also requires that certificate holders complete the following CTLE requirements in language acquisition to address the needs of English language learner students:

- a CTLE certificate holder who holds a professional certificate in the certificate title of English to speakers of other languages (all grades) or a holder of a bilingual extension under section 80-4.3 of this Title, shall be required to complete a minimum of 50 percent of the required CTLE clock hours in language acquisition; and
- for all other CTLE certificate holders a minimum of 15 percent of the required CTLE clock hours shall be dedicated to language acquisition; and
- for a CTLE certificate holder who holds a Level III Teaching Assistant certificate, a minimum of 15 percent of the required CTLE clock hours shall be dedicated to language acquisition.

Based on feedback from the field, the proposed amendment provides an exemption from these requirements for teachers/school leaders in districts who possess a waiver from such requirements pursuant to Part 154 of the Commissioner's regulations.

The statute further requires that the CTLE be rigorous and completed through a sponsor approved by the Department. The proposed amendment also requires CTLE to be aligned with the following NYS Professional Development standards created by the Professional Standards and Practices Board.

The statute also contains a provision which allows adjustments to the 100 hour CTLE requirement to be made by the Department for health reasons, military service or good cause acceptable to the Department which may prevent compliance. In addition, the statute also allows a peer review teacher, or a principal acting as an independent trained evaluator, conducting a classroom observation as part of the teacher evaluation system to credit his/her time towards meeting his/her CTLE. The proposed amendment also provides an adjustment to the CTLE requirement for a holder of a teaching certificate who achieves certification from the National Board for Professional Teaching Standards for the registration period in which such certification is achieved, provided that the candidate meets the CTLE requirements in language acquisition, if required.

A conditional registration may be issued to allow a candidate up to one year to complete the remaining CTLE hours to remain eligible to practice in a New York State public school or BOCES. When the CTLE has been completed, the CTLE certificate holder will be deemed registered for the remaining registration period. If the CTLE certificate holder continues to practice at an applicable school without his/her registration, he/she may be subject to moral character review pursuant to Part 83 of the Commissioner's regulations. The proposed amendment also requires CTLE certificate holders to maintain a record of their completed CTLE, similar to other licensed professions.

In addition, the proposed amendment requires that if a CTLE certificate holder returns to practice in an applicable school, he/she will be required to register with the Department prior to resuming practice. If the certificate holder is in the middle of a registration period when he/she becomes inactive and is no longer practicing, he/she must complete a minimum of 20 hours of CTLE for every year that he/she was practicing in an applicable school.

Continuing Teacher and Leader Education Sponsors

Education Law § 3006-a also requires the Department to approve all CTLE sponsors. School districts or BOCES may apply as sponsors and will be required to attest that they have a professional development plan consistent with 100.2(dd) of the Commissioner's regulations. For teacher centers, IHEs and professional organizations and unions, they will be required to submit an attestation that the CTLE they provide will meet the rigorous CTLE requirements in the regulations in order to be approved. None of these entities will be required to pay a fee. All other entities will be required to apply to the Department on an application form prescribed by the Department, with a $600 fee and they will have to demonstrate how they meet each of the CTLE requirements outlined in the regulation and they will be subject to the Department's approval. Each sponsor will be approved for a five year period and will then be required to submit a renewal application.

Professional Development Plans

The proposed amendment also retains the requirement in 100.2(dd) of the regulations for school districts and BOCES to develop a professional development plan, but amends the requirements to require such plan to only include 100 hours instead of the currently required 175 hours to be consistent with the new law.

4. COSTS:

a. Costs to State government: The rule implements Subpart C of Part EE of Chapter 56 of the Laws of 2015 and does not impose any costs on State government, including the State Education Department, beyond those costs imposed by the statute.

b. Costs to local government: The new rule does not impose any costs on local government, including school districts and BOCES, beyond those costs imposed by the statute.

Sponsors:

The proposed amendment requires providers of continuing teacher and leader education to be approved by the Department. There is a $600 fee for entities seeking approval by the Department, however, this fee is waived for all school districts, BOCES, teacher centers, NYS institutions of higher education, professional organizations and unions.

(c) Costs to private regulated parties: None, unless a certificate holder chooses to obtain CTLE through an approved provider that charges a fee for CTLE courses. Also, if a certificate holder does not register before his/her specified registration date, he/she shall not be employed in his/her certificate area and may be subject to late fees of $10 per month.

(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 local government, except as otherwise provided or in the Paperwork section in section 6.

6. PAPERWORK:

Certificate holders must register and re-register every five years through the online TEACH system. Registration for those newly certified will be automatic upon certification. Reporting requirements for completed CTLE by certificate holders for school districts and BOCES must be also be completed through the online TEACH system.

The proposed amendment also requires that school districts and BOCES (as well as all other approved sponsors) report information to the Department on CTLE hours completed by attendees including the program and the number of hours completed, through the online TEACH system.

It also requires CTLE certificate holders to maintain a record of completed CTLE, including: the title of the program, the total number of hours completed, the number of hours completed in language acquisition addressing the needs of English language learners, the sponsor's name and any identifying number, attendance verification, and the date and location of the program for at least three years from the end of the registration period in which the CTLE was completed.

7. DUPLICATION:

The rule does not duplicate existing State or Federal requirements.

8. ALTERNATIVES:

There are no alternatives to the registration and CTLE requirements imposed by the new law, and the law applies equally to all permanent, professional, and teaching assistant Level III certificate holders practicing in New York State. However, the statute includes provisions for a conditional registration and adjustments to CTLE requirements for those who are unable to fulfill their CTLE requirements during the five-year registration period for certain enumerated reasons.

9. FEDERAL STANDARDS:

There are no applicable Federal standards concerning registration and CTLE requirements for certificate holders.

10. COMPLIANCE SCHEDULE:

Education Law § 3006 requires holders of a teaching certificate in the classroom teaching service, teaching assist or educational leadership certificate that is valid for life to register every five years commencing with the 2016-2017 school year. Education Law § 3006-a requires that commencing with the 2016-2017 school year, each holder of a professional certificate in the classroom teaching service, holder of a level III teaching assistant to comply with the CTLE requirements enumerated in the statute.

Regulatory Flexibility Analysis

(a) Small businesses:

The proposed rule implements, and otherwise conforms the Commissioner's regulations to Subpart C of Part EE of Chapter 56 of the Laws of 2015 relating to the registration process for all Permanent, Professional and Teaching Assistant Level III certificate holders and the establishment of continuing teacher and leader education (CTLE) requirements for Professional and Teaching Assistant Level III certificate holders. The proposed rule also retains the requirement in Section 100.2(dd) of the Regulations of the Commissioner of Education for school districts and BOCES to develop a professional development plan, amending the 175 hour requirement to 100 hours to be consistent with the new law. The rule does not impose any new 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:

1. EFFECT OF RULE:

Commencing with the 2016-2017 school year, any holder of a teaching certificate in the classroom teaching service, teaching assistant or educational leadership that is valid for life to register with the department every five years and holders of a professional certificate in the classroom teaching service or educational leadership service (i.e., school building leader, school district leader, school district business leader) and holders of a Level III Teaching Assistant certificate who are practicing in a New York public school or board of cooperative educational services (BOCES) shall be required to complete 100 hours of Continuing Teacher and Leader Education (CTLE) during each five year registration period. School districts and BOCES will also be required to apply to the Department if they would like to become an approved sponor to offer CTLE. The proposed rule also retains the requirement in Section 100.2(dd) of the Regulations of the Commissioner of Education for school districts and BOCES to develop a professional development plan, amending the 175 hour requirement to 100 hours to be consistent with the new law.

2. COMPLIANCE REQUIREMENTS:

See Needs and Benefits and Paperwork sections of the Regulatory Impact Statement submitted herewith for an analysis of the compliance requirements for holders of Permanent, Professional, and Teaching Assistant Level III certificates and Department approved sponsors, including school districts and BOCES.

3. PROFESSIONAL SERVICES:

The proposed rule does not impose any additional professional services requirements on local governments beyond those imposed by the statute.

4. COMPLIANCE COSTS:

There are no additional costs on local governments beyond those imposed by the statute. Moreover, school districts and BOCES will not be

required to pay a fee to become an approved sponsor under the proposed amendment.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The rule does not impose any additional technological requirements on holders of Permanent, Professional, and Teaching Assistant Level III certificates, school districts or BOCES. Economic feasibility is addressed in the Costs section of the Regulatory Impact Statement submitted herewith. Registration will be completed through the online TEACH system, which has been used by certificate holders for certification and employment purposes.

6. MINIMIZING ADVERSE IMPACT:

The rule is necessary to implement, and otherwise conform the Commissioner's Regulations to, Subpart C of Part EE of Chapter 56 of the Laws of 2015 which requires a registration process for all Permanent, Professional and Teaching Assistant Level III certificate holders and the establishment of continuing teacher and leader education (CTLE) requirements for Professional and Teaching Assistant Level III certificate holders. 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. However, the Department provided flexibility to local governments in that it waived the fee to become an approved CTLE sponsor for school districts and BOCES.

7. LOCAL GOVERNMENT PARTICIPATION:

The Department sought guidance from several stakeholder groups, including the New York State United Teachers, the United Federation of Teachers, NYS School Board Association, NYS Council of School Superintendents, and district superintendents, which are representatives of local governments or employees of local governments.

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.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

Commencing with the 2016-2017 school year, any holder of a teaching certificate in the classroom teaching service, teaching assistant or educational leadership that is valid for life to register with the department every five years and holders of a professional certificate in the classroom teaching service or educational leadership service (i.e., school building leader, school district leader, school district business leader) and holders of a Level III Teaching Assistant certificate who are practicing in a New York public school or board of cooperative educational services (BOCES) shall be required to complete 100 hours of Continuing Teacher and Leader Education (CTLE) during each five year registration period, including those certificate holders who live or work 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:

See the Needs and Benefits and Paperwork sections of the Regulatory Impact Statement submitted herewith for the reporting, recordkeeping, and other compliance requirements for certificate holders and Department approved sponsors, including those located in rural areas of the State. The rule does not impose any additional professional services requirements on rural areas beyond those imposed by, or inherent in, the statute.

3. COSTS:

See the Costs section of the Regulatory Impact Statement submitted herewith for an analysis of the costs of the proposed rule, including for certificate holders and sponsors located in rural areas of this State.

4. MINIMIZING ADVERSE IMPACT:

The rule is necessary to implement, and otherwise conform the Commissioner's Regulations to, Subpart C of Part EE of Chapter 56 of the Laws of 2015 relating to the registration process for all Permanent, Professional and Teaching Assistant Level III certificate holders and the establishment of CTLE requirements for Professional and Teaching Assistant Level III certificate holders. The statute does not establish differing compliance or reporting requirements for certificate holders in rural areas.

However, where the Department had some flexibility, it provided a waiver from the requirements from the CTLE requirements related to language acquisition for teachers, leaders and teaching assistants employed by a district or BOCES with an approved Part 154 waiver.

5. RURAL AREA PARTICIPATION:

The Department sought guidance on the proposed amendment from several stakeholder groups, including the New York State United Teachers, the United Federation of Teachers, the NYS School Board Association, the NYS Council of School Superintendents, and district superintendents, who have representatives who live and/or work in rural areas of this State. Many of the comments from these stakeholder groups have been incorporated into the proposed amendment.

Job Impact Statement

The purpose of proposed rule is to implement Subpart C of Part EE of Chapter 56 of the Laws of 2015 relating to the registration process for all Permanent, Professional and Teaching Assistant Level III certificate holders and the establishment of continuing teacher and leader education (CTLE) requirements for Professional and Teaching Assistant Level III certificate holders. The proposed rule also retains the requirement in Section 100.2(dd) of the Regulations of the Commissioner of Education for school districts and BOCES to develop a professional development plan, amending the 175 hour requirement to 100 hours to be consistent with the new law. Because the proposed amendment implements statutory requirements and 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 beyond those imposed by statute, 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 ADOPTION

Graduate-Level Teacher and Educational Leadership Programs

I.D. No. EDU-40-15-00009-A

Filing No. 344

Filing Date: 2016-03-22

Effective Date: 2016-04-06

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

Action taken: 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)

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 or summary was published in the October 7, 2015 issue of the Register, I.D. No. EDU-40-15-00009-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, 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 2019, 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 Emergency Adoption and Proposed Rule Making in the State Register on October 7, 2015, the State Education Department (SED) received the following comments:

1. COMMENT:

The language in the item itself states that the GRE and 3.0 are only for candidates seeking their first, initial certification (last paragraph on page 2). However, the actual regulation change included doesn't have that qualification and just states that the new standards are for graduate teacher and school building leader programs (third paragraph on page 5). As such, it is unclear if this applies to traditional initial cert candidates, or to all candidates (including Trans B candidates and candidates seeking additional certifications). Clarification around this issue would be greatly appreciated.

DEPARTMENT RESPONSE: The underlying statute does not limit the new admissions requirements to only students who are seeking their initial certification. The reference to an initial certificate in the Regents item was an inadvertent error. Therefore, the Department will revise the Regents item accordingly. However, since the reference to the initial certificate is not in the regulation, no regulatory changes are needed.

2. COMMENT:

Does this regulation specify that the revised general test (GRE) is required i.e., verbal reasoning, quantitative reasoning, and analytical writing but not GRE subject tests?

DEPARTMENT RESPONSE: Although the underlying statute does not specify the GRE general test, the Department believes that is what is meant. It should also be noted that the statute includes the option for an institution to identify a substantially equivalent admission examination to the GRE.

3. COMMENT:

Does this regulation (GRE) also apply to programs that lead to additional certification, i.e., advanced certificate programs?

DEPARTMENT RESPONSE: Yes, the admissions requirements apply to all graduate-level teacher and educational leadership programs. As stated in the response to Comment No. 1, the Department will remove the reference in the Regents item to initial certification.

4. COMMENT:

Currently, Teachers College has entrance examination requirement for admission across all teacher education programs. Applications for admission to Teachers College's 2016 summer and fall programs have already been printed and disseminated. As such, given the ability of students admitted for 2016 to have flexibility on when they "commence" instruction, we would suggest a 1-year exemption to allow for a transition to the new mandate. This limited flexibility will permit Teachers College (and possibly other programs) to establish the appropriate "substantially equivalent" entrance exam or other relevant assessments to be aligned with the law.

A one year exemption would also allow Teachers College the time to prepare for admissions and provide accurate information at recruiting events as well as in admissions and application materials.

DEPARTMENT RESPONSE: Adding a 1-year effective date as requested by the commenter would necessitate an amendment to the underlying statute and is not something that the Department can accomplish through regulation. However, the statute and proposed regulation permit institutions to exempt up to 15% of any incoming class from the selection criteria upon a determination by the institution that a student has demonstrated the potential to positively contribute to the teaching profession.

5. COMMENT:

Teachers College allows students to defer admission for one year. Students admitted to either Spring, Summer or Fall 2015, for example, have already been approved to defer their admission to Fall 2016. The new state regulations directly affect these students because they were not required to have a GRE score when TC first offered them admission in 2015. At the time that they deferred their admission to 2016, they were informed that no additional application materials are required prior to enrollment in 2016. A transition year would allow us to enroll such students under our current guidelines.

DEPARTMENT RESPONSE: Adding a transition year as requested by the commenter would necessitate an amendment to the underlying statute and is not something that the Department can accomplish through regulation. However, the statute and proposed regulation permit institutions to exempt up to 15% of any incoming class from the selection criteria upon a determination by the institution that a student has demonstrated the potential to positively contribute to the teaching profession.

6. COMMENT:

I am deeply troubled by and opposed to the implementation of a GRE requirement for our programs in teacher certification for the following reasons:

1) based on research on such high stakes tests and their disparate effect on specific populations, such a requirement will accelerate the ''whitening'' of the teaching force;

2) given the new requirement of a 3.0 GPA, it is unclear why we need this additional test that doesn't correlate any better with later academic success;

3) there is absolutely no evidence that particular scores on the GRE correlate well with success as a teacher and there are too many variables to even begin to determine a meaningful correlation;

4) this will penalize students who wish to teach subjects other than math, because they will have had no recent educational experience that allows them to succeed on those standardized questions;

5) this will of course make a tidy profit for those selling preparation guides and test prep programs and thus throw up another block to aspiring teachers who do not have the means to pay for such tutoring;

6) this adds to the already astronomical expense to pursue certification;

7) it does little but intensify the emphasis on testing that has caused so much anger and disgust among teachers, parents, and teacher educators in NY State;

8) it confuses particular test taking skills with teaching ability;

9) such a requirement further strips autonomy from teacher education programs who best can determine who should be admitted, because it requires another standardized admission requirement that ignores differences in background, resources and context.

DEPARTMENT RESPONSE: Most of the comments are really about the underlying statute and are not something that the Department can address through regulation. However, the statute includes the option for an institution to identify a substantially equivalent admission examination to the GRE. In addition, the statute and regulation provide for an exemption of up to 15% of any incoming class from the selection criteria upon a determination by the institution that a student has demonstrated the potential to positively contribute to the teaching profession.

7. COMMENT:

The legitimate authority of the local independent college and university is eroded by the action both of the law and the concomitant amendments. Local faculty and administrators are in a better position to make judgments about the "prediction of success as leaders" and the impact of rigorous classroom success. It is inappropriate for the SED to replace this judgment with a system that is dramatically flawed.

DEPARTMENT RESPONSE: See Response to Comment No. 6.

8. COMMENT:

The amendments propose that Educational Leadership programs create "rigorous selection criteria". This provision presumes that there is not a "rigorous selective criteria with predictive success" in place. Most Graduate Schools have in their Educational Leadership criteria for admission, a need for a Master's degree successfully completed along with permanent certification as a teacher or pupil personnel services in New York State. Advanced Certificate programs also require a Master's degree and a minimum of 45 graduate credits. To intimate that a "rigorous selection criteria" may not be in existence is a false assumption. They already exist in most programs.

DEPARTMENT RESPONSE: This comment is about the underlying statute and is not something that the Department can address through regulation.

9. COMMENT:

This requirement is at the essence of these amendments and is replete with numerous psychometric and statistical issues which I will list and describe. The limitations of this testing, particularly, in the School Building Leader exam is extraordinary. First, there has been a lack of appropriate field testing by Pearson. This limitation has been delineated by the Metropolitan Council of Educational Administration (MCEAP). The letter sent by the organization to the SED, indicates, in detail, numerous issues of validity, reliability and fairness to those preparing for school building leadership positions upon program completion. Numerous problems were found in validity, reliability, and fairness. In terms of the test's validity, MCEAP said "that the items do not actually discriminate leadership candidate readiness, as other choices appear plausible and the correct answers would not be problematic if done as second choice. In terms of reliability, there was a great concern that bias issues may make the test question dilemmas more difficult based on lack of exposure to the test question dilemmas(urban, suburban, rural)". Also, MCEAP believes that the "versions of the various tests may not be measuring the same set of skills and proficiencies". Additionally, "test is biased against individuals who do not read quickly and memorize information readily". In terms of fairness, the state assessments require knowledge and skill of resources that are not readably available or easily available. " Given testing limitations and documented by MCEAP, to suspend and end an Education Leadership Program based on these results is inadvisable, inaccurate and unfair at best. Additionally, for many of the components of both exams, there are questionable responses (which I and others as practitioners for many years) believe could be accepted as correct but are rejected by the examiners since they require a forced choice response.

DEPARTMENT RESPONSE: The comments relate to the validity of the school building leader examination are outside the scope of the proposed amendment. Nevertheless, the Department believes the examination is valid and properly assesses the minimum knowledge, skills and abilities required of a school building leader.

Moreover, the Department believes 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 should be able to suspend the program's authority to admit new students. Programs need to properly prepare candidates to ensure that they are able to enter the building on day 1 and be successful. Therefore, the Department believes that programs should be held accountable for the performance of their students on these exams, particularly in instances where fewer than 50 percent of their students are passing an examination required for certification.

10. COMMENT:

The criteria describing annual "cohort" referenced in the amendments could have graduate students from previous cohorts or from students many years previous who have completed their program, and then, decide to take the state exam some significant years after their courses have ended.

Colleges have no control over when these teachers or administrators who are graduate students take the state exams, even if it is many years after their course work has ended. Obviously, they will count toward the potential passage/failure rate for the particular year. This fact contaminates the results from year to year.

DEPARTMENT RESPONSE: The proposed amendment implements the provisions of the statute and, therefore, a statutory change would be needed.

11. COMMENT:

The small number of program completers who take the SBL and/or SDL exams can have the impact of inflating the passage/failure rate which in turn, will provide a distorted picture of the annual cohort rate and could lead to possible suspension of the program over a three year period. Obviously, these results will have a potentially detrimental impact.

DEPARTMENT RESPONSE: Education Law § 210-b allows the Department to adjust its methodology for determining examination passage rates for one or more certification examinations to account for sample size and accuracy. The Department has done this and has decided to use a sample size of at least 10 test scores.

12. COMMENT:

Several commenters did not support the program requirement of a minimum score on the GRE as research on the predictive ability of GRE tests and other similar assessments is not entirely certain, may create a negative disproportionate impact with the policy, would likely exclude the very teachers we need to recruit to serve the diverse populations in our schools today, and are even less predictive for graduate study than they are for undergraduate study. Further, the GRE poorly predicts STEM success among females and students of color. Finally, these scores have demonstrated a weak predictive capacity for only the first year of graduate study, not for overall graduate school success. Given that a more important indicator of interest for the public welfare might be candidates' performance after having graduated from our programs, weak predictors of first-year success in program seem ill advised as admission standards.

Given no definitive predictive data, setting cut scores at the State level would not be defensible. Thus, it is appropriate that the emergency regulation recognized that individual institutions would need to set the bar for entry scores according to their own understandings of such tests' ability to provide useful information about admitted candidates. However, such varying standards will in the end offer little evidence of the State's commitment to the general welfare, as the bar in some programs could be so low as to be meaningless. Over time, collecting these data might provide more insight into whether GRE scores offer any actionable information for teacher candidate admissions, and those data might be of interest to the State. However, this hypothetical future benefit of the proposed regulation seems far outweighed by the challenges in equity, defensibility, and added cost to prospective teachers, who already spend nearly $1000 to take exams for their certification.

DEPARTMENT RESPONSE: The proposed amendment implements Education Law § 210-a and therefore any comments relating to the underlying statute must be pursued through a legislative change. However, the statute does provide the option for an institution to identify a substantially equivalent admission examination to the GRE. The statute and proposed regulation also permit institutions to exempt up to 15% of any incoming class from the selection criteria upon a determination by the institution that a student has demonstrated the potential to positively contribute to the teaching profession.

13. COMMENT:

To ensure potential teachers have the knowledge and skills they need, teacher candidates in New York already have more hours of examinations than do doctors, lawyers, and engineers in order to receive their initial certificates. It is reasonable to believe that the requirements for content knowledge such as that tested on the GRE will be amply assessed through standardized testing by the time candidates seek licensure. Requiring candidates to pay for yet another exam seems a meaningless excess—especially since the exam offers virtually no predictive validity.

DEPARTMENT RESPONSE: The proposed amendment implements Education Law § 210-a. Therefore, a legislative change would be needed to address this comment.

14. COMMENT:

Another way to regulate admissions concerns is to have institutions of higher education participate in knowledge-building activities around performance-based assessments for candidate selection. Incentivizing programs to develop meaningful, rigorous performance-based intake processes could help the State better understand what qualities future educators should be screened for. Alternatively, having admission candidates succeed on content knowledge tests the State has designed for certification could discourage individuals who might not take the education profession seriously from applying in the first instance.

Accordingly, language along the lines of the following might be more appropriate for the admissions regulation: "…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. Additionally, candidates must either 1) have achieved a minimum score, to be set by the institution, on the Graduate Record Examination (GRE), 2) have achieved passing scores on the ALST and on the Multi-Subjects exams appropriate for the level of licensure, or 3) have succeeded in an intensive multi-stage admissions assessment process with defensible criteria, reliable scoring approaches, and longitudinal assessment of admissions criteria correlations with program outcomes."

DEPARTMENT RESPONSE: The proposed amendment implements Education Law § 210-a. This comment is related to the underlying statute and is not something that the Department can address through regulation. However, the statute includes the option for an institution to identify a substantially equivalent admission examination to the GRE. The statute and proposed regulation also permit institutions to exempt up to 15% of any incoming class from the selection criteria upon a determination by the institution that a student has demonstrated the potential to positively contribute to the teaching profession.

15. COMMENT:

The requirement for programs to submit to the State candidates who have graduated in the preceding year is defined as July 1 through June 30. Federal accountability and CAEP accreditation requirements use the reporting timeframe of September 1 through August 31. To reduce paperwork and reporting burdens and to align data analyses, I urge the Regents to change the reporting definition of "preceding year" to September 1 through August 31.

DEPARTMENT RESPONSE: Education Law § 210-b defines the academic year for this purpose as July 1 through June 30. The proposed amendment merely implements the statutory definition of the academic year. To change this definition, a statutory change is needed.

16. COMMENT:

We are opposed to having the Board of Regents mandate particular selection criteria for all colleges. Although the stated intent is "predicting a candidate's academic success in its program," there is absolutely no evidence that requiring a minimum GPA of 3.0 or a minimum score on a standardized assessment will predict success.

Equally important, these new criteria will thwart critical efforts to diversify the teaching force by recruiting more men and women from under-represented populations. Many of the individuals from these groups fall into what appears to be an intractable achievement gap. As a group their grades and standardized test scores are below the level of the majority, and may well be below the minimum requirements set by the State.

Implementation of the proposed minimum requirements will keep candidates who have the potential to succeed from entering our program. Like all teacher preparation programs across New York State, the number of students in our programs has declined in recent years. Further decreases will threaten the viability of what has been for many years a highly successful program. In a small program such as ours the ability to exempt up to 15% of an incoming class from these requirements could mean as few as 2-3 students.

DEPARTMENT RESPONSE: The proposed amendment implements Education Law § 210-a. This comment is related to the underlying statute and is not something that the Department can address through regulation. However, the statute includes the option for an institution to identify a substantially equivalent admission examination to the GRE. The statute and proposed regulation also permit institutions to exempt up to 15% of any incoming class from the selection criteria upon a determination by the institution that a student has demonstrated the potential to positively contribute to the teaching profession.

REVISED RULE MAKING
NO HEARING(S) SCHEDULED

Preschool Special Education Programs and Services

I.D. No. EDU-45-15-00014-RP

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

Proposed Action: Amendment of sections 200.4, 200.16 and 200.20 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 305(1), (2), (20), 308(not subdivided), 3214(3), 4401(5), 4402, 4403(3), 4410(3) and (10)

Subject: Preschool special education programs and services.

Purpose: To enact requirements relating to appointment of 1:1 aide by

Committee on Special Education (CSE); Special Education Itinerant Services (SEIS); related services; and standards for approved preschool providers.

Text of revised rule: 1. Paragraph (3) of subdivision (d) of section 200.4 of the Regulations of the Commissioner of Education is amended, effective July 1, 2016, to read as follows:

(3) Consideration of special factors. The CSE shall:

(i) . . .

(ii) . . .

(iii) . . .

(iv) . . .

(v) consider whether the student requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a free appropriate public education; [and]

(vi) include a statement in the IEP if, in considering the special factors described in this paragraph, the committee has determined a student needs a particular device or service (including an intervention, accommodation, or other program modification) in order for the student to receive a free appropriate public education*; and*

(vii) prior to the IEP recommendation of assignment of additional supplementary school personnel (one-to-one aide) to meet the individualized needs of a student with a disability, consider:

(a) the management needs of the student that would require a significant degree of individualized attention and intervention;

(b) the skills and goals the student would need to achieve that will reduce or eliminate the need for the one-to-one aide;

(c) the specific support (e.g., assistance with personal hygiene or behaviors that impede learning) that the one-to-one aide would provide for the student;

(d) other supports, accommodations and/or services that could support the student to meet these needs (e.g., behavioral intervention plan; environmental accommodations or modifications; instructional materials in alternate formats; assistive technology devices; peer-to-peer supports);

(e) the extent (e.g., portions of the school day) or circumstances (e.g., for transitions from class to class) the student would need the assistance of a one-to-one aide;

(f) staff ratios in the setting where the student will attend school;

(g) the extent to which assignment of a one-to-one aide might enable the student to be educated with nondisabled students and, to the maximum extent appropriate, in the least restrictive environment;

(h) any potential harmful effect on the student or on the quality of services that he or she needs that might result from the assignment of a one-to-one aide; and

(i) the training and support that shall be provided to the one-to-one aide to help the one-to-one aide understand the student's disability-related needs, learn effective strategies for addressing the student's needs, and acquire the necessary skills to support the implementation of the student's individualized education program.

Nothing in this subparagraph shall be construed to prohibit or limit the assignment of shared one-to-one aides at the discretion of the school to meet the individualized needs of students whose IEPs include the recommendation for one-to-one aides. The duties of a teacher aide or teaching assistant providing individualized support to a student with a disability shall be consistent with the duties prescribed pursuant to section 80-5.6 of this Title.

2. Subparagraph (ii) of paragraph (3) of subdivision (i) of section 200.16 of the Regulations of the Commissioner of Education is amended, effective July 1, 2016, to read as follows:

(ii) Special education itinerant services as defined in section 4410(1)(k) of Education Law are services provided by a certified special education teacher of an approved program on an itinerant basis at a site determined by the board including but not limited to an approved or licensed prekindergarten or head start program; the student's home; a hospital; a State facility; or a child care location as defined in section 4410 of the Education Law. If the board determines that documented medical or special needs of the preschool student indicate that the student should not be transported to another site, the student shall be entitled to receive special education itinerant services in the preschool student's home. Such services shall be for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities. Indirect services means consultation provided by a certified special education teacher to assist the child's teacher in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a preschool student with a disability who attends an early childhood program. An early childhood program, for purposes of this paragraph, means a regular preschool program or day care program approved or licensed by a governmental agency in which a child under the age of five attends. Special education itinerant services shall be provided to a preschool student with a disability for whom such services have been recommended as follows:

(a) the service shall be recommended by the Committee on Preschool Special Education and shall be included in the student's individualized education program. *Such recommendation shall identify the setting where such services would be delivered; specify the frequency, duration, intensity and location of direct special education itinerant services; and, for students who attend a regular early childhood program, specify, if any, the frequency, duration and location for the provision of indirect special education itinerant services as such term is defined in this subparagraph;*

(b) . . .

(c) . . .

(d) . . .

(e) . . .

3. Subparagraph (iii) of paragraph (3) of subdivision (i) of section 200.16 is amended, effective July 1, 2016, as follows:

(iii) Special classes shall be provided on a half-day or full-day basis pursuant to section 200.1(p), (q), and (v) of this Part and in accordance with section 200.6(h)(2) and (3) or section 200.9(f)(2)(x) of this Part and shall assure that:

(a) . . .

(b) . . .

(c) such services shall be provided for not less than two and one half hours per day, two days per week; and

(d) consistent with the requirements of section 200.20(a)(9) of this Part, the special class shall include instructional services and related services, as specified in the student's individualized education program.

4. Subdivision (b) of section 200.20 is amended, effective July 1, 2016, as follows:

(b) Preschool programs funded pursuant to section 4410 of the Education Law shall also meet the following additional requirements:

(1) . . .

(2) . . .

(3) Each approved preschool program shall ensure that:

(i) . . .

(ii) the executive director or person assigned to perform the duties of a chief executive officer shall reside within a reasonable geographic distance from the program's administrative, instructional and/or evaluation sites to ensure appropriate oversight of the program; and

(iii) if paid as a full time executive director, the executive director shall be employed in a full-time, full-year position and shall not engage in activity that would interfere with or impair the executive director's ability to carry out and perform his or her duties, responsibilities and obligations.

(4) Each program approved to provide special education itinerant services shall ensure that such service is provided, consistent with the recommendations in the students' individualized education programs, as an itinerant service to the preschool student at a regular early childhood program or the student's home or other child care location identified by the parent, consistent with the requirements of section 200.16(i)(3)(ii) of this Part.

(5) Each approved preschool program shall ensure that the educational director, if hired on or after September 1, 2016, shall possess a NYS teaching certificate pursuant to section 80-3.3 of this Title valid for classroom teaching services to students with disabilities, birth-grade 2, or certification in early childhood education, or possesses New York State certification or licensure in speech-language pathology, psychology, occupational or physical therapy or another related services field as such term is defined in section 200.1(qq) of this Part; and, consistent with the requirements of section 80-3.10 of this Title, shall hold New York State certification as a School Building Leader or School District Leader or School Administrator/Supervisor. Nothing in this paragraph shall require that an approved preschool program hire an educational director in addition to the executive director, when the executive director otherwise provides the on-site direction of the program.

(6) Make-up of missed services. Each preschool provider shall, consistent with Department guidelines, ensure the make-up of missed services occurs, consistent with the duration and location specified in the IEP, within 30 days of the missed session unless there is a documented child-specific reason why the make-up session could not be provided within 30 days.

(7) Program standards for instruction of preschool students with disabilities. Each approved provider shall, as applicable, ensure that preschool students with disabilities receive instruction and positive behavioral supports that are based on peer-reviewed or evidence-based practices and consistent with the standards in this paragraph.

(i) Instructional standards for approved preschool special class programs.

(a) By not later than September 1, 2017, providers shall adopt and implement curricula aligned with the New York State Prekindergarten

Foundation for the Common Core, which ensures continuity with instruction in the early elementary grades; and shall provide early literacy and emergent reading programs based on developmentally appropriate, effective and evidence-based instructional practices.

(b) The instructional program for preschool students with disabilities shall be based on the ages, interests, strengths and needs of the children.

(c) Procedures shall be implemented to promote the active engagement of parents and/or guardians in the education of their children. Such procedures shall include support to children and their families for a successful transition into kindergarten.

(ii) Program standards for positive behavioral supports for approved preschool special class programs.

(a) By not later than September 1, 2017, providers shall establish and implement a program-wide system of positive evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students, which shall include:

(1) universal supports for all children through nurturing and responsive relationships and high quality environments;

(2) practices that are targeted social-emotional strategies to prevent problem behaviors; and

(3) practices related to individualized intensive interventions.

(b) Except as provided pursuant to section 201.8 of this Title, no preschool student with a disability may be suspended, expelled or otherwise removed by the provider from an approved preschool special education program or service because of the student's behavior prior to the transfer of the student to another approved program recommended by the committee on preschool special education.

(iii) Progress Monitoring. Approved preschool special education programs shall conduct regular progress monitoring of student achievement data over time to adjust, as appropriate, the student's instructional program and, as necessary, to request meetings of the CPSE to consider changes to the student's individualized education program. The program shall provide regular written reports of student progress to the student's parent and committee on preschool special education, consistent with frequency or timetable for such periodic reports on the progress the student is making toward the annual goals as identified in the student's individualized education program.

Revised rule compared with proposed rule: Substantial revisions were made in sections 200.4(d)(3), 200.9(f)(2), 200.16(f), (i)(3) and 200.20(b).

Text of revised 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: Pat Geary, State Education Department, Office of Special Education, State Education Building, Room 309, 89 Washington Ave., Albany, NY 12234, (518) 402-3353, email: spedpubliccomment@nysed.gov

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

Summary of Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on November 10, 2015, the following substantial revisions were made:

200.4(d)(3), relating to assignment of individual aide to a student with a disabilities, is revised to: (1) clarify "one-to-one aide" means assignment of additional supplementary school personnel) to meet a student's individual needs; (2) add consideration of student's management needs that require a significant degree of individualized attention and intervention; (3) add "behaviors that impede learning" as example of student need that might be addressed by one-to-one aide; (4) delete "natural" from "supports, accommodations and/or services" and delete "changes in scheduling" from support examples; (5) add extent a one-to-one aide might enable student to be educated in least restrictive environment be considered together with any potential harmful effect on student or quality of services that might result from assignment of one-to-one aide; (6) add consideration of training/support to be provided to one-to-one aide; (7) provide nothing in regulations prohibits or limits assignment of shared one-to-one aides; (8) add duties to be considered in assignment of one-to-one aide be consistent with duties in 80.5-6.

200.9(f)(2)(ix)(c) and (d) and 200.16(i)(3)(ii) revised to retain indirect special education itinerant services.

200.16(f) deleted and 200.16(i)(3)(ii)(a) revised to require Committee on Preschool Special Education's (CPSE) recommendation included in a student's individualized education program (IEP) to identify setting where special education itinerant services (SEIS) will be delivered, identify frequency, duration, intensity and location of direct SEIS and, for students who attend a regular early childhood program, frequency, duration and location of indirect services.

200.16(i)(3)(iii)(d) revised to read that, consistent with the requirements of 200.20(a)(9), special class shall include instructional/ related services as specified in student's IEP.

200.20(b) revised to: (1) require approved SEIS providers to ensure SEIS is provided, consistent with students' IEP, as an itinerant service to preschool student at a regular early childhood program or student's home or other child care location identified by parent; (2) require educational director of approved preschool program hired on or after September 1, 2016, to possess NYS teaching certificate pursuant to 80-3.3 valid for classroom teaching services to students with disabilities, birth-grade 2 or licensure or certification in a related services field; and provide that nothing in regulation requires an approved preschool program hire educational director in addition to executive director, provided that executive director provides on-site direction of program; (2) delete requirements each preschool provider ensure it employs substitute teachers for special class and SEIS and have written policies and procedures for make-up services; (3) revise effective date of requirements for instructional standards to September 1, 2017; add literacy instruction be based on developmentally appropriate, effective and evidence-based instructional practices; and delete 'essential components' of background knowledge, phonological awareness, expressive and receptive language, vocabulary development and phonemic awareness; and replace "ensure" with "promote", relating to requirement preschool program have procedures for active engagement of parents/guardians; (4) revise effective date by which all programs must establish/implement program-wide system of positive evidence-based practices to September 1, 2017; and (5) add progress monitoring be consistent with frequency or timetable for periodic reports on student's progress toward annual goals identified in IEP.

These revisions require that Needs and Benefits, Costs, Local Government Mandates, and Compliance Schedule sections of previously published Regulatory Impact Statement be revised to read as follows:

NEEDS AND BENEFITS:

At the April 2015 Regents meeting, SED staff discussed data on outcomes for preschool students with disabilities, including a federal report on suspensions and expulsions of preschool students. SED recommended policy changes to enhance the quality of preschool special education instruction and behavioral supports, improve efficient use of staff resources, improve effectiveness, coordination and continuity of special education services and support inclusion of preschool students with disabilities in regular early childhood programs and activities and in classes with nondisabled peers.

Consistent with the April discussion, the amendments include the following policy changes to improve outcomes for preschool students with disabilities, ages 3-5:

- amends § 200.4(d)(3) to require Committees on Special Education (CSE) and Committees on Preschool Special Education (CPSE) to make certain considerations prior to determining a student needs a one-to-one aide;
- amends § 200.16(i)(3)(ii)(a) to require the CPSE's recommendation, included in a student's IEP, identify the site setting where services would be delivered; specify frequency, intensity, duration and location of direct special education itinerant services (SEIS); and, for students attending a regular early childhood program, specify if any, frequency, duration and location for provision of indirect SEIS;
- amends § 200.16(i)(3)(iii)(d) to clarify the special class shall include instructional and related services;
- amends § 200.20(b) to require that each approved preschool program:

o has an appropriately qualified educational director;

o ensures make-up of missed services consistent with Department guidelines and student's IEP;

o provides instruction in Prekindergarten Foundation for the Common Core, early literacy and emergent reading programs;

o provides instruction based on ages, interests, strengths and needs of children;

o ensures active engagement of parents/guardians in their children's education;

o establishes/implements program-wide system of positive, evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students;

o prohibits suspension, expulsion or removal of a preschool child from a special education program/services because of behavior, until the appropriate transfer of the child can be arranged by theCPSE; and

o conducts progress monitoring of student achievement data and regular reports of students' progress to the students' parents and to CPSEs.

COSTS:

(a) Costs to State government: None.

(b) Costs to local governments: None. No additional costs for CSEs and CPSEs to make certain considerations under § 200.4(d)(3) prior to determining a student needs a one-to-one aide, since these considerations would be made at student's initial/annual review IEP meetings.

(c) Costs to regulated parties: No additional costs related to provision in § 200.16(i)(3)(ii) and (iii) because State law requires that SEIS be provided on an itinerant basis at the site setting recommended by CPSE and existing regulations require that special class providers implement IEPs of students admitted to the program, including related services.

No additional costs for hiring educational directors who meet qualifications for education directors of approved preschool programs in § 200.20(b)(5), since these qualifications are consistent with State certification requirements and qualifications for prekindergarten/universal prekindergarten programs and there is no requirement that programs hire additional staff.

No additional costs for requiring in § 200.20(b)(6) that providers ensure make-up of missed services consistent with duration, intensity and location specified in the IEP. Tuition costs established for such programs include consideration of costs necessary to ensure students' IEPs are implemented.

Requiring in § 200.20(b)(7) that approved programs provide instruction in Prekindergarten Foundation for the Common Core, early literacy and emergent reading programs; provide instruction based on the ages, interests, strengths and needs of the children; ensure the active engagement of parents and/or guardians in the education of their children; and establish and implement a program wide system of positive, evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students may require programs to adjust their current instructional and behavioral support systems. It is feasible that providers can adjust their programs to meet these standards without additional professional development. For those seeking professional development/support, resources are posted on SED's website that teachers and others can access at no cost and SED is providing through its funded technical assistance networks, professional development at no cost to providers to assist them to adjust their policies and practices consistent with the standards established. The amendments do not require additional staffing, but may require some approved providers to use existing resources differently to ensure the instructional and behavioral support standards are provided to preschool students with disabilities.

Because providers would continue to be reimbursed for providing special education services, no cost to providers is anticipated for the prohibition in § 200.20(b)(6)(ii)(b) of the suspension, expulsion or removal of a preschool child from a special education program or services because of behavior until the appropriate transfer of the child can be arranged by the CPSE.

No costs for requiring in § 200.20(b)(7)(iii) that preschool special education providers conduct progress monitoring of student achievement data and regular reports of students' progress to the students' parents and to the CPSEs, since this requirement is consistent with existing requirement in Commissioner's Regulation § 200.7(c)(4) that approved programs provide an educational progress report on each student and other data or reports to the referring district or agency.

(d) Costs to SED for implementation and continuing compliance: None.

LOCAL GOVERNMENT MANDATES:

The amendments require that each approved preschool program:

- have an appropriately qualified educational director;
- ensure make-up of missed services consistent with Department guidelines and student's IEP;
- provide instruction in Prekindergarten Foundation for the Common Core, early literacy and emergent reading programs;
- provide instruction based on ages, interests, strengths and needs of children;
- ensure active engagement of parents and/or guardians in education of their children;
- establish/ implements program-wide system of positive, evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students; and
- prohibit suspension, expulsion or removal of preschool child from special education program/services because of behavior until appropriate transfer of child can be arranged by CPSE.

The amendments also require certain considerations be made by the CPSE or CSE prior to determining that a student needs a one-to-one aide, including:

- management needs of the student that would require a significant degree of individualized attention and intervention;
- skills and goals the student would need to achieve that will reduce or eliminate the need for the one-to-one aide;
- specific support (e.g., assistance with personal hygiene or behaviors that impede learning) that the one-to-one aide would provide the student;
- other supports, accommodations and/or services that could support the student to meet these needs (e.g., behavioral intervention plan; environmental accommodations or modifications; instructional materials in alternate formats; assistive technology devices; peer-to-peer supports);
- extent (e.g., portions of the school day) or circumstances (e.g., for transitions from class to class) the student would need the assistance of a one-to-one aide;
- staff ratios in the setting where the student will attend school;
- extent to which assignment of a one-to-one aide might enable the student to be educated with nondisabled students and, to the maximum extent appropriate, in the least restrictive environment;
- any potential harmful effect on the student or on the quality of services that he or she needs that might result from the assignment of a one-to-one aide; and
- training and support that shall be provided to the one-to-one aide to help the one-to-one aide understand the student's disability-related needs, learn effective strategies for addressing the student's needs, and acquire the necessary skills to support the implementation of the student's individualized education program.

In addition, the amendments clarify that:

- special class programs shall include instructional services and related services as specified in students' IEPs;
- SEIS recommendations in the IEP must specify the setting and frequency, duration, location and intensity for such services; and
- SEIS must be provided consistent with IEPs as an itinerant service to the preschool student at a regular early childhood program or the student's home or other child care location identified by the parent.

COMPLIANCE SCHEDULE:

The amendments generally become effective on July 1, 2016, with certain requirements delayed for required implementation to provide sufficient time for preschool providers to benefit from professional development offered by SED and to implement the new instructional and behavioral standards, as follows:

- 200.20(b)(5) provides that the requirement that approved preschool program providers ensure that educational directors, hired on or after September 1, 2016, to hold certain specified certificates, licenses or certification, as specified in the regulation;
- 200.20(b)(7)(i)(a) requires approved preschool special class program providers to adopt and implement curricula aligned with the New York State Prekindergarten Foundation for the Common Core and other instructional standards specified in the regulation by not later than September 1, 2017;
- section 200.20(b)(7)(ii)(a) requires providers to establish and implement a program-wide system of positive evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students, including supports and practices as specified in the regulation, by not later than September 1, 2017.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on November 10, 2015, substantial revisions have been made to the proposed rule as described in the Revised Regulatory Impact Statement submitted herewith.

These changes require that the Compliance Requirements section of the previously published Regulatory Flexibility Analysis be revised to read as follows:

2. COMPLIANCE REQUIREMENTS:

The proposed amendment in necessary to implement Regents policy changes to improve outcomes for preschool students with disabilities, ages 3-5, and includes the following changes:

- amends § 200.4(d)(3) to require Committees on Special Education (CSE) and Committees on Preschool Special Education (CPSE) to make certain considerations prior to determining that a student needs a one-to-one aide;
- amends § 200.16(i)(3)(ii)(a) to require that the CPSE's recommendation, included in a student's IEP, identify the site setting where services would be delivered; specify the frequency, intensity, duration and location of direct special education itinerant services (SEIS); and, for students who attend attending a regular early childhood program, specify if any, the frequency, duration and location for the provision of indirect SEIS;
- amends § 200.16(i)(3)(iii)(d) to clarify the special class shall include instructional and related services;
- amends § 200.20(b) to require that each approved preschool program:

o has an appropriately qualified educational director;

o ensures make-up of missed services consistent with Department guidelines and student's IEP;

o provides instruction in the Prekindergarten Foundation for the Common Core, early literacy and emergent reading programs;

o provides instruction based on the ages, interests, strengths and needs of the children;

o ensures the active engagement of parents and/or guardians in the education of their children;

o establishes and implements a program wide system of positive, evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students;

o prohibits the suspension, expulsion or removal of a preschool child

from a special education program or services because of behavior until the appropriate transfer of the child can be arranged by the Committee on Preschool Special Education (CPSE); and

o conducts progress monitoring of student achievement data and regular reports of students' progress to the students' parents and to the CPSEs.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on November 10, 2015, substantial revisions have been made to the proposed rule as described in the Revised Regulatory Impact Statement submitted herewith.

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

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

The proposed amendment is necessary to implement Regents policy changes to improve outcomes for preschool students with disabilities, ages 3-5, and includes the following policy changes:

• amends section 200.4(d)(3) to require Committees on Special Education (CSE) and Committees on Preschool Special Education (CPSE) to make certain considerations prior to determining that a student needs a one-to-one aide;

• amends section 200.16(i)(3)(ii)(a) to require that the CPSE's recommendation, included in a student's IEP, identify the site setting where services would be delivered; specify the frequency, intensity, duration and location of direct special education itinerant services (SEIS); and, for students who attend attending a regular early childhood program, specify if any, the frequency, duration and location for the provision of indirect SEIS;

• amends section 200.16(i)(3)(iii)(d) the special class shall include instructional and related services;

• amends section 200.20(b) to require that each approved preschool program:

o has an appropriately qualified educational director;

o ensures make-up of missed services consistent with Department guidelines and student's IEP;

o provides instruction in the Prekindergarten Foundation for the Common Core, early literacy and emergent reading programs;

o provides instruction based on the ages, interests, strengths and needs of the children;

o ensures the active engagement of parents and/or guardians in the education of their children;

o establishes and implements a program wide system of positive, evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students;

o prohibits the suspension, expulsion or removal of a preschool child from a special education program or services because of behavior until the appropriate transfer of the child can be arranged by the Committee on Preschool Special Education (CPSE); and

o conducts progress monitoring of student achievement data and regular reports of students' progress to the students' parents and to the CPSEs.

3. COMPLIANCE COSTS:

The proposed amendments do not impose any costs on school districts in rural areas. There will be no additional costs for CSEs and CPSEs to make certain considerations under § 200.4(d)(3) prior to determining a student needs a one-to-one aide, since these considerations would be made at student's initial/annual review IEP meetings. There will be no additional costs related to provision in § 200.16(i)(3)(ii) and (iii), because State law already requires that SEIS be provided on an itinerant basis at the child care location selected by parent, and existing regulations already require that special class providers implement the IEPs of students admitted to the program, which include related services in the student's IEPs. The remaining provisions in the proposed amendments are generally applicable to approved SEIS providers and approved preschool programs for preschool children with disabilities funded pursuant to Education Law section 4410, and do not impose any costs on school districts in rural areas.

There will be no additional costs for hiring educational directors who meet the qualifications for education directors of approved preschool programs in § 200.20(b)(5), since these qualifications are consistent with State certification requirements and qualifications for prekindergarten/universal prekindergarten programs and there is no requirement that programs hire additional staff.

There will be no additional costs for requiring in § 200.20(b)(6) that providers ensure make-up of missed services consistent with duration, intensity and location specified in the IEP. Tuition costs established for such programs include consideration of costs necessary to ensure students' IEPs are implemented.

Requiring in § 200.20(b)(7) that approved programs provide instruction in Prekindergarten Foundation for the Common Core, early literacy and emergent reading programs; provide instruction based on the ages, interests, strengths and needs of the children; ensure the active engagement of parents and/or guardians in the education of their children; and establish and implement a program wide system of positive, evidence-based practices to support social-emotional competence and teach social-emotional skills to preschool students may require programs to adjust their current instructional and behavioral support systems. It is feasible that providers can adjust their programs to meet these standards without additional professional development. For those seeking professional development/support, SED has resources posted on its website that teachers and others can access at no cost and SED is providing through its funded technical assistance networks, professional development at no cost to the providers to assist them to adjust their policies and practices consistent with the standards established. The amendments do not require additional staffing, but may require some approved providers to use existing resources differently to ensure the instructional and behavioral support standards are provided to preschool students with disabilities.

Because providers would continue to be reimbursed for providing special education services, there is no cost anticipated for providers for the proposed prohibition in § 200.20(b)(6)(ii)(b) of the suspension, expulsion or removal of a preschool child from a special education program or services because of behavior until the appropriate transfer of the child can be arranged by the CPSE.

There will be no costs for requiring in § 200.20(b)(7)(iii) that preschool special education providers conduct progress monitoring of student achievement data and regular reports of students' progress to the students' parents and to the CPSEs, since this requirement is consistent with existing requirement in Commissioner's Regulation § 200.7(c)(4) that approved programs provide an educational progress report on each student and other data or reports to the referring district or agency.

Revised Job Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on November 10, 2015, substantial revisions have been made to the proposed rule as described in the Revised Regulatory Impact Statement submitted herewith.

The proposed amendment in necessary to implement Regents policy changes to to enhance the quality of preschool special education instruction and behavioral supports, improve efficient use of staff resources, improve effectiveness, coordination and continuity of special education services and support inclusion of preschool students with disabilities in regular early childhood programs and activities and in classes with nondisabled peers. The proposed amendment, as revised, will not have an adverse impact on jobs and employment opportunities in New York State. Because it is evident from the nature of the revised proposed amendment that it will not adversely 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 November 10, 2015, the State Education Department (SED) received the following comments.

One-to-One Aides

COMMENT:

Consider training to help aide better address student's needs and enable student to be educated with nondisabled students. Eliminate unclear terms "natural supports", "changes in scheduling", "personal hygiene", "potential positive benefits and negative impact of aide". Use terms IEP-recommended assistant or aide. Clarify that more than one student with similar needs may be assigned to aide.

DEPARTMENT RESPONSE:

Proposed regulation has been revised to clarify that one-to-one (1:1) aide means assignment of additional supplementary school personnel to meet individualized needs of student with a disability; add that committee must consider extent to which 1:1 aide would enable student to be in least restrictive environment; add that committee must consider training and support needed by 1:1 aide; and clarify that shared 1:1 aides are not prohibited.

COMMENT:

Don't use staff ratios to determine need for aide. Distinguish need based on medical vs. behavioral concerns. Consider unique circumstances.

DEPARTMENT RESPONSE:

Staff ratios are an important consideration in determining need for an aide. In classrooms that have a high staff-to-student ratio, or students with fewer needs, existing staff may be able to support a student with increased needs, and a 1:1 aide may not be necessary. In contrast, a student might remain in his/her least restrictive environment with a 1:1 aide to provide support. Proposed considerations will ensure thoughtful assessment of each situation, including medical and behavioral, when determining student's need for an aide.

COMMENT:

Begin amendment for 2016-17 school year and beyond only; don't require adjustment of existing IEPs. Track data to assess consequences.

DEPARTMENT RESPONSE:

Revised effective date of proposal is July 1, 2016; and would not require revisions to IEPs in effect at time of adoption. CPSE or CSE would be responsible to monitor student progress data.

Indirect SEIS

COMMENT:

Wrong to eliminate indirect SEIS when State is promoting high-quality education in LRE; arbitrarily eliminated; an integral part of continuum of services; give teachers flexibility to provide consultation and planning.. Exception should be made for children with autism so that applied behavior analysis (ABA) services and parent training can be provided in home. Obligates CPSE to choose certain levels of support. Contracted teachers are unavailable for non-billable team meetings. Unclear when indirect services will occur. Direct teaching time is reduced if it includes consultation and modifications to environment and instruction. In rural areas, travel time will prevent new requirement from being met. Indirect services are cost effective and efficient. Unable to collect indirect services data to determine general education support needed.

DEPARTMENT RESPONSE:

Department agrees that unintended consequences may result from proposed repeal of indirect SEIS. Proposed rule has been revised to retain indirect SEIS and add to section 200.16 (i)(3)(ii)(a) that CPSE is responsible for recommendation of SEIS on a student's IEP, including the site setting; frequency; duration; intensity; and location of provision of direct services, and the frequency; duration; and location of the provision of indirect services for students attending a regular early childhood program.

COMMENT:

Indirect SEIS services should remain separate and billable or won't be provided. Difficult to find SEIS teachers, yet they are expected to do more for less reimbursement. Disagree that teacher consult responsibility is retained in proposal. Rates do not support decision; unfunded mandate. Disagree that repeal has no cost to providers. Per NYSED methodology, as reimbursable expenditures increase, so should reimbursement rates, but not so. Unclear how to bill for SEIS services if not on IEP. Clearly define and create formula for indirect services; clarify billable time for nonstandard work week.

DEPARTMENT RESPONSE:

Department agrees that unintended fiscal consequences may result from proposed repeal of indirect SEIS and therefore, indirect SEIS will be retained in regulations.

COMMENT:

Remove "individual services" from definition of SEIS, as it is intended to be a group service, and term "who attends an early childhood program".

DEPARTMENT RESPONSE:

Department declines to remove "individual services" from definition of SEIS, as SEIS may be provided individually or in a group (i.e., 2-3 students), as indicated on a student's IEP. The regulatory purpose of indirect SEIS is, for students attending regular early childhood programs, to assist the child's teacher in adjusting the learning environment or modifying instructional methods.

Provision of SEIS

COMMENT:

Eliminates provision of SEIS in homes; making SEIS contingent on a family's ability to pay preschool tuition is unfair and illegal. NYSED is not complying with 2012 and 2015 federal guidance stating that districts without a public preschool program must ensure that LRE requirements are met, and may include "providing home-based services''. Daycare or preschool enrollment is not required to receive special education services. Some children receive SEIS because special class is unavailable; refusing to provide SEIS to children not in program further violates their rights. Could result in increased special class or SCIS placements. Not consistent with LRE and won't improve outcomes. Children who aren't in program and don't have medical or safety concerns are unable to receive SEIS. Creates a two-tier system consisting of parents who can and cannot afford to pay for preschool services. Creates further hardship on children who are homeless or transient and can't maintain preschool placement.

DEPARTMENT RESPONSE:

To ensure that there are no unintended consequences from the proposed amendment, it has been revised to clarify that CPSE recommendation for SEIS must specify in IEP, the site where such services will be delivered and location for provision of services within that setting. Consistent with section 4410 of the Laws of New York, SEIS may be provided in the child's home when recommended by CPSE based on special needs of the student.

COMMENT:

After school hours are necessary to provide instruction and feedback to parents who work. Children in daycare nap in afternoon, but stay later than school day hours. Limits availability for scheduling services and make up sessions. Removal from classroom to receive SEIS and related services will result in reduced classroom instruction. Services provided outside regular school day are necessary if SEIS teacher is unavailable during school day, to avoid excess removals from class, and during summer when program is not in session. Need flexibility in rural areas due to lack of providers. Make exceptions for extenuating circumstances. Delivery of SEIS should be based on needs of child.

DEPARTMENT RESPONSE:

Proposed rule has been revised to ensure that SEIS is provided consistent with students' IEPs and that CPSEs are clear in their IEP recommendations as to setting, frequency, duration, intensity and location of such services.

COMMENT:

Children should get all services from one agency where SEIS teacher is employed. May be necessary for providers to cut costs by having parents bring child to agency for SEIS sessions.

DEPARTMENT RESPONSE:

While the CPSE must select an approved provider of SEIS for the child, the SEIS provider's location is not the same as the location for SEIS delivery that must be specified in the IEP and to allow SEIS providers to establish SEIS programs at their agencies would be inconsistent with the purpose of this service.

Special Class and Related Services

COMMENT:

Clarify "school day". Proposal is overly broad; not always able to provide parent counseling, training and other services during school day. Difficult to provide all related services when child attends half-day program. Clarify if SEIS providers from other agencies need to be hired in order for all services to be delivered during regular school day. Students will be removed from classroom to receive related services, reducing time for classroom learning and to engage with peers. Districts need flexibility to provide education in integrated settings. Will reduce parent contact and make up sessions. Include exception for extenuating circumstances. CSE/CPSE should not be limited in providing FAPE.

DEPARTMENT RESPONSE:

Proposed language has been revised to clarify that a special class must include both instructional services and related services as specified on student's IEP. In recommending full-day or half-day special class programs, CPSE should consider frequency, duration, intensity and location for related services the student needs to benefit from special education.

COMMENT:

Impedes ability to implement IEPs because of difficulty obtaining some related services in rural areas. Keeps children out of appropriate programs because of inability to develop IEP based on services that program has available. Contingent on program staffing, which is an issue because salaries are better in public schools. Difficult to find bilingual evaluators; shortage of speech and occupational therapists.

DEPARTMENT RESPONSE:

To ensure no unintended consequences of the proposed rule, previously proposed language has been deleted and new proposed language added to clarify that a special class program must include instruction and related services as specified in a student's IEP. Approved programs should not be only accepting students who "fit" into their program; rather they should be ensuring that students receive the services that they need to benefit from the program.

Educational Directors

COMMENT:

Preschool educational director doesn't need "specialized preparation for teaching in early childhood". Should be decided by program and not NYSED. Executive director doesn't need to meet educational qualifications if program employs appropriately qualified educational program director. No evidence that higher educational requirements results in increased educational outcomes. Lack of providers in rural areas will be made worse because low salaries won't justify cost of higher educational requirements.

DEPARTMENT RESPONSE:

The proposed rule applies only to individuals hired after the effective date of the proposed regulation and will ensure consistency with the requirements for educational directors of prekindergarten programs in the State.

COMMENT:

Unclear why proposal is only limited to directors hired after September 1, 2016.

DEPARTMENT RESPONSE:

Proposed rule would only affect educational directors hired on or after September 1, 2016 to ensure that requirement is not imposed retroactively, resulting in individuals losing their current jobs.

Make Up Missed Services

COMMENT:
Clarify how to use and "plan" for substitute teachers. Expenses are not reimbursed if more substitutes are employed than needed. Clarify if substitute and SEIS teachers will be compensated the same. If substitutes are underestimated, make-up time frames may be violated. Small programs cannot provide enough work to retain candidates for make-ups. Unclear how a child will benefit from a stranger providing occasional make-up session.
DEPARTMENT RESPONSE:
To ensure unintended consequences, proposed rule to require substitute teachers for SEIS has been deleted.
Program Standards: Instructional
COMMENT:
Ensure essential components of literacy in proposal are consistent with NYS Prekindergarten Foundation for Common Core.
DEPARTMENT RESPONSE:
Proposed rule was revised to delete the list of essential components of early literacy and emergent reading programs.
COMMENT:
Implementation should occur based on child's cognitive functioning, not by September 1, 2016. Children with significant intellectual challenges need basic prerequisite skills first. Preparation and planning needed prior to implementing. Add "developmentally appropriate" before "instructional practices".
DEPARTMENT RESPONSE:
While all programs should have been providing instruction toward the State's learning standards, proposed effective date for this section has been revised to September 1, 2017. Proposed rule has also been revised to ensure that instruction provided to preschool students is developmentally appropriate.
Program Standards: Active Engagement of Parents
COMMENT:
Unclear how to "ensure" parent engagement; clarify who would be penalized if parents aren't engaged.
DEPARTMENT RESPONSE:
Proposed language has been revised to state that procedures shall be implemented to "promote" the active engagement parents. Teachers and other staff can help to promote the active engagement of parents.
Program Standards: Behavioral Supports
COMMENT:
Due to complexity of implementation, begin September 1, 2017. Need guidance on what types of programs would need to follow this regulation.
DEPARTMENT RESPONSE:
The proposed effective date is revised to September 1, 2017 for all preschool providers.
Program Standards: Progress Monitoring
COMMENT:
Indicate frequency of progress monitoring, as in school-age regulations. Clarify who is responsible for this; burdensome for teachers.
DEPARTMENT RESPONSE:
Proposed rule has been revised to add that regular reports of progress must be written in consistency with frequency for reports to parents as specified in student's IEP.

Department of Health

EMERGENCY RULE MAKING

Zika Action Plan; Performance Standards

I.D. No. HLT-14-16-00001-E
Filing No. 314
Filing Date: 2016-03-17
Effective Date: 2016-03-17

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

Action taken: Addition of section 40-2.24 to Title 10 NYCRR.

Statutory authority: Public Health Law, sections 602, 603 and 619

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

Specific reasons underlying the finding of necessity: Zika virus is newly emerging as a worldwide threat to the public's health, and it is spreading widely in South and Central America. Zika virus has been associated with microcephaly and potentially other birth defects. In particular, there have been reports in Brazil and other countries of microcephaly in infants of mothers who were infected with Zika virus while pregnant. Developing research appears to support this association. Zika virus may also cause a rare disorder called Guillain Barré Syndrome, which can cause paralysis in severe cases. For these reasons, in February 2016, the World Health Organization declared Zika virus a public health emergency of international concern.

Because 80% of cases are asymptomatic, limited control measures exist. Further, although Zika virus is transmitted primarily though the bite of a mosquito, sexual transmission has also been documented.

To date, the Department's Wadsworth Center has conducted tests on samples from more than 1,600 patients, and 49 have been found to be positive for Zika virus. New York has the second highest total of any state in the continental United States after Florida. With the exception of one possible case of sexual transmission, all of the infected patients have been returning travelers from countries where Zika virus is ongoing.

In Central and South America, the Zika virus has been primarily transmitted by a mosquito bite from the species Aedes aegypti. That species is not currently present in New York State; however, a related species of mosquito, Aedes albopictus, is present in New York City, as well as the Counties of Nassau, Rockland, Suffolk, and Westchester.

Because Aedes albopictus is a tropical mosquito, it has difficulty surviving cold winters, limiting its northward spread, but it has adapted to survive in a broader temperature range. Although researchers are currently uncertain if Aedes albopictus can effectively transmit the Zika virus, New York State must prepare for this contingency.

A primary public health objective is to reduce the risk to developing fetuses of pregnant women in New York State. As such, during the spring, summer and fall, it is important that state and local health departments (LHDs) take action to protect all New Yorkers from the Zika virus.

LHDs are integral State partners and play important roles in human surveillance, health education, and mosquito surveillance and control. As a result, it is essential that LHDs are prepared to respond to the threat of Zika virus in their communities. Many LHDs may need to respond to travel associated cases only, because they do not have Aedes albopictus mosquitoes within their borders. However, those counties that do have Aedies Albopictus generally have large populations and a high number of travelers to affected areas.

Accordingly, these emergency regulations require that, as a condition of State Aid for public health work, each LHD must adopt and implement a Zika Action Plan (ZAP) that includes specified elements, but that can also be tailored to the situation within its borders. Those counties that do not have Aedes albopictus must perform human disease monitoring of travel-associated cases and provide education about Zika virus. For those counties that have, or that are at risk for acquiring, Aedes albopictus, additional required activities include: enhanced human disease monitoring and disease control; enhanced education about Zika virus; mosquito trapping, testing and habitat inspection specific to Aedes albopictus; mosquito control; and identification and commitment of staff available to join State-coordinated rapid response teams, which may be deployed to those areas where the Department determines that there is a potential transmission of Zika Virus by mosquitoes.

Thus, to protect the public from the immediate threat posed by Zika virus, the Commissioner of Health has determined it necessary to file these regulations on an emergency basis. State Administrative Procedure Act § 202(6) empowers the Commissioner to adopt emergency regulations when necessary for the preservation of the public health, safety or general welfare and that compliance with routine administrative procedures would be contrary to the public interest.

Subject: Zika Action Plan; Performance Standards.

Purpose: To require local health departments to develop a Zika Action Plan as a condition of State Aid.

Text of emergency rule: Pursuant to the authority vested in the Commissioner of Health by sections 602, 603 and 619 of the Public Health Law, Subpart 40-2 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended by adding a new section 40-2.24, to be effective upon filing with the Secretary, as follows:

§ 40-2.24 Zika Action Plan; performance standards.

(a) By April 15, 2016, the local health department shall adopt and implement a Zika Action Plan (ZAP), in accordance with guidance to be issued by the Department, and which shall include, but not be limited to, the following activities:

(1) for all local health departments:

(i) human disease monitoring; and

(ii) education about Zika Virus Disease; and

(2) in addition, for those local health departments identified by the Department as jurisdictions where mosquitoes capable of transmitting the Zika Virus are currently located or may be located in the future:

(i) enhanced human disease monitoring and disease control;

(ii) enhanced education about Zika Virus Disease;

(iii) mosquito trapping, testing and habitat inspections specific to Aedes albopictus, and for such other species as the Department may deem appropriate;

(iv) mosquito control; and

(v) identification and commitment of staff available to join State-coordinated rapid response teams, which may be deployed to those areas where the Department determines that there is a potential transmission of Zika Virus by mosquitoes.

(b) For so long as determined necessary and appropriate by the Department, local health departments shall update their ZAP plans annually and submit such plans to the Department as part of the Application for State Aid made pursuant to section 40-1.0 of this Part.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire June 14, 2016.

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

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

A Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not submitted, but will be published in the *Register* within 30 days of the rule's effective date.

Public Service Commission

NOTICE OF ADOPTION

Revisions to Various Rules and Measurements of the NPCC

I.D. No. PSC-51-14-00006-A

Filing Date: 2016-03-21

Effective Date: 2016-03-21

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

Action taken: On 3/17/16, the PSC adopted the modifications to the Regional Reliability Criteria of the Northeast Power Coordinating Council, Inc. (NPCC) for inclusion in the New York State Reliability Rules.

Statutory authority: Public Service Law, sections 4(1), 5(2), 65(1), 66(1), (2), (4) and (5)

Subject: Revisions to various rules and measurements of the NPCC.

Purpose: To adopt revisions to various rules and measurements of the NPCC.

Substance of final rule: The Commission, on March 17, 2016, adopted the modifications to the Regional Reliability Criteria of the Northeast Power Coordinating Council, Inc. for inclusion in the New York State Reliability Rules, 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: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York, 12223, (518) 486-2655, email: john.pitucci@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.

(05-E-1180SA15)

NOTICE OF ADOPTION

Petition for a Limited Waiver

I.D. No. PSC-25-15-00007-A

Filing Date: 2016-03-21

Effective Date: 2016-03-21

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

Action taken: On 3/17/16, the PSC adopted an order approving Chevrah Hatzalah Volunteer Ambulance Corps, Inc.'s (Hatzalah) petition for a limited waiver to allow unblocking of Caller ID information for calls placed to its emergency service lines.

Statutory authority: Public Service Law, sections 91 and 96

Subject: Petition for a limited waiver.

Purpose: To approve Hatzalah's petition for a limited waiver.

Substance of final rule: The Commission, on March 17, 2016, adopted an order approving Chevrah Hatzalah Volunteer Ambulance Corps, Inc.'s petition for a limited waiver to allow unblocking of Caller ID information for calls placed to its emergency service lines, 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: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York, 12223, (518) 486-2655, email: john.pitucci@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-0304SA1)

NOTICE OF ADOPTION

Waiver of the Communication Requirements of Con Ed's Rider S and Rider U Electric Tariff

I.D. No. PSC-29-15-00020-A

Filing Date: 2016-03-21

Effective Date: 2016-03-21

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

Action taken: On 3/17/16, the PSC adopted an order denying Energy Technology Savings, Inc.'s (ETS) request for waiver of the communication requirements of Consolidated Edison Company of New York Inc.'s (Con Ed) Rider S and Rider U electric tariff.

Statutory authority: Public Service Law, sections 4, 65 and 66

Subject: Waiver of the communication requirements of Con Ed's Rider S and Rider U electric tariff.

Purpose: To deny ETS's waiver of the communication requirements of Con Ed's Rider S and Rider U electric tariff.

Substance of final rule: The Commission, on March 17, 2016, adopted an order denying Energy Technology Savings, Inc.'s request for waiver of the communication requirements of Consolidated Edison Company of New York Inc.'s electric tariff, Rider S, the Commercial System Relief Program, and Rider U, the Distribution Load Relief Program, 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: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York, 12223, (518) 486-2655, email: john.pitucci@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-E-0362SA1)

NOTICE OF ADOPTION

Revised Appendix B of the Brooklyn/Queens Order

I.D. No. PSC-31-15-00010-A
Filing Date: 2016-03-21
Effective Date: 2016-03-21

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

Action taken: On 3/17/16, the PSC adopted an order approving Consolidated Edison Company of New York, Inc.'s (Con Ed) revised Appendix B of the Order Establishing Brooklyn/Queens Demand Management Program (Brooklyn/Queens Order).

Statutory authority: Public Service Law, sections 2(3), (4), (12), (13), 4(1), 5(1)(b), (2), 22, 65(1), 66(1), (2), (9), (12)(b) and (12)(e)

Subject: Revised Appendix B of the Brooklyn/Queens Order.

Purpose: To approve Con Ed's revised Appendix B of the Brooklyn/Queens Order.

Substance of final rule: The Commission, on March 17, 2016, adopted an order approving Consolidated Edison Company of New York, Inc.'s revised Appendix B of the December 12, 2014 Order Establishing Brooklyn/Queens Demand Management Program, 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: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York, 12223, (518) 486-2655, email: john.pitucci@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-E-0302SA3)

NOTICE OF ADOPTION

Amendments to P.S.C No. 1—Water to Increase Annual Revenues

I.D. No. PSC-39-15-00008-A
Filing Date: 2016-03-18
Effective Date: 2016-03-18

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

Action taken: On 3/17/16, the PSC adopted an order approving Windham Ridge Water Corp.'s (Windham) amendments to P.S.C. No. 1—Water to increase annual revenues by $5,616 or 9.3%.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1), (3), (10)(a), (b) and (f)

Subject: Amendments to P.S.C No. 1—Water to increase annual revenues.

Purpose: To approve Windham's amendments to P.S.C No. 1—Water to increase annual revenues.

Substance of final rule: The Commission, on March 17, 2016, adopted an order approving Windham Ridge Water Corp.'s (Windham) amendments to P.S.C. No. 1 – Water to increase annual revenues by $5,616 or 9.3%, and directed Windham to file further revisions to implement the changes, 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: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York, 12223, (518) 486-2655, email: john.pitucci@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-0515SA1)

NOTICE OF ADOPTION

AMI Business Plan

I.D. No. PSC-44-15-00021-A
Filing Date: 2016-03-17
Effective Date: 2016-03-17

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

Action taken: On 3/17/16, the PSC adopted an order approving Consolidated Edison Company of New York, Inc.'s (Con Ed) Advanced Metering Infrastructure (AMI) Business Plan, subject to a cap on capital expenditures of $1.285 billion.

Statutory authority: Public Service Law, sections 5, 65, 66 and 67

Subject: AMI Business Plan.

Purpose: To approve Con Ed's AMI Business Plan.

Substance of final rule: The Commission, on March 17, 2016, adopted an order approving Consolidated Edison Company of New York, Inc.'s Advanced Metering Infrastructure Business Plan, subject to a cap on capital expenditures of $1.285 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: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York, 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(13-E-0030SA11)

NOTICE OF ADOPTION

Tariff Amendments to Revise Rider H Contained in P.S.C. No. 9—Gas

I.D. No. PSC-44-15-00032-A
Filing Date: 2016-03-21
Effective Date: 2016-03-21

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

Action taken: On 3/17/16, the PSC adopted an order approving Consolidated Edison Company of New York Inc.'s (Con Ed) tariff amendments to revise Rider H - Non Residential Distributed Generation contained in P.S.C. No. 9—Gas.

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

Subject: Tariff amendments to revise Rider H contained in P.S.C. No. 9—Gas.

Purpose: To approve Con Ed's tariff amendments to revise Rider H contained in P.S.C. No. 9—Gas.

Substance of final rule: The Commission, on March 17, 2016, adopted an order approving Consolidated Edison Company of New York Inc.'s tariff amendments to revise Rider H – Non Residential Distributed Generation contained in P.S.C. No. 9—Gas, 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: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York, 12223, (518) 486-2655, email: john.pitucci@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-G-0601SA1)

NOTICE OF ADOPTION

Modifications to the SIR

I.D. No. PSC-47-15-00011-A
Filing Date: 2016-03-18
Effective Date: 2016-03-18

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

Action taken: On 3/17/16, the PSC adopted an order approving modifications to the Standardized Interconnection Requirements (SIR).

Statutory authority: Public Service Law, sections 65(1), (2), (3), 66(1), (2), (3), (5), (8) and (10)

Subject: Modifications to the SIR.

Purpose: To approve modifications to the SIR.

Substance of final rule: The Commission, on March 17, 2016, adopted an order approving modifications to the Standardized Interconnection Requirements (SIR) and directed Central Hudson Gas and Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric and Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation to incorporate the revised SIR into their electric tariff filings, 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: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York, 12223, (518) 486-2655, email: john.pitucci@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-E-0557SA1)

NOTICE OF ADOPTION

Request to Extend the Term of and Enter into a New Credit Facility

I.D. No. PSC-49-15-00008-A
Filing Date: 2016-03-18
Effective Date: 2016-03-18

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

Action taken: On 3/17/16, the PSC adopted an order approving New York Independent System Operator, Inc.'s (NYISO) request to extend the term of its credit facilities and enter into a new unsecured term loan credit facility.

Statutory authority: Public Service Law, sections 4(1), 5(2), 65(1), 66(1), (2), (4), (5) and 69

Subject: Request to extend the term of and enter into a new credit facility.

Purpose: To approve NYISO's request to extend the term of and enter into a new credit facility.

Substance of final rule: The Commission, on March 17, 2016, adopted an order approving New York Independent System Operator, Inc.'s request to extend the term of its credit facilities, consisting of a $50 million revolving line of credit and a $100 million term loan facility, for an additional one-year period until December 31, 2018, and to increase the principal amount available under the term loan facility by $25 million, to a maximum of $125 million, and enter into a new unsecured term loan credit facility in the amount of $30 million, 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: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York, 12223, (518) 486-2655, email: john.pitucci@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-E-0655SA1)

NOTICE OF ADOPTION

Amended Electric Emergency Response Plans

I.D. No. PSC-02-16-00010-A
Filing Date: 2016-03-21
Effective Date: 2016-03-21

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

Action taken: On 3/17/16, the PSC adopted an order approving New York's six major electric utilities' (Utilities) amended Electric Emergency Response Plans.

Statutory authority: Public Service Law, sections 5(1)(b) and 66(21)(a)

Subject: Amended Electric Emergency Response Plans.

Purpose: To approve the Utilities' amended Electric Emergency Response Plans.

Substance of final rule: The Commission, on March 17, 2016, adopted an order approving amended Electric Emergency Response Plans, filed in March 2016 by Central Hudson Gas and Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric and Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc. and Rochester Gas and Electric Corporation, 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: John Pitucci, Public Service Commission, Three Empire State Plaza, Albany, New York, 12223, (518) 486-2655, email: john.pitucci@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-E-0689SA1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Revisions to S.C. No. 4 Back-Up/Supplementary Service Related to Contract Demand

I.D. No. PSC-14-16-00006-P

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

Proposed Action: The Commission is considering a proposal by Consolidated Edison Company of New York, Inc. to revise Service Classification No. 4 (SC No. 4)—Back-Up/Supplementary Service contained in its steam tariff schedule, P.S.C. No. 4.

Statutory authority: Public Service Law, section 66

Subject: Revisions to S.C. No. 4 Back-Up/Supplementary Service related to contract demand.

Purpose: To consider revisions to S.C. No. 4 Back-Up/Supplementary Service related to contract demand.

Substance of proposed rule: The Public Service Commission is considering a proposal filed by Consolidated Edison Company of New York, Inc. (Con Edison) to revise Service Classification No. 4 (SC No. 4) – Back-Up/Supplementary Service contained in P.S.C. No. 4 – Steam. Con Edison proposes to modify provisions related to contract demand to: (1) set steam contract demands based on the maximum potential demand at any time within the months of December through March versus November through April; (2) allow customers to request an upward or downward revision in contract demand for prospective billing periods; (3) allow accounts to be subject to contract demand increases only if the monthly maximum demand exceeds the currently effective contract demand by more than two percent within the months of December through March; (4) base the contract demand surcharge multiplier on the number of months that the current contract demand was in effect, provided that the multiplier would not be less than six nor more than 24. Con Edison also proposes revisions to SC No. 4 Special Provision A's applicability to exempt steam geothermal and solar thermal technologies, unless the customer elects otherwise. As the potential revenue loss associated with the proposed changes is un-

known, Con Edison proposes establishing a deferral mechanism for any lost revenues associated with these changes. The Commission may grant, deny or modify, in whole or in part, and may consider other related items.

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.

(16-S-0134SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Regulation of Customer Name Changes on Pending Interconnection Applications for Grandfathered Projects

I.D. No. PSC-14-16-00007-P

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

Proposed Action: The Commission is considering a petition filed by SunEdison LLC requesting an order that it may change the customer name on pending interconnection applications for grandfathered projects.

Statutory authority: Public Service Law, sections 2(2-a), (13), 5(1)(b), 64, 65(1), 66, 66-j and 66-l

Subject: Regulation of customer name changes on pending interconnection applications for grandfathered projects.

Purpose: To consider regulation of customer name changes on pending interconnection applications for grandfathered projects.

Substance of proposed rule: The Public Service Commission is considering a petition filed by SunEdison LLC (Petitioner) on March 4, 2016 requesting authorization to change the customer name on pending interconnection applications for grandfathered projects. The Petitioner requests an Order declaring that the Petitioner may change the customer name on pending preliminary interconnection applications for grandfathered projects without jeopardizing their grandfathered status. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed herein 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, (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, (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.

(16-E-0133SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Resetting Retail Markets for ESCO Mass Market Customers

I.D. No. PSC-14-16-00008-P

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

Proposed Action: The Commission is considering imposing limitations upon energy service company eligibility to provide services, prices for commodity-only services, and the range of value-added services with respect to residential and small non-residential customers.

Statutory authority: Public Service Law, sections 5(1), 65(1), (2), (3), 66(2), (3), (5), (8), (9) and (12)

Subject: Resetting retail markets for ESCO mass market customers.

Purpose: To ensure consumer protections with respect to residential and small non-residential ESCO customers.

Substance of proposed rule: The Commission is considering imposing limitations upon energy service company (ESCO) eligibility to provide services, prices for commodity-only services, and the range of value-added services with respect to residential and small non-residential electric and natural gas customers (together, mass market customers). The Commission is also considering imposing limitations upon the prices that ESCOs may charge for commodity-only services to mass market customers, and also upon the range of value-added services that they may offer to mass market customers. The Commission is considering whether energy service companies (ESCOs):

1. May only enroll mass market customers and renew expiring agreements with existing mass market customers based on forward-going contracts that either (a) guarantee savings in comparison to what the customer would pay on an annual basis as a full service utility customer (or if a customer for periods less than a year, for the period in which the ESCO provided the customer's energy); (b) provide an electricity product derived from at least 30% renewable sources including biomass, biogas, hydropower, solar energy, and wind energy, and including renewable attributes; or (c) provide some other defined energy-related value-added service.

2. Must receive affirmative consent from a mass market customer prior to renewing that customer from a fixed rate or guaranteed savings contract into a contract that provides renewable energy but does not guarantee savings.

3. Must enroll mass market customers currently served through month-to-month variable rate agreements in a compliant product at the end of the current billing cycle or return the customers to utility supply service.

4. Must file a certification by the Chief Executive Officer (CEO) or equivalent corporate officer of the ESCO certifying that any enrollments will comply with the provisions stated above.

The Commission is also considering what period of time, if any, should be afforded to ESCOs to adjust their practices before any such revisions become effective. The Commission is also considering enhanced enforcement provisions to address ESCO violations of the Uniform Business Practices (UBP) and whether ESCOs eligible to operate in New York should be directed to comply with these enhanced and all other UBP provisions. The enhanced provisions include:

1. The ability for the Commission to proceed directly with an Order to Show Cause for eligibility revocation, or any less severe action it determines is appropriate, against any ESCO that has a single UBP violation.

2. Revisions to the UBP that would explicitly detail the Commission's authority to impose consequences on ESCOs where there is a material pattern of consumer complaints regarding matters under the ESCO's control, such as marketing practices, even where those complaints do not reveal any violations of the UBP.

3. Modifications to the UBP that would explicitly state that the Commission may impose consequences on ESCOs that violate any state, federal, or local law, rule, or regulation with respect to marketing. Moreover, that modification to the UBP shall also cover instances even where there is not a companion federal, state or local law, rule or regulation prohibiting such marketing, if there is evidence that the mass market customer has posted such a sign and the ESCO proceeded with marketing at the door of the establishment.

The Commission is also considering whether Electric and gas distribution utilities that have tariff provisions providing for retail access should file tariff amendments or addenda to incorporate or reflect in their tariffs the UBP provisions described above. The Commission is also considering the following issues:

1. Whether prospective ESCO sales to mass market customers, including renewal of expiring contracts, should be limited to products that include guaranteed savings or a defined energy-related value-added service. If not, precisely how should this requirement be broadened or narrowed?

2. What specific products or categories of products should constitute energy-related value-added services? For example, if energy efficiency products are to qualify, should a specific minimum energy savings be required and if so, of what amount? If certain commodity-only products are to qualify, such as fixed price products or green energy products, should any restrictions be placed on the prices for such products and, if so, how should those restrictions be determined?

3. Whether other requirements, in addition to those identified in question 1, above, should be imposed on ESCO marketing or sales to mass market customers.

4. What changes, if any, should be made to the three-day period for residential customer rescission/cancellation of an agreement with an ESCO. Should this period be extended to 30 days?

5. Whether a rescission/cancellation period should be applied to small non-residential customers. If so, what period is appropriate?

6. Whether and under what circumstances ESCOs should be required to post performance bonds or other forms of demonstrated financial capability. If so, what magnitude is appropriate and how can this be administered most efficiently?

7. Whether the Commission should reconsider the framework for ESCO oversight under the Public Service Law (PSL) and, if so, what changes should be made.

8. What penalties may apply to ESCOs that violate the UBP or other Commission Orders or provisions of the PSL (for example, the application of PSL §§ 25 and 25-a).

The Commission may adopt, reject or modify, in whole or in part, the matters proposed, may consider alternative proposals, 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-M-0127SP2)

Department of State

NOTICE OF ADOPTION

State Energy Conservation Construction Code (the ''Energy Code'')

I.D. No. DOS-47-15-00016-A

Filing No. 345

Filing Date: 2016-03-22

Effective Date: 2016-10-03

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

Action taken: Repeal of Part 1240; and addition of new Part 1240 to Title 19 NYCRR.

Statutory authority: Energy Law, section 11-103(2)

Subject: State Energy Conservation Construction Code (the ''Energy Code'').

Purpose: To repeal the existing Energy Code and to adopt a new, updated Energy Code.

Substance of final rule: This rule repeals the current version of Part 1240 of Title 19 of the NYCRR and adds a new version of Part 1240 (entitled "State Energy Conservation Construction Code") in its place. The new version of Part 1240 is summarized below.

Section 1240.1 ("State Energy Conservation Construction Code") provides that Part 1240 and the publications incorporated by reference in Part 1240 constitute the State Energy Conservation Construction Code (the "Energy Code") promulgated pursuant to Article 11 of the Energy Law.

Section 1240.2 ("Definitions") defines certain terms used in Part 1240, including:

"2016 Energy Code Supplement" (the publication entitled "2016 Supplement to the New York State Energy Conservation Construction Code," published by the New York State Department of State, publication date March, 2016);

"2015 IECC" (the publication entitled "2015 International Energy Conservation Code," published by the International Code Council, Inc. [Second Printing: May, 2015]);

"2015 IECC Commercial Provisions" (that part of the 2015 IECC that is designated as the "IECC - Commercial Provisions");

"2015 IECC Commercial Provisions (as amended)" (the 2015 IECC Commercial Provisions, as said provisions are deemed to be amended by Part 1 of the 2016 Energy Code Supplement);

"2015 IECC Residential Provisions" (that part of the 2015 IECC that is designated as the "IECC - Residential Provisions");

"2015 IECC Residential Provisions (as amended)" (the 2015 IECC Residential Provisions, as said provisions are deemed to be amended by Part 3 of the 2016 Energy Code Supplement);

"ASHRAE 90.1-2013" (the publication entitled "Energy Standard for Buildings Except Low-Rise Residential Buildings," standard reference number 90.1-2013, published by American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc., publication date July 2014);

"ASHRAE Appendix G Excerpt" (the publication entitled "Standard 90.1 Appendix G 2013 Performance Rating Method, Excerpt from ANSI/ASHRAE/IES Standard 90.1-2013 (I-P)," published by ASHRAE, publication date 2015);

"ASHRAE 90.1-2013 (as amended)" (ASHRAE 90.1-2013, as said publication is deemed to be amended by Part 2 of the 2016 Energy Code Supplement);

"commercial building" (any building that is not a residential building, as defined in subdivision (p) of section 1240.2); and

"residential building" (includes: (1) detached one-family dwellings having not more than three stories above grade plane; (2) detached two-family dwellings having not more than three stories above grade plane; (3) buildings that (i) consist of three or more attached townhouse units and (ii) have not more than three stories above grade plane; (4) buildings that (i) are classified in accordance with Chapter 3 of the publication entitled "2015 International Building Code," published by the International Code Council, Inc. (Third Printing: October 2015), in Group R-2, R-3 or R-4 and (ii) have not more than three stories above grade plane; (5) factory manufactured homes (as defined in section 372(8) of the Executive Law); and (6) mobile homes (as defined in section 372(13) of the Executive Law).

Other terms defined in section 1240.2 are "building," "building system," "dwelling unit," "Energy Code," "grade plane," "historic building," and "townhouse unit."

Section 1240.3 ("Amendments made by the 2016 Energy Code Supplement") provides that for the purposes of applying the 2015 IECC Commercial Provisions, the 2015 IECC Residential Provisions, and ASHRAE 90.1-2013 in this State:

(a) the 2015 IECC Commercial Provisions shall be deemed to be amended in the manner provided in Part 1 of the 2016 Energy Code Supplement;

(b) ASHRAE 90.1-2013 shall be deemed to be amended in the manner provided in Part 2 of the 2016 Energy Code Supplement; and

(c) the 2015 IECC Residential Provisions shall be deemed to be amended in the manner provided in Part 3 of the 2016 Energy Code Supplement.

Section 1240.4 is entitled "Energy Code provisions applicable to Commercial Buildings."

Subdivision (a) of section 1240.4 ("2015 IECC Commercial Provisions (as amended)") provides that except as otherwise provided in section 1240.6 ("Exceptions") of Part 1240, the construction of all new commercial buildings; all additions to, alterations of, and/or renovations of existing commercial buildings; and all additions to, alterations of, and/or renovations of building systems in existing commercial buildings shall comply with the requirements of the 2015 IECC Commercial Provisions (as amended). Section 1240.4(a) also incorporates the 2015 IECC Commercial Provisions and the 2016 Energy Code Supplement by reference; specifies the name and addresses of the publishers where the 2015 IECC (which contains the 2015 IECC Commercial Provisions) and the 2016 Energy Code Supplement may be obtained; and specifies that those publications are available for public inspection and copying at the office of the New York State Department of State located at One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231-0001.

Subdivision (b) of section 1240.4 ("ASHRAE 90.1-2013 (as amended)") provides that to the extent provided in the 2015 IECC Commercial Provisions (as amended), compliance with the requirements of ASHRAE 90.1-2013 (as amended) shall be permitted in lieu of compliance with specified sections of the 2015 IECC Commercial Provisions (as amended). Subdivision (b) of section 1240.4 also incorporates ASHRAE 90.1-2013, the 2016 Energy Code Supplement, and the ASHRAE Appendix G Excerpt by reference; specifies the name and addresses of the

publishers where ASHRAE 90.1-2013, the ASHRAE Appendix G Excerpt, and the 2016 Energy Code Supplement may be obtained; and specifies that those publications are available for public inspection and copying at the office of the New York State Department of State located at One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231-0001.

Subdivision (c) of section 1240.4 ("Referenced standards") provides that the referenced standards listed in Chapter 6 of the 2015 IECC Commercial Provisions (as amended) are considered to be part of the 2015 IECC Commercial Provisions (as amended), subject to the provisions and limitations set forth in Sections C106.1, C106.1.1, and C106.1.2 of the 2015 IECC Commercial Provisions (as amended).

Subdivision (c) of section 1240.4 also incorporates the following referenced standards by reference, and provides that the following referenced standards shall be considered to be part of the 2015 IECC Commercial Provisions (as amended), subject to the provisions and limitations set forth in Sections C106.1, C106.1.1, and C106.1.2 of the 2015 IECC Commercial Provisions (as amended):

(1) Room Fan Coil, publication date 2008 ("AHRI 440-08"), and Unit Ventilators, publication date 1998 ("AHRI 840-98"), published by the Air Conditioning, Heating, and Refrigeration Institute;

(2) ASHRAE HVAC Systems and Equipment Handbook - 2012, publication date 2012 ("ASHRAE-2012"); Energy Standard for Buildings Except Low-Rise Residential Buildings, July 2014 printing ("ASHRAE 90.1-2013"); Peak Cooling and Heating Load Calculations in Buildings, Except Low-rise Residential Buildings, publication date 2014 (ANSI/ASHRAE/ACCA Standard 183-2007 [RA2014]); and the ASHRAE Appendix G Excerpt, published by American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc.;

(3) Standard Test Method for Determining Air Leakage Rate by Fan Pressurization, publication date 2010 ("ASTM E 779-10"), and Standard Specification for Air Barrier (AB) Material or System for Low-Rise Framed Building Walls, publication date 2011 ("ATSM E 1677-11"), published by ASTM International;

(4) North American Fenestration Standard / Specification for Windows, Doors and Unit Skylights, publication date 2011 ("AAMA / WDMA / CSA 101 / I.S.2 / A440-11"), published by Canadian Standards Association;

(5) 2015 International Building Code (Third Printing: October 2015), 2015 International Fire Code (Third Printing: June 2015), 2015 International Fuel Gas Code (Third Printing: June 2015), 2015 International Mechanical Code (Third Printing: November 2015), 2015 International Plumbing Code (Third Printing: August 2015), 2015 International Property Maintenance Code (Fourth Printing: December 2015), and 2015 International Residential Code (Second Printing: January 2016), published by International Code Council, Inc.;

(6) National Electrical Code, publication date 2014 (NFPA 70-14), published by National Fire Protection Association;

(7) HVAC Air Duct Leakage Test Manual, publication date 1985 ("SMACNA-85"), published by Sheet Metal and Air Conditioning Contractors National Association, Inc.; and

(8) Standard for Oil-Fired Central Furnaces, Ninth Edition, including revisions through April 22, 2010, publication date 2010 ("UL 727-06") (Note: The Ninth Edition of this standard was originally published on April 7, 2006. The version of this standard incorporated herein by reference includes revisions through April 22, 2010, and was published in 2010); Oil-fired Unit Heaters—with Revisions through April 2010, original publication date 1995, with revisions published through 2010 ("UL 731-95), published by Underwriters Laboratory.

Subdivision (c) of section 1240.4 also specifies the name and addresses of the publishers where the foregoing referenced standards may be obtained, and specifies that those publications are available for public inspection and copying at the office of the New York State Department of State located at One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231-0001.

Section 1240.5 is entitled "Energy Code provisions applicable to Residential Buildings."

Subdivision (a) of section 1240.5 ("2015 IECC Residential Provisions (as amended)") provides that except as otherwise provided in section 1240.6 ("Exceptions") of Part 1240, the construction of all new residential buildings; all additions to, alterations of, and/or renovations of existing residential buildings; and all additions to, alterations of, and/or renovations of building systems in existing residential buildings shall comply with the requirements of the 2015 IECC Residential Provisions (as amended). Subdivision (a) of section 1240.5 also incorporates the 2015 IECC Residential Provisions and the 2016 Energy Code Supplement by reference; specifies that names and addresses of the publishers from which copies of the 2015 IECC (which includes the 2015 IECC Residential Provisions) and the 2016 Energy Code Supplement may be obtained, and specifies that the 2015 IECC and the 2016 Energy Code Supplement are available for public inspection and copying at the office of the New York State Department of State located at One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231-0001.

Subdivision (b) of section 1240.5 ("Referenced standards") provides that the referenced standards listed in Chapter 6 of the 2015 IECC Residential Provisions (as amended) are considered to be part of the 2015 IECC Residential Provisions (as amended), subject to the provisions and limitations set forth in Sections R106.1, R106.1.1, and R106.1.2 of the 2015 IECC Residential Provisions (as amended). Subdivision (b) of section 1240.5 also provides that the following referenced standards are incorporated herein by reference and shall be considered to be part of the 2015 IECC Residential Provisions (as amended), subject to the provisions and limitations set forth in Sections R106.1, R106.1.1, and R106.1.2 of the 2015 IECC Residential Provisions (as amended):

(1) Residential Load Calculation, Eighth Edition, publication date 2011 ("Manual J – 2011"), and Residential Equipment Selection, publication date 2013 ("Manual S—13"), published by Air Conditioning Contractors of America;

(2) Method for Measuring Floor Area in Office Buildings, publication date 1996 (Z-65-96), published by American National Standards Institute;

(3) ASHRAE Handbook of Fundamentals - 2013, publication date 2013 ("ASHRAE - 2013"), published by American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc.;

(4) Standard Test Method for Determining Air Leakage Rate by Fan Pressurization, publication date 2010 ("ASTM E 779-10"), and Standard Test Method for Determining Air Tightness of Building Using an Orifice Blower, publication date 2011 ("ASTM E 1827-11"), published by ASTM International;

(5) 2015 International Building Code (Third Printing: October 2015); 2015 International Fire Code (Third Printing: June 2015); 2015 International Fuel Gas Code (Third Printing: June 2015); 2015 International Mechanical Code (Third Printing: November 2015); 2015 International Plumbing Code (Third Printing: August 2015); 2015 International Property Maintenance Code (Fourth Printing: December 2015); 2015 International Residential Code (Second Printing: January 2016); Standard on the Design and Construction of Log Structures, publication date 2012 ("ICC 400–12"); 2006 International Energy Conservation Code, publication date 2006 ("IECC-2006"); and Energy Conservation Construction Code of New York State, publication date 2010, published by International Code Council, Inc.; and

(6) National Electric Code, publication date 2014 ("NFPA 70-14"), published by National Fire Protection Association.

Section 1240.6 ("Exceptions") provides that the Energy Code shall not apply to the alteration or renovation of an historic building or to certain alterations of existing buildings, provided that the alteration will not increase the energy usage of the building. These exceptions mirror the provisions of Energy Law § 11-104(5) and Energy Law § 11-103(1)(b).

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 1240.2, 1240.3, 1240.4 and 1240.5.

Text of rule and any required statements and analyses may be obtained from: Miriam McGiver, Department of State, 99 Washington Ave., Albany, NY 12231-0001, (518) 486-9530, email: miriam.mcgiver@dos.ny.gov

Revised Regulatory Impact Statement

The Department of State (DOS) believes that the changes made to rule are nonsubstative, and do not necessitate a change to the original Regulatory Impact Statement or to the Summary of the Regulatory Impact Statement as published in the Notice of Proposed Rule Making.

Those changes made to rule are summarized as follows:

The rule as proposed would have incorporated by reference the October 2013 printing of ASHRAE 90.1-2013 and the "2015 Energy Code Supplement" (publication date: October 16, 2015), and would have made reference to the "First Printings" of the "I-Codes" to be used in the rule that updates the Uniform Code. The rule as adopted incorporates the July 2014 printing of ASHRAE 90.1-2013, the "2016 Energy Code Supplement" (publication date: March 2016), and the "ASHRAE Appendix G Excerpt," and makes reference to the later printings of the "I-Codes" that will now be used in the rule that updates the Uniform Code. Changes were made throughout the text of 19 NYCRR Part 1240 to be added by this rule and the 2016 Energy Code Supplement to be incorporated by reference in this rule to reflect the foregoing.

In addition, section 1240.4(c)(1) was changed to correct the name of AHRI 440-08; section 1240.4(c)(2) was changed to correct the reference to "Standard 183-2007 (RA 2011)" to "Standard 183-2007 (RA 2014)," and section 1240.4(c)(3) was changed to correct the name of ATSM E 1677-11.

Changing from the 2015 Energy Code Supplement to the 2016 Energy Code Supplement also results in the following changes:

Exception 5 in 2015 IECC Section C402.4.2 is amended (2016 Energy Code Supplement, Part 1, Section 12).

An entry for the ASHRAE Appendix G Excerpt was added to 2015 IECC Chapter C6 (2016 Energy Code Supplement, Part 1, Section 18).

Definitions of certain terms used in ASHRAE 90.1-2013 have been added or amended (2016 Energy Code Supplement, Part 2, Section 1).

ASHRAE 90.1-2013 section 4.2.1.1 has been amended (2016 Energy Code Supplement, Part 2, Section 2).

ASHRAE 90.1-2013 section 8.4.1 has been amended (2016 Energy Code Supplement, Part 2, Section 5).

Appendix G, as it appears in ASHRAE 90.1-2013, has been replaced with Appendix G, as it appears in the ASHRAE Appendix G Excerpt (2016 Energy Code Supplement, Part 2, Section 6).

2015 IECC section R403.12 has been amended (2016 Energy Code Supplement, Part 3, Section 19).

Changing from the October 2013 printing of ASHRAE 90.1-2013 to the July 2014 printing, and replacing Appendix G (as it appears in ASHRAE 90.1-2013) with Appendix G (as it appears in the ASHRAE Appendix G Excerpt), also results in the following changes:

Appendix G has been changed from "Informative Appendix G" to "Normative Appendix G."

A new definition of "boiler system" has been added.

ASHRAE 90.1-2013 Section 5.5.3.1.1 has been revised to correct numbering.

ASHRAE 90.1-2013 Section 6.2.1 has been revised to correct the partial titles of sections in a list to match the complete titles as shown in the text.

ASHRAE 90.1-2013 Section 6.5.9 has been revised to complete the last sentence.

ASHRAE 90.1-2013 Section 7.5.3, Exception 3, was corrected to exempt individual water heaters with inputs not greater than 100,000 Btu/h rather than not greater than 1,000,000 Btu/h.

ASHRAE 90.1-2013 Table 9.6.1 has been revised by deleting the second occurrence of the "Facility for the Visually Impaired" line in the Table.

ASHRAE 90.1-2013 Section G3.1.1 has been revised to describe Table G3.1.1-3 as depending on climate zone rather than heat source.

ASHRAE 90.1-2013 Section G3.1.1.4 has been revised to correct the "IFLR" term in the Section to indicate floor area rather than wall area.

Revised Regulatory Flexibility Analysis

The Department of State (DOS) believes that the changes made to rule are nonsubstative, and do not necessitate a change to the original Regulatory Flexibility Analysis for Small Businesses and Local Government (RFASBLG) or to the Summary of the RFASBLG as published in the Notice of Proposed Rule Making.

Those changes made to rule are summarized as follows:

The rule as proposed would have incorporated by reference the October 2013 printing of ASHRAE 90.1-2013 and the "2015 Energy Code Supplement" (publication date: October 16, 2015), and would have made reference to the "First Printings" of the "I-Codes" to be used in the rule that updates the Uniform Code. The rule as adopted incorporates the July 2014 printing of ASHRAE 90.1-2013, the "2016 Energy Code Supplement" (publication date: March 2016), and the "ASHRAE Appendix G Excerpt," and makes reference to the later printings of the "I-Codes" that will now be used in the rule that updates the Uniform Code. Changes were made throughout the text of 19 NYCRR Part 1240 to be added by this rule and the 2016 Energy Code Supplement to be incorporated by reference in this rule to reflect the foregoing.

In addition, section 1240.4(c)(1) was changed to correct the name of AHRI 440-08; section 1240.4(c)(2) was changed to correct the reference to "Standard 183-2007 (RA 2011)" to "Standard 183-2007 (RA 2014)," and section 1240.4(c)(3) was changed to correct the name of ATSM E 1677-11.

Changing from the 2015 Energy Code Supplement to the 2016 Energy Code Supplement also results in the following changes:

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2015 IECC section R403.12 has been amended (2016 Energy Code Supplement, Part 3, Section 19).

Changing from the October 2013 printing of ASHRAE 90.1-2013 to the July 2014 printing, and replacing Appendix G (as it appears in ASHRAE 90.1-2013) with Appendix G (as it appears in the ASHRAE Appendix G Excerpt), also results in the following changes:

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ASHRAE 90.1-2013 Section G3.1.1.4 has been revised to correct the "IFLR" term in the Section to indicate floor area rather than wall area.

Revised Rural Area Flexibility Analysis

The Department of State (DOS) believes that the changes made to rule are nonsubstative, and do not necessitate a change to the original Rural Area Flexibility Analysis (RAFA) or to the Summary of the RAFA as published in the Notice of Proposed Rule Making.

Those changes made to rule are summarized as follows:

The rule as proposed would have incorporated by reference the October 2013 printing of ASHRAE 90.1-2013 and the "2015 Energy Code Supplement" (publication date: October 16, 2015), and would have made reference to the "First Printings" of the "I-Codes" to be used in the rule that updates the Uniform Code. The rule as adopted incorporates the July 2014 printing of ASHRAE 90.1-2013, the "2016 Energy Code Supplement" (publication date: March 2016), and the "ASHRAE Appendix G Excerpt," and makes reference to the later printings of the "I-Codes" that will now be used in the rule that updates the Uniform Code. Changes were made throughout the text of 19 NYCRR Part 1240 to be added by this rule and the 2016 Energy Code Supplement to be incorporated by reference in this rule to reflect the foregoing.

In addition, section 1240.4(c)(1) was changed to correct the name of AHRI 440-08; section 1240.4(c)(2) was changed to correct the reference to "Standard 183-2007 (RA 2011)" to "Standard 183-2007 (RA 2014)," and section 1240.4(c)(3) was changed to correct the name of ATSM E 1677-11.

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Exception 5 in 2015 IECC Section C402.4.2 is amended (2016 Energy Code Supplement, Part 1, Section 12).

An entry for the ASHRAE Appendix G Excerpt was added to 2015 IECC Chapter C6 (2016 Energy Code Supplement, Part 1, Section 18).

Definitions of certain terms used in ASHRAE 90.1-2013 have been added or amended (2016 Energy Code Supplement, Part 2, Section 1).

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2015 IECC section R403.12 has been amended (2016 Energy Code Supplement, Part 3, Section 19).

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ASHRAE 90.1-2013 Section G3.1.1.4 has been revised to correct the "IFLR" term in the Section to indicate floor area rather than wall area.

Revised Job Impact Statement

The Department of State has determined that this rule will not have a substantial adverse impact on jobs and employment opportunities.

The rule will amend the State Energy Conservation Construction Code (the "Energy Code"). The Energy Code, as amended by this rule, will be set forth in (1) the 2015 International Energy Conservation Code (the "2015 IECC"), (2) the 2013 edition of the Energy Standard for Buildings Except Low Rise Residential Buildings ("ASHRAE 90.1-2013"), and (3) the 2016 Supplement to the New York State Energy Conservation Construction Code (the "2016 Energy Code Supplement"). For the purposes of applying the 2015 IECC and ASHRAE 90.1-2013 in New York State, the Commercial Provisions of the 2015 IECC (the "2015 IECC Commercial Provisions") will be deemed to be amended in the manner provided in Part 1 of the 2016 Energy Code Supplement; ASHRAE 90.1-2013 will be deemed to be amended in the manner provided in Part 2 of the 2016 Energy Code Supplement; and the Residential Provisions of the 2015 IECC (the "2015 IECC Residential Provisions") will be deemed to be amended in the manner provided in Part 3 of the 2016 Energy Code Supplement.

The Energy Code, as amended by this rule, will be (1) a building energy code for residential buildings which is based on the 2015 IECC Residential Provisions and (2) a building energy code for commercial buildings which is based on the 2015 IECC Commercial Provisions and ASHRAE 90.1-2013.

The 2015 IECC is a model code developed and published by the International Code Council, Inc. ASHRAE 90.1-2013 is a standard published by the American Society of Heating, Refrigeration and Air Conditioning Engineers, Inc. Both the 2015 IECC and ASHRAE 90.1-2013 incorporate more current technology in the area of energy conservation. In addition, as a performance-based, rather than a prescriptive, code, the 2015 IECC provides for alternative methods of achieving code compliance, thereby allowing regulated parties to choose the most cost effective method.

As more fully appears in the Regulatory Impact Statement issued for this rule making, the Department of State anticipates that the Energy Code, as amended by this rule, will be cost effective, meaning that the present value of savings in energy costs resulting from constructing buildings according to requirements of the Energy Code as amended by this rule, rather than the requirements of the current version of the Energy Code, will exceed the sum of the increase in initial construction costs plus the present value of the increase in maintenance and replacement costs resulting from constructing buildings according to requirements of the Energy Code as amended by this rule, rather than the requirements of the current version of the Energy Code.

As a consequence, the Department of State and the State Fire Prevention and Building Code Council conclude that the Energy Code, as amended by this rule, will provide a greater incentive for the construction of new buildings and the rehabilitation of existing buildings than exists with the current version of the Energy Code. Therefore, the Department of State and the State Fire Prevention and Building Code Council conclude that this rule will not have a substantial adverse impact on jobs and employment opportunities within New York.

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 no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

This rule will amend the State Energy Conservation Construction Code (Energy Code). The Department of State (DOS) received comments described below.

COMMENT 1: Many commenters support adoption of the 2015 International Energy Conservation Code (the 2015 IECC), with minimal changes.

RESPONSE: The State Fire Prevention and Building Code Council (Code Council) determined at an early stage in the development of this rule that the amended and updated Energy Code should be based on the 2015 IECC and ASHRAE 90.1-2013, with only minimal changes. In general, the changes made to the 2015 IECC and ASHRAE 90.1-2013 are those necessary to satisfy (1) New York State statutory requirements or (2) special conditions existing in New York State.

The 2015 IECC and ASHRAE 90.1-2013 are nationally recognized model codes and standards that are (1) developed with the assistance of recognized experts in energy efficiency from all parts of the nation, and (2) adopted, or to be adopted, in whole or in substantial part, in most if not all other states in the nation. Adopting an Energy Code based on the 2015 IECC and ASHRAE 90.1-2013, with only the minimum changes described above, will (1) facilitate adoption and implementation of the amended and updated Energy Code, thereby accelerating the time when the benefits to be realized by this rule will begin to be realized, and (2) maximize the similarities between New York State's Energy Code and the energy codes in effect in other states, thereby increasing the ability of builders in this State to use products and techniques developed and available nationally; this, in turn, should help reduce construction costs in this State.

The rule already reflects the approach supported by Comment 1. No change to the proposed rule is required to address Comment 1.

In the Responses to the following Comments, the phrase "DOS believes this is an unwarranted additional change" indicates that DOS believes that any benefit that might result from incorporating the alternative requested in the Comment would be more than offset by risk of losing benefits to be realized by adopting 2015 IECC and ASHRAE 90.1-2013 with minimal changes, as described in this Response to Comment 1.

COMMENT 2: Request to amend the rule to use only U-factor in prescriptive provisions, removing the R-value path. Commenter states the R-value method does not consider thermal bridging of building penetrations.

RESPONSE: Removing R-value methodology from 2015 IECC limits prescriptive path options. IECC and ASHRAE 90.1 use R-value methodology, having provisions to restrict thermal bridging by specific code requirements. DOS believes this is an unwarranted additional change. This alternative will not be incorporated.

COMMENT 3: Request to specify, in the scope of the Energy Rating Index residential compliance option, that on-site generation does not count toward compliance. The commenter argues that this change will make compliance simpler and more equitable, spurring development of ultra-low energy buildings.

RESPONSE: DOS believes the rule as originally proposed promotes on-site energy generation. DOS believes this is an unwarranted additional change. This alternative will not be incorporated.

COMMENT 4: Request to provide a more stringent air leakage threshold for townhouses and multi-family structures.

RESPONSE: The rule makes a major change, restricting air leakage to less than half current levels. DOS believes this is an unwarranted additional change. This alternative will not be incorporated.

COMMENT 5: Requests to move the effective date of amended and updated Energy Code to January 1, 2017.

RESPONSE: The effective date of this rule will be changed from 90 days after publication of the Notice of Adoption to 180 days after publication.

COMMENT 6: Request to "harmonize" the 2015 IECC and ASHRAE 90.1-2013 by making their requirements equal.

RESPONSE: The rule intends to have two separate compliance paths. Harmonization would defeat this intent. This alternative will not be incorporated.

COMMENT 7: Requests to include Appendix G to ASHRAE 90.1-2103 (with addenda k, r, z, aa, ad, bm, and dx) as an acceptable code compliance path.

RESPONSE: The rule has been changed to incorporate this alternative.

COMMENT 8: Requests to amend ASHRAE 90.1-2013 to allow 5% total voltage drop for feeder and branch circuits, rather than 2% for feeder circuits and 3% for branch circuits.

RESPONSE: The rule has been changed to incorporate this alternative.

COMMENT 9: Request to update the minimum efficiency tables (Tables 6.8.1-9 and 6.8.1-10) in ASHRAE 90.1-2013 by adding IEER values for high efficiency VRF multisplit air conditioners and heat pumps, effective January 1, 2017.

RESPONSE: Further review is required to assure this alternative would not affect the payback period that must be considered under New York's Energy Law. This alternative will not be incorporated.

COMMENT 10: Request to replace description of "reroofing" in the 2016 Energy Code Supplement with term "roof recover" as defined in 2015 IECC.

RESPONSE: Language as proposed reflects a statutory exception in the New York Energy Law. This alternative will not be incorporated.

COMMENT 11: Request to modify item 3 in 2015 IECC Section C401.2 to require the same energy cost for prescriptive and performance methods.

RESPONSE: DOS believes this is an unwarranted additional change. This alternative will not be incorporated.

COMMENT 12: Request to modify 2015 IECC Section C402.1.2 to provide a prescriptive roof insulation option with combined continuous and cavity that has the same U-value as the requirement for continuous insulation.

RESPONSE: The change would, overall, reduce insulation of roofs. DOS believes this is an unwarranted additional change. This alternative will not be incorporated.

COMMENT 13: Request to modify 2015 IECC Section C402.4.2 to maintain current trigger for skylight requirement (10,000 square feet) rather than 2,500 square feet.

RESPONSE: The rule as proposed has options that do not require skylights. DOS believes this is an unwarranted additional change. This alternative will not be incorporated.

COMMENT 14: Request to modify 2015 IECC Section C402.4.2, Exception 5, to provide that certain interior spaces adjacent to vertical fenestration will be exempt from the skylight requirement where the lighting is controlled according to Section C405.2.3, which addresses "daylight-responsive controls."

RESPONSE: The suggest alternative is a minor change that will clarify meaning and intent of the rule. The rule has been changed to incorporate this alternative.

COMMENT 15: Request to clarify the phrase "enclosed in a room isolated from inside thermal envelope" in Section C402.5.3 of the 2015 IECC.

RESPONSE: DOS believes that no further clarification is required. No change will be made to the rule in response to Comment 15.

COMMENT 16: Requests to confirm commenters' interpretation of items 2 and 3 of Section C403.3.1 of 2015 IECC.

RESPONSE: Commenters' interpretations, as reflected in commenters' request, is correct. No change to the rule is required.

COMMENT 17: Request to change the title of 2015 IECC Table C403.4.1.1 from "Effective Dates for Fan Control" to "Systems Requiring Fan Controls."

RESPONSE: DOS believes that users will be able to determine the meaning of the Table without changing its name.

COMMENT 18: Request to modify 2015 IECC Section C404.4 by removing the requirement that insulation of piping run all the way to the fixture and by clarifying the exception for "the tubing from the connection at the termination of the fixture supply piping to a plumbing fixture or plumbing appliance."

RESPONSE: With regard to the first part of this request, DOS believes this is an unwarranted additional change. With regard to portion of comment that addresses clarification of "tubing exception," DOS believes that users of 2015 IECC will be able to determine when line from connection at termination of fixture supply piping to a plumbing fixture or plumbing appliance is "tubing" for purposes of "tubing exception" in Section C404.4. This alternative will not be incorporated.

COMMENT 19: Request to modify 2015 IECC Section C501.6 to clarify that historic buildings are exempt from the Energy Code.

RESPONSE: Chapter 1 of the 2015 IECC Commercial Provisions, as amended by Part 1 of the 2016 Energy Code Supplement, provides that "Historic buildings are exempt from Energy Code." No change to the rule is required.

COMMENT 20: Request to make several changes to 2015 IECC Section C408, which addresses system commissioning.

RESPONSE: DOS believes this is an unwarranted additional change. This alternative will not be incorporated.

COMMENT 21: Request to amend the 2015 IECC to resolve an apparent conflict between exception 7 in Section C503.1 and the exception in Section C503.6.

RESPONSE: Exception 7 in Section C503.1 reflects the statutory exception in Energy Law § 11-103(b)(7). If an alteration consisting of replacement of less than 50 percent of the luminaries in a space (1) does not increase the installed interior lighting power in that space and (2) does not increase the energy use of the building, exception 7 in Section C503.1 will apply, and Section C503.6 will not be applicable.

If an alteration consisting of replacement of less than 50 percent of the luminaries in a space does not increase the installed interior lighting power in that space, but does increase the energy use of the building, exception 7 in Section C503.1 will not apply, Section C503.6 will apply, and the lighting systems must comply with Section C405. However, if that alteration involves replacement of less than 10 percent of the luminaires in the space, the exception in Section C503.6 will apply.

Based on the foregoing, DOS believes that no conflict exists between exception 7 in Section C503.1 and the exception in Section C503.6. No change will be made to the rule in response to Comment 21.

COMMENT 22: Request to ensure the availability of an applicable REScheck program and contractor training prior to final adoption of the rule.

RESPONSE: REScheck for 2015 IECC is available at U.S. Department of Energy website.

DOS anticipates training on new Energy Code will be available to code enforcement personnel and design professionals.

COMMENT 23: Request to change rule to provide that Passive House Planning Package (PHPP) energy modeling software may be used to demonstrate compliance with Energy Code for residential buildings.

RESPONSE: Section R101.5.1 provides that compliance with 2015 IECC Residential Provisions can be demonstrated through use of software approved in writing by Secretary of State. An interested party is free to apply to the Secretary of State for approval of a particular software product, such as the PHPP. No change to the rule will be made in response to Comment 23.

COMMENT 24: Requests to modify IECC 2015 Section R401.2 and/or Section R402.1, including requests that (1) homes meeting the "Passive House" criteria be deemed to comply with the Energy Code; (2) the energy threshold that triggers conformance to the building thermal envelope be raised; (3) the limit in part 1 of the exception to Section R402.1 be increased.

RESPONSE: DOS believes this is an unwarranted additional change. In addition, the 2015 IECC has an exception for low energy homes. Many homes that are built to "Passive House" model would qualify for this exception. This alternative will not be incorporated.

COMMENT 25: Requests to provide an alternative compliance path for log homes, to include compliance with ICC-400, the "Standard on Design and Construction of Log Homes" published by International Code Council, Inc.

RESPONSE: DOS believes this is an unwarranted additional change. This alternative will not be incorporated.

COMMENT 26: Requests to modify 2015 IECC Section R402.1.2 and Table R402.1.2 to provide for "cavity only" insulation, with no continuous insulation requirement, or require foam sheathing used for continuous insulation to have higher R-values that will prevent condensation.

RESPONSE: DOS believes this is an unwarranted additional change. Additionally, the 2015 IECC allows use of trade-offs in REScheck to work around exterior insulation requirement. This alternative will not be incorporated.

COMMENT 27: Request to modify 2015 IECC Section R402.4.1.1 to provide that a visual inspection may be used in lieu of the "blower door" test.

RESPONSE: DOS believes this is an unwarranted additional change. This alternative will not be incorporated.

COMMENT 28: Request to modify 2015 IECC Section R403.12 to correct reference in that Section to "APSP 15" to reference to "APSP 15a."

RESPONSE: The typographical error will be corrected.

COMMENT 29: Request to modify 2015 IECC Section R502.1.2 to correct what commenter believes to be an inadvertent omission of a compliance option.

RESPONSE: DOS believes this is an unwarranted additional change. This alternative will not be incorporated.

Changes made to the rule as originally proposed.

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NOTICE OF ADOPTION

To Adopt Updated Provisions for the Uniform Fire Prevention and Building Code (''Uniform Code'')

I.D. No. DOS-47-15-00017-A

Filing No. 346

Filing Date: 2016-03-22

Effective Date: 2016-10-03

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

Action taken: Amendment of Part 1219; repeal of Parts 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227 and 1228; addition of new Parts 1220, 1221, 1222, 1223, 1224, 1225, 1226 and 1227 to Title 19 NYCRR.

Statutory authority: Executive Law, section 377

Subject: To adopt updated provisions for the Uniform Fire Prevention and Building Code (''Uniform Code'').

Purpose: To repeal the existing text of the Uniform code and adopt updated text for the Uniform Code.

Substance of final rule: This rule making repeals the current versions of Parts 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, and 1228 of Title 19 of the Official Compilation of Codes, Rules and Regulations of the State of New York and adds new Parts 1220, 1221, 1222, 1223, 1224, 1225, 1226 and 1227. The individual Parts pertain to specified portions of the Uniform Fire Prevention and Building Code and are summarized below:

Part 1220 Residential Construction

Section 1220.1. Requirements.

(a) Except as provided in subdivision (b) of this section, the construction, alteration, movement, replacement, repair, equipment, use, maintenance, removal and demolition of applicable residential structures and their accessory structures shall comply with the requirements of the "2015 International Residential Code" Second Printing, published by the International Code Council, Inc. (hereinafter the 2015 IRC), incorporated herein by reference.

Applicable residential structures include detached one- and two-family dwellings and multiple single-family dwellings (townhouses), not more than three stories in height above grade with a separate means of egress; such one-family dwellings converted to bed and breakfast dwellings; and certain specified dwellings under the supervision or jurisdiction of a department or agency of New York State (NYS). Copies of the 2015 IRC may be obtained from the publisher at the following address of the publisher:

International Code Council, Inc.

500 New Jersey Avenue, NW, 6th Floor

Washington, DC 20001

The 2015 IRC is available for public inspection and copying at:

New York State Department of State

One Commerce Plaza, 99 Washington Avenue

Albany, NY 12231-0001

(b) As applied in NYS, the 2015 IRC shall be deemed amended as specified in "2016 Uniform Code Supplement," published in March, 2016, by the NYS Department of State and incorporated herein by reference. Copies may be obtained and are available for inspection and copying at the New York State office specified in subdivision (a) of this section.

(c) Referenced standards. Certain published standards are incorporated by reference into 19 NYCRR Part 1220. The 2016 Uniform Code Supplement identifies such standards, and the names and addresses of publishers from which copies may be obtained. Such standards are available for public inspection and copying at the NYS office specified in subdivision (a) of this section.

Part 1221 Building Construction

Section 1221.1. Requirements.

(a) Except as provided in subdivision (b) of this section, the construction, alteration, movement, enlargement, replacement, repair, equipment, use and occupancy, maintenance, removal and demolition of every building or structure, or appurtenance connected or attached to any building or structure, shall comply with the requirements of the publication entitled "2015 International Building Code" Third Printing, published by the International Code Council, Inc. (hereinafter the 2015 IBC), incorporated herein by reference. Copies of the 2015 IBC may be obtained from the publisher at the address specified in subdivision (a) of Section 1220.1. The 2015 IBC is available for public inspection and copying at the NYS office listed in subdivision (a) of section 1220.1.

(b) As applied in NYS, the 2015 IBC shall be deemed amended as specified in "2016 Uniform Code Supplement," published in March 2016, by the NYS Department of State and incorporated herein by reference. Copies may be obtained and are available for inspection and copying at the NYS office specified in subdivision (a) of section 1220.1.

(c) Referenced standards. Certain published standards are incorporated by reference into 19 NYCRR Part 1221. The 2016 Uniform Code Supplement identifies such standards, and the names and addresses of publishers from which copies may be obtained. Such standards are available for public inspection and at the NYS office specified in subdivision (a) of Section 1220.1.

Part 1222 Plumbing Systems

Section 1222.1. Requirements.

(a) Except as provided in subdivision (b) of this section, the erection, installation, alteration, repair, relocation, replacement, addition to, use or maintenance of plumbing systems, nonflammable medical gas systems, and sanitary and condensate vacuum collection systems, shall comply with the requirements of the "2015 International Plumbing Code" Third Printing, published by the International Code Council, Inc. (hereinafter the 2015 IPC), incorporated herein by reference. Copies of the 2015 IPC may be obtained from the publisher, ICC, at the address of the publisher specified in subdivision (a) of Section 1220.1. The 2015 IPC is available for public inspection and copying at the NYS office specified in subdivision (a) of section 1220.1.

(b) As applied in NYS, the 2015 IPC shall be deemed amended as specified in "2016 Uniform Code Supplement," published in March 2016, by the NYS Department of State and incorporated herein by reference. Copies may be obtained and are available for inspection and copying at the NYS office specified in subdivision (a) of section 1220.1.

(c) Referenced standards. Certain published standards are incorporated by reference into 19 NYCRR Part 1222. The 2016 Uniform Code Supplement identifies such standards, and the names and addresses of publishers from which copies may be obtained. Such standards are available for public inspection and copying at the NYS office specified in subdivision (a) of Section 1220.1.

Part 1223 Mechanical Systems

Section 1223.1. Requirements.

(a) Except as provided in subdivision (b) of this section, the design, installation, maintenance, alteration and inspection of mechanical systems that are permanently installed and utilized to provide control of environmental conditions and related processes within buildings shall comply with the requirements of the publication entitled "2015 International Mechanical Code" Third Printing, published by the International Code Council, Inc. (hereinafter the 2015 IMC), incorporated herein by reference. Copies of the 2015 IMC may be obtained from the publisher at the address of the publisher specified in subdivision (a) of Section 1220.1. The 2015 IMC is available for public inspection and copying at the NYS office specified in subdivision (a) of section 1220.1.

(b) As applied in NYS, the 2015 IMC shall be deemed amended as specified in "2016 Uniform Code Supplement," published in March, 2016, by the NYS Department of State and incorporated herein by reference. Copies may be obtained and are available for inspection and copying at the NYS office specified in subdivision (a) of section 1220.1.

(c) Referenced standards. Certain published standards are incorporated by reference into 19 NYCRR Part 1223. The 2016 Uniform Code Supplement identifies such standards, and the names and addresses of publishers from which copies may be obtained. Such standards are available for public inspection and copying at the NYS office specified in subdivision (a) of Section 1220.1.

Part 1224 Fuel Gas Equipment and Systems

Section 1224.1. Requirements.

(a) Except as provided in subdivision (b) of this section, the design, installation, maintenance, alteration and inspection of fuel gas piping and equipment, fuel gas-fired appliances and fuel gas fired appliance ventilating systems shall comply with the requirements of the publication entitled

"2015 International Fuel Gas Code" Third Printing, published by the International Code Council, Inc. (hereinafter the 2015 IFGC), incorporated herein by reference. Copies of the 2015 IFGC may be obtained from the publisher at the address of the publisher specified in subdivision (a) of Section 1220.1. The 2015 IFGC is available for public inspection and copying at the NYS office specified in subdivision (a) of section 1220.1.

(b) As applied in NYS, the 2015 IFGC shall be deemed amended as specified in "2016 Uniform Code Supplement," published in March, 2016, by the NYS Department of State and incorporated herein by reference. Copies may be obtained and are available for inspection and copying at the NYS office specified in subdivision (a) of section 1220.1.

(c) Referenced standards. Certain published standards are incorporated by reference into 19 NYCRR Part 1224. The 2016 Uniform Code Supplement identifies such standards, and the names and addresses of publishers from which copies may be obtained. Such standards are available for public inspection and copying at the NYS office specified in subdivision (a) of Section 1220.1.

Part 1225 Fire Prevention

Section 1225.1. Requirements.

(a) Except as provided in subdivision (b) of this section, structures, processes and premises; the storage, handling or use of structures, materials or devices; the occupancy and operation of structures and premises; and the construction, extension, repair, alteration or removal of fire suppression and alarms systems, shall comply with the requirements of the publication entitled "2015 International Fire Code" Third Printing, published by the International Code Council, Inc. (hereinafter the 2015 IFC, incorporated herein by reference. Copies of the 2015 IFC may be obtained from the publisher at the address of the publisher specified in subdivision (a) of Section 1220.1. The 2015 IFC is available for public inspection and copying at the NYS office specified in subdivision (a) of section 1220.1.

(b) As applied in NYS, the 2015 IFC shall be deemed amended as specified in "2016 Uniform Code Supplement," published in March, 2016, by the NYS Department of State and incorporated herein by reference. Copies may be obtained and are available for inspection and copying at the NYS office specified in subdivision (a) of section 1220.1.

(c) Referenced standards. Certain published standards are incorporated by reference into 19 NYCRR Part 1225. The 2016 Uniform Code Supplement identifies such standards, and the names and addresses of publishers from which copies may be obtained. Such standards are available for public inspection and copying at the NYS office specified in subdivision (a) of Section 1220.1.

Part 1226 Property Maintenance

Section 1226.1. Requirements.

(a) Except as provided in subdivision (b) of this section, all existing residential and nonresidential structures, premises, equipment and facilities, owners, operators and occupants of existing structures and premises, and the occupancy of existing structures and premises, shall comply with the requirements of the publication entitled "2015 International Property Maintenance Code" Fourth Printing, published by the International Code Council, Inc. (hereinafter the 2015 IPMC), and incorporated herein by reference. Copies of the 2015 IPMC may be obtained from the publisher at the address of the publisher specified in subdivision (a) of Section 1220.1. The 2015 IPMC is available for public inspection and copying at the NYS office specified in subdivision (a) of section 1220.1.

(b) As applied in NYS, the 2015 IPMC shall be deemed amended as specified in "2016 Uniform Code Supplement," published in March, 2016, by the NYS Department of State and incorporated herein by reference. Copies may be obtained and are available for inspection and copying at the NYS office specified in subdivision (a) of section 1220.1.

(c) Referenced standards. Certain published standards are incorporated by reference into 19 NYCRR Part 1226. The 2016 Uniform Code Supplement identifies such standards, and the names and addresses of publishers from which copies may be obtained. Such standards are available for public inspection and copying at the NYS office specified in subdivision (a) of Section 1220.1.

Part 1227 Existing Buildings

Section 1227.1. Requirements.

(a) Except as provided in subdivision (b) of this section, the repair, alteration, change of occupancy, addition and relocation of existing buildings shall comply with the requirements of the "2015 International Existing Building Code" Fifth Printing, published by the International Code Council, Inc. (hereinafter the 2015 IEBC), incorporated herein by reference. Copies may be obtained from the publisher at the address of the publisher specified in subdivision (a) of Section 1220.1. The 2015 IEBC is available for public inspection and copying at the NYS office specified in subdivision (a) of section 1220.1.

(b) As applied in NYS, the 2015 IEBC shall be deemed amended as specified in "2016 Uniform Code Supplement," published in March 2016, by the NYS Department of State and incorporated herein by reference. Copies may be obtained and are available for inspection and copying at the NYS office specified in subdivision (a) of section 1220.1.

(c) Referenced standards. Certain published standards are incorporated by reference into 19 NYCRR Part 1227. The 2016 Uniform Code Supplement identifies such standards, and the names and addresses of publishers from which copies may be obtained. Such standards are available for public inspection and copying at the NYS office specified in subdivision (a) of section 1220.1.

Finally, 19 NYCRR Part 1219 is amended to conform the references in such Part to the revised titles of Parts 1220 through 1227 and to delete the reference to the repealed Part 1228.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 1220.1, 1221.1, 1222.1, 1223.1, 1224.1, 1225.1, 1226.1 and 1227.1.

Text of rule and any required statements and analyses may be obtained from: John Addario, Department of State, Division of Building Standards & Codes, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-4073, email: John.Addario@dos.ny.gov

Additional matter required by statute: Executive Law § 378(15)(b) authorizes the State Fire Prevention and Building Code Council ("Code Council") to provide that, during the period between the date of adoption of changes to the Uniform Fire Prevention and Building Code ("Uniform Code") and the date on which such changes become effective, a person shall have the option of complying either with the provisions of the Uniform Code as changed or the provisions as they were set forth immediately prior to adoption of the change.

At its meeting held March 9, 2016, the Code Council voted to adopt this rulemaking to amend the Uniform Code. In addition, the Code Council voted to provide that, during the transition period between adoption of this rule and the date on which the changes to the Uniform Code become effective, a person shall have the option of complying with either the provisions of the Uniform Code as changed, or with the provisions of the Uniform Code in effect immediately prior to the adoption of this rule.

Pursuant to Section 377(1) of the Executive Law, Acting Secretary of State Rosanna Rosado reviewed the amendment of the Uniform Code to be implemented by this rule, found that such amendment effectuates the purposes of Article 18 of the Executive Law, and therefore approves said amendment.

Summary of Revised Regulatory Impact Statement

1. STATUTORY AUTHORITY

Article 18 of the Executive Law, entitled the New York State Uniform Fire Prevention and Building Code Act, establishes the State Fire Prevention and Building Code Council (hereinafter "Code Council") and authorizes such council to formulate a code to be known as the Uniform Fire Prevention and Building Code (hereinafter "Uniform Code"). Executive Law section 377 directs that the Uniform Code shall provide reasonably uniform standards and requirements for construction and construction materials for public and private buildings, including factory manufactured homes, consonant with accepted standards of engineering and fire prevention practices.

Executive Law section 378 provides that the Uniform Code shall address certain specified subjects. The subjects are listed in the full Regulatory Statement.

Subdivision 1 of Executive Law section 377 specifically states that the Code Council may amend particular provisions of the Uniform Code and shall periodically review the entire code to assure that it effectuates the purposes of Article 18 of the Executive Law. This rule making repeals the existing text of the Uniform Code which is based on earlier editions of model codes published by the International Code Council (ICC), and replace it with new text which is based upon the 2015 editions of eight individual model codes developed and published by the ICC, a national building officials' organization. Although the existing text of the Uniform Code is to be repealed, much of the new code text will essentially be a recodification of current Uniform Code provisions but with modifications identified in the 2016 Uniform Code Supplement to accommodate advances in construction technology and to address issues specific to New York State.

2. LEGISLATIVE OBJECTIVES

Subdivision 2 of Executive Law section 371 declares that it shall be the public policy of the State of New York to provide for promulgation of a Uniform Code addressing building construction and fire prevention in order to provide a basic minimum level of protection to all people of the State from the hazards of fire and inadequate building construction. The Code Council was assigned the task of formulating the Uniform Fire Prevention and Building Code which took effect January 1, 1984. However, in the years following, the Uniform Code did not keep pace with the evolving technology of fire prevention and building construction. As the rest of the nation moved to using a nationally accepted set of model codes, New York continued to maintain its own building and fire preven-

tion code until January of 2003, when the existing text of the Uniform Code was replaced with text based primarily on the 2000 editions of several model codes known collectively as the International Codes.

The Uniform Code adopted in 2003 was based on International Codes, and represented the first major revision of the Uniform Code since its inception in January 1984. The Uniform Code was revised again in 2007 and 2010. The 2010 revision was based primarily on the 2006 edition of the International Codes. This rule making revises the Uniform Code once again, and replaces the current version of the code with a new version based primarily on the 2015 edition of the International Codes. By repealing the existing text of the Uniform Code and replacing it with an update based primarily upon newer versions of model codes developed and published by the ICC, the Code Council seeks to better effectuate the purposes, objectives, and standards set forth in Article 18 of the Executive Law and therefore concludes that the rule making conforms with the public policy objectives of Executive Law section 371.

3. NEEDS AND BENEFITS

The purpose of this rule making is to adopt new provisions for the Uniform Code. This change is necessary if New York State is to remain competitive with the rest of the nation in matters involving building construction while at the same time providing an adequate level of safety to its residents. It is also necessary if New York State wishes to keep pace with evolving technology concerning fire prevention and building construction and to have a building and fire prevention code which is consistent with nationally accepted model codes.

Included in Item #3 of the full Regulatory Impact Statement, the Needs and Benefits of significant new provisions of the Uniform Code are discussed.

4. COSTS

a. COST TO REGULATED PARTIES FOR THE IMPLEMENTATION OF, AND CONTINUING COMPLIANCE, WITH THE PROPOSED RULE.

Further information concerning the costs of significant provisions of the Uniform Code is discussed in the full Regulatory Impact Statement. The new provisions of the Uniform Code are expected to reduce some building and development costs and increase others. While costs vary depending on the construction or modification project, the Department does not anticipate that the costs will differ greatly from those associated with the current code. This rule reflects performance based regulatory requirements providing regulated parties more alternatives to protect the occupants and users of buildings while at the same time fulfilling programmatic space needs with the most cost effective solution.

b. COSTS TO THE AGENCY, THE STATE AND LOCAL GOVERNMENTS FOR THE IMPLEMENTATION OF, AND CONTINUED ADMINISTRATION OF THE RULE.

The Department of State, State agencies that administer and enforce the Uniform Code, State agencies that own or construct buildings, and local governments that administer and enforce the Uniform Code will be required to obtain copies of the new code books. It is anticipated that the set of code books will cost between $554 and $737. Smaller agencies and local governments typically require only one set of code books. Larger local governments may require multiple sets. Approximately 4,000 code enforcement officials in 1,600 municipalities will be affected by a new version of the Uniform Code.

Further information concerning costs and savings of the most significant of the new provisions of the Uniform Code are discussed within Item #3 of the full Regulatory Impact Statement.

5. LOCAL GOVERNMENT MANDATES

This rule making imposes some programs, services, duties and responsibilities upon counties, cities, towns, villages, school districts, fire districts and other special districts. When any of the aforementioned governmental entities undertake the construction of a building or structure, the construction process is subject to the provisions of the rule to the same extent that the construction of a private building or structure would be regulated.

For example, this rule making requires emergency operation centers and schools located within a 250 mile per hour (mph) tornado design wind speed area to build storm shelters designed to resist higher wind forces than other areas of the state.[1] These areas are located within a small portion of Chautauqua and Cattaraugus counties.

Similarly, existing buildings and structures owned or under the control of local government entities are potentially subject to maintenance or fire prevention provisions of the Uniform Code, and therefore, may become subject to maintenance and fire prevention provisions of the Uniform Code, as amended by this rule.

Pursuant to Executive Law, Section 381, every city, town and village is responsible for administering and enforcing the Uniform Code. Consequently, local government personnel will require training in the details of this rule. However, the Department of State, Building Standards and Codes Division has funding available to provide for training local government code enforcement officials. This training will provide knowledge to enable local government to enforce this regulation.

6. PAPERWORK

This rule will not impose any additional reporting or record keeping requirements. No additional paperwork is anticipated.

7. DUPLICATION

The New York State Uniform Fire Prevention and Building Code provides standards for the construction and maintenance of buildings and structures and for the protection of buildings and structures and their occupants from the hazards of fire. These are matters for which the federal government does not impose comprehensive requirements. The federal government has addressed the topic of accessible and usable facilities for the physically disabled, however, through adoption of the Americans with Disabilities Act (ADA) and the Fair Housing Act. The new text proposed for the Uniform Code also requires accessibility to buildings and structures for the physically disabled. Although the existence of federal and state standards may raise issues of overlap or conflict, no such overlap or conflict exists with this rule.

Several State agencies have promulgated regulations which impose requirements upon buildings or structures which house activities which are licensed or regulated by the particular agency. Such regulations may impose an additional layer of regulation upon the construction, maintenance, or use of certain categories of buildings. These other regulations, however, are focused upon activities or occupants regulated or protected by the particular State agency and have been promulgated pursuant to statutory authority other than Article 18 of the Executive Law.

8. ALTERNATIVES

It is the policy of the Department of State to modernize and amend the Uniform Fire Prevention and Building Code, so as to maintain consistency with the national model codes, to keep building practices in New York State consistent with practice nationally, and to incorporate new technical developments in a timely manner. Consequently, the alternative of maintaining existing provisions of the Uniform Code was rejected.

To assist the Code Council, staff at the Department of State, Building Standards and Codes Division reviewed the ICC Codes and made recommendations to the Code Council to ensure that the new provisions of the Uniform Code would remain appropriate and applicable to developing design and construction issues and needs in New York State.

Proposed New York modifications made by staff at the Department of State, Building Standards and Codes Division were posted on the DOS website for public inspection. Code update presentations by DOS staff were made to various groups.

Public hearings were held after a notice of proposed rule making was published in the State Register in accordance with the provisions of the State Administrative Procedure Act. A draft of the proposed code was also available on the Department's website and an e-bulletin was sent announcing that fact.

9. FEDERAL STANDARDS

The federal government has adopted the Americans with Disabilities Act (ADA) which requires certain facilities to be accessible and usable by the physically disabled. The new text of the Uniform Code also includes provisions which require buildings and structures to be accessible and usable by the physically disabled. The new code text will exceed the minimum standards established by the federal government.

10. COMPLIANCE SCHEDULE

Upon publication of the notice of adoption for this rule making, a transition period will commence. During this period, regulated parties will have the option of construction in compliance with either current code provisions or the newly adopted provisions.

The delay of the effective date of the new Uniform Code provisions and the option of compliance with either the existing or the new Code during that period ensures that regulated parties will be able to achieve compliance with the rule on the date it becomes effective.

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[1] Schools located on a small strip on the south edge of the western end of the state will be required to build storm shelters. This specified area is shown darkly shaded on page 10 at the following: https://law.resource.org/pub/us/code/ibr/icc.500.2008.pdf

Revised Regulatory Flexibility Analysis

The Department of State (DOS) concludes that the changes made to the last published rule are nonsubstantive and do not necessitate a revision of the original Regulatory Flexibility Analysis for Small Businesses and Local Government (RFASBLG) published in the Notice of Proposed Rule Making.

The changes made to the previously published rule text provide clarification as to the application of the proposed text and do not alter or increase any effect of the rule upon small businesses or local governments. For instance whereas the proposed rule text provided for incorporation by reference of several model codes developed and published by the

International Code Council (ICC), noting a publication date of May 2014, the rule as adopted specifies the particular printing (ie. Second, Third, Fifth) of the specific ICC code which is incorporated by reference. A review of the Regulatory Flexibility Analysis for Small Businesses and Local Governments published with the Notice of Proposed Rule Making leads to the conclusion that the nonsubstantive changes made to the rule text do not necessitate revision of the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments.

Revised Rural Area Flexibility Analysis

The Department of State (DOS) concludes that the changes made to the last published rule are nonsubstantive, and do not necessitate a revision of the original Rural Area Flexibility Analysis (RAFA) published in the Notice of Proposed Rule Making.

The changes made to the previously published rule text provide clarification as to the application of the proposed text and do not alter or increase any effect of the rule upon rural areas in New York State. For instance whereas the proposed rule text provided for incorporation by reference of several model codes developed and published by the International Code Council (ICC), noting a publication date of May 2014, the rule as adopted specifies the particular printing (ie. Second, Third, Fifth) of the specific ICC code which is incorporated by reference. A review of the Rural Area Flexibility Analysis published with the Notice of Proposed Rule Making leads to the conclusion that the nonsubstantive changes made to the rule text do not necessitate revision of the previously published Rural Area Flexibility Analysis.

Revised Job Impact Statement

The Department of State has determined that this rule will not have a substantial adverse impact on jobs and employment opportunities.

This rule making repeals the current version of the Uniform Fire Prevention and Building Code (Uniform Code), and adopts new text for the code. The current version of the Uniform Code is based upon the 2006 editions of model codes developed by the International Code Council (ICC), with some New York modifications. This rule repeals the existing text of the Uniform Code and adopts new text based upon the 2015 editions of model codes developed by the ICC. The provisions of the ICC model codes will be supplemented by provisions which address topics specific to New York.

The ICC model codes incorporate the most current technology in the areas of building construction and fire prevention. ICC codes are updated on a three-year cycle to keep current with industry practice and technical and life-safety evolution. As a consequence, the Department of State concludes that this rule which is based upon the newer (2015) versions of the ICC Codes will provide a greater incentive to construction of new buildings and rehabilitation of existing buildings than exists with the current Uniform Code text. Therefore, this rule making will not have a substantial adverse impact on jobs and employment opportunities within New York.

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 no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

Many comments were received requesting modifications to the codes published by the International Code Council (the "I-Codes"). The I-Codes are nationally recognized model codes and standards that are (1) developed with the assistance of recognized experts in building construction from all parts of the nation, and (2) adopted, or to be adopted, in whole or in substantial part, in most if not all other states in the nation. Adopting the Uniform Code based on the 2015 I-Codes, with only the minimum changes will (1) facilitate adoption and implementation of the amended and updated Uniform Code, thereby accelerating the time when the benefits to be realized by this rule will begin to be realized, and (2) maximize the similarities between New York State's Uniform Code and the codes in effect in other states, thereby increasing the ability of builders in this State to use products and techniques developed and available nationally; this, in turn, should help reduce construction costs in this State. For this reason the State Fire Prevention and Building Code Council ("Code Council") did not make changes in response to many of the comments received because it concluded that such changes were unwarranted and would be contrary to the benefits realized by adopting the 2015 I-Codes with only minimal changes.

Requirements contained in the 2015 I-Codes for which comments requested modification included: 1) requirements in the 2015 International Residential Code (IRC) pertaining to stairway illumination, gypsum board attachment, fire protection of floors, ventilation, duct thickness, GFI protection near sinks, AFCI protection in kitchens and laundry areas, alterations or repairs of existing basements, adding provisions for light straw-clay and straw bale construction (Appendices R and S); 2) requirements in the International Building Code (IBC) pertaining to sprinkler and fire detection requirements in assembly occupancies and in attics with noncombustible construction, fire-retardant treated wood, or noncombustible insulation, liquid propane storage in factories, sprinklers business occupancies, portable fuel-fired heaters in business and mercantile occupancies, firewall materials, framing wall requirements for exterior wall assemblies in ordinary and heavy timber construction (Types III and IV), and dormitory accessibility on college campuses; and 3) requirements in the International Plumbing Code (IPC) pertaining to water fixture flow rates. The Code Council did not make changes in response to many of these comments because such changes were unwarranted and contrary to the benefits realized by adopting the 2015 I-Codes with only minimal changes.

Comments were received that sought administrative or code clarifications. These comments were general in nature and did not require amendment of the proposed rule text. The subject matter of these comments included: summer camp cabins, permit requirements for alterations, definitions (plastic composite, thermosetting plastic, manufactured home, ultimate consumer, contract builder, acceptable renewable energy sources, and unvented room heater), electrical power, wiring, devices and equipment for owner occupied one-family dwellings and accessory structures; requirements in the IRC for factory manufactured home and existing buildings; heating, toilet facilities, and kitchen requirements for owner-occupied dwellings, unvented portable kerosene-fired heaters, protection of piping against physical damage, and the separation between the garage and the residence by 5/8" type-X gypsum wallboard; requirements in the IBC for fire resistance rating of gypsum wall board protection for steel assemblies, sawn lumber, and regulations by other NYS agencies (Appendix S in the current code); requirements in the IPC for the disinfection of potable water systems and access to public water supply; and, requirements in the International Fire Code (IFC) pertaining to construction requirements for existing buildings and fire apparatus access roads.

Comments were received in support of amendments to grade mark and inspection requirements for sawn lumber; fuel gas safeguard devices, requirements in the IRC pertaining to water supply and distribution systems; and, updating to the 2014 National Electric Code (NEC). One commenter supported the ICC code development process instead of modifying the I-Codes.

Comments that led to changes being made to the originally proposed 2016 Supplement include:

- Supplement Section E101.1 should reference the IRC and not RCNYS (ie. Residential Code of New York State).
- The prohibition of asbestos pipe is not needed because its use is not permitted by the IPC.
- The reference to NFPA 1142 does not provide the title or year of the standard.
- Clarify the allowance of natural cut trees in places of public assembly.

A comment was received requesting that the requirements for existing buildings in Section AJ803.2 (flood hazard areas) of the IRC be made consistent with Section 1103.5 (flood hazard areas) of the 2015 IEBC. The Code Council did not amend the rule text in response to this comment because it concluded the change was unwarranted.

A comment was received favoring the IRC 7 3/4" maximum stair riser height requirement for stairs over the proposed 8 1/4" riser height in the 2016 Supplement. After discussion the Code Council decided to include such amendment of the IRC in part to accommodate size limitations for transporting factory manufactured homes.

Comments were received concerning the modified International Symbol of Accessibility. No change was made to this requirement because it is required by NYS statute.

Comments were received expressing concerns about the wind speed provisions of the IRC. Issues included new terminology, new prescriptive methods, new design wind speeds, allowable stress design vs. ultimate strength design methodology, and connection requirements. The Code Council concludes that the 2015 IRC satisfactorily addresses wind design. Therefore, the Code Council did not make changes in response to this comment because the change is unwarranted and contrary to the benefits realized by adopting the 2015 I-Codes with only minimal changes.

A comment was received stating that the Corrugated Stainless Steel Tubing (CSST) bonding requirements of the residential and fuel gas portions of the 2016 Supplement should be clarified so as to result in consistent requirements. The Supplement was revised to provide clarification.

Comments were received requesting that the provisions for flood-resistant construction that govern residential structures be coordinated with the provisions that govern non-commercial structures. The rule text was revised to so as to better harmonize the flood hazard criteria in the IRC with that contained in the IBC.

A comment was received requesting changes to add flood provisions for pools located in Coastal A Zones including provisions that would require (1) pools be designed and constructed in accordance with ASCE 24; (2) equipment elevated to or above the design flood elevation or be anchored to prevent flotation; (3) protection from water entering the components during flooding; and, (4) ground-fault circuit interrupter

protection. Changes were not made in response to this comment because any possible benefit would be outweighed by the benefits to be realized from adoption of the 2015 I-Codes with only minimal changes.

A comment was received requesting provisions to address the additional impact that sea-level rise, storm surge, increasingly heavy precipitation events, and climate change will have on the flood hazard provisions of the code. Changes in response to this comment were not made because such a change would be contrary to the benefits realized by adopting the 2015 I-Codes with only minimal changes.

Comments were received requesting sprinkler systems be required in all new one- and two- family dwellings and townhouses based upon an assertion that new homes burn faster, produce more heat and smoke, and collapse quicker than older homes. Some expressed concerns of possible tradeoffs in the I-Codes that may have gone unnoticed. Advocates for sprinklers in townhouses cited the following additional reasons: (1) life safety; (2) cost savings of the common walls separating townhouses allowed to be reduced from two-hour to one-hour fire resistance rating; (3) limited means of egress; (4) limited access for fire service access; (6) occupants can suffer fire loss, injury or death through the fault of a neighbor; (7) townhouses are generally connected to municipal water which does not require additional pumps or storage tanks; and (8) the number of line of duty deaths (LODD) per 100,000 fires has increased, partly due to flashover and collapse attributed to modern construction methods. Comments were also received in favor of the decision to not require sprinklers in these buildings. The commenters emphasized that the claims of cost savings of common wall construction is not realistic because consumers prefer two-hour over one hour fire rated common walls for the sake of privacy. They also emphasized concerns over the added cost of construction when public water is not available and noted that 46 states do not mandate sprinklers in townhouses. No changes in response to these comments were made because the Code Council decided to maintain the current requirements in the 2010 Residential Code of New York State which requires residential sprinklers in homes that are 3 stories above grade.

Comments were received asking that the IFC be amended to add a requirement for fire suppression systems at gas stations stating that the lack of fire suppression will negatively affect the level of safety which suppression systems are designed to provide. Many comments also expressed fears of job loss. One commenter believes that high capacity portable extinguishers will be required at new gas stations which do not have suppression systems. It should be noted that portable extinguishers have already been required under Section 2205.5 of the current 2010 Fire Code of New York State and will continue to be required under Section 2305.5 of the new IFC. The DOS also received comments in support of removing the requirement for these systems claiming that dispensing equipment is much safer today than in the past and suppression systems are actually unreliable, unsafe and very expensive when they discharge. The Department of State conducted extensive research into the cost vs. safety benefits of the systems and concluded that there is a tremendous cost associated with design, installation, and maintenance of these systems with very little measurable benefit provided by them. Statistics have shown that on average, two fatalities occur in gas station fires each year in the U.S where by far most states do not require suppression systems. After review of research on this matter, the Code Council did not make any changes in response to these comments and decided to adopt the IFC without amending the requirements for fuel dispensing systems. In addition, the Council concluded that a change would diminish the benefits to be realized by adopting the 2015 I-Codes with only minimal changes.

Comments were received protesting the provisions in the IRC and IFC for solar photovoltaic systems and the extensive roof access and venting requirements around solar panels. Many commenters believe that the new requirements would drastically scale back the amount of solar panels installed and would be contrary to New York State's renewable energy goals. Commenters emphasized that in many cases roof ridge access is already available at adjacent roofs and additional access should not be needed on every roof surface that contains solar panels.

In an attempt to harmonize the intent of the model code provisions with the needs of the industry, the Code Council revised the rule text in a manner that continues to require space for rooftop access and venting but recognizes the availability of adjoining roof surfaces that could provide access under certain conditions and thereby eliminate the need to require access on every roof surface. The Code Council concludes that a balance has been struck between the needs of the industry and the safety of first responders. The effective requirements have not changed: solar photovoltaic systems must be installed to (1) provide access to the ridge and (2) provide clearance along the ridge.

Department of Taxation and Finance

NOTICE OF ADOPTION

City of New York Withholding Tables and Other Methods

I.D. No. TAF-05-16-00002-A
Filing No. 337
Filing Date: 2016-03-21
Effective Date: 2016-04-06

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

Action taken: Repeal of Appendix 10-C; and addition of new Appendix 10-C to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subdivision First, 671(a)(1), 697(a), 1309 and 1312(a); Administrative Code of the City of New York, sections 11-1771(a) and 11-1797(a); L. 2015, ch. 59, part B

Subject: City of New York withholding tables and other methods.

Purpose: To provide current City of New York withholding tables and other methods.

Text or summary was published in the February 3, 2016 issue of the Register, I.D. No. TAF-05-16-00002-EP.

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

Text of rule and any required statements and analyses may be obtained from: Kathleen D. Chase, Department of Taxation and Finance, Office of Counsel, Building 9, W.A. Harriman Campus, Albany, NY 12227, (518) 530-4153, email: Kathleen.OConnell@tax.ny.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 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.

Workers' Compensation Board

NOTICE OF ADOPTION

Health Insurance Matching Program (HIMP)

I.D. No. WCB-14-15-00009-A
Filing No. 340
Filing Date: 2016-03-22
Effective Date: 2016-06-01

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

Action taken: Repeal of Subparts 325-5 and 325-6; and addition of new Subparts 325-5 and 325-6 to Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 13, 117 and 141

Subject: Health Insurance Matching Program (HIMP).

Purpose: Provide the process for health insurers to recover from workers' compensation carriers.

Substance of final rule: Subparts 325-5 and 325-6 are repealed and new Subparts 325-5 and 325-6 are added.

Section 325-5.1 is unchanged.

Section 325-5.2 has been added that includes the definitions contained in 325-6.1, amends the definition of health insurer to clarify that provisions related to a health insurer include a health insurer "when acting directly or through a HIMP agent." Section 325-5.2 adds a new definition for a HIMP agent at subparagraph (h).

Section 325-5.3 has minor changes to reflect changes in the HIMP process.

Section 325-5.4, formerly 325-5.2, describes eligibility to participate in the program and clarifies the roles of insurers and HIMP agents.

Section 325-5.5, formerly Section 325-5.6, subparagraph (a) permits the Chair to prescribe the format and content for computer searches. Subparagraph (b) sets forth a time limitation for the insurer to obtain a computer match of 360 days between the date of accident for the compensation injury and the date of treatment for which the health insurer seeks reimbursement. Subparagraph (c) defines what constitutes a "full match" and subparagraph (d) defines what constitutes a "partial match." Subparagraph (g) describes the process for access to the Board's electronic case files and for manual searches of archived paper files by Board staff.

Section 325-5.6, formerly Section 325-5.7, increases the fee for each search from $.043 to $.045. The new 325-5.6 increases the fee for manual review of an archived Board file from $1.795 to $2.50, and requires the health insurer to pay the copying costs for such file. Section 325-5.6 eliminates the $25 fee for a manual search for Board records. Copying costs are as prescribed in the Public Officer's Law, section 87(1)(b)(iii).

In addition to requiring the insurer to report the total amount recovered under the HIMP program each year, section 325-5.7, formerly Section 5.11, requires reporting of the total amount of reimbursement requested, the number of arbitrations requested and the number of arbitrations resolved in favor of the insurer, and the names of medical providers who received duplicate payments from the insurer and the carrier.

Section 325-5.8, formerly Section 325-5.5(a), imposes a penalty of $10,000 for misuse of confidential information as provided in subdivision (h) of section thirteen of the Workers' Compensation Law.

The cross-references in Section 325-5.9 have been updated.

Section 325-6.1 is now in alphabetical order and a definition for HIMP agent has been added.

In Section 325-6.2 clarifies that when a health insurer receives a full match on a claim, the health insurer does not need to resubmit subsequent treatments for that claimant to the Board seeking a new full match on the identical case.

Section 325-6.3 has been revised to clarify and simplify the process and time limitations for filing a HIMP-1 claim form filed by a health insurer with a compensation carrier. In addition, the health insurer must now include standard medical codes, such as ICD, CPT and DRG codes, on the HIMP-1 claim form to enhance the carrier's ability to compare the request for reimbursement against the information in the matching workers' compensation case. Section 325-6.3 also describes the process for a carrier to obtain clarifying medical records.

Section 325-6.4 has been amended to provide that the carrier may object to requests for reimbursement (1) if the treatment was provided on or after the date that the Board approved a waiver on the part of the claimant to the right to medical treatment in connection with a settlement under WCL Section 32; (2) if the carrier would not be obligated to pay for the treatment pursuant to WCL Section 29 because the claimant recovered proceeds from a third party and the corresponding carrier lien or offset has not been extinguished; 3) if the treatment was not made in accordance with the medical treatment guidelines; and 4) when authorization for the treatment had been previously sought by the medical provider from the compensation carrier and the authorization was denied.

Section 325-6.5 has minor updates in the terms used.

Section 325-6.6 describes the timelines pertaining to requests for arbitration. While the substantive provisions have not been modified, the text has been clarified.

Section 325-6.7, formerly Section 325-6.11, describes the process for initiating arbitration.

Section 325-6.8, formerly Section 325-6.12, describes the process for withdrawing arbitration requests.

In Section 325-6.9, formerly Section 325-6.11, in subparagraph (b) the time to request oral hearing for arbitration has been changed from 10 business days to 14 days and the Board no longer plays a role in selecting the location for such arbitration. Subparagraph (c) reiterates that the dispute forum shall set the date, time and location of an oral hearing and permits such hearings to take place via video-conference.

Section 325-6.10, formerly Section 325-6.15, increases the fee for a desk arbitration from $150 to $175. Subparagraph (c) provides for a $150 fee for requests for reconsideration made pursuant to the Section 325-6.12. The fees for oral hearing are unchanged.

Section 325-6.11, formerly Section 325-6.13, subparagraph (a) adds a sentence permitting a party to seek reconsideration pursuant to Section 325-6.12. In addition to updating the cross-references in subparagraph (c) the time for service has been changed from 10 business days to 14 calendar days. Subparagraph (d) has been updated to remove the reference to a "stenographic" record. The fees charged when an adjournment is requested are unchanged.

Section 325-6.12, formerly Section 325-6.14, incorporates the new means of service defined in Section 325-6.15. Subparagraph (b) permits recovery of the fee for manual searches by the health insurer in arbitration when the health insurer prevails. Subparagraph (c) permits the arbitrator to impose a fee of a $1000 for a frivolous or bad faith request for arbitration or request for reconsideration of an arbitration decision. Subparagraph (d) describes a process for filing an application for reconsideration of the arbitrator's decision when it is believed that there is a mistake of law or fact in the arbitrator's decision.

Section 325-6.13, formerly Section 325-6.16, describes the process for enforcement and appeals of arbitrator's decisions.

Section 325-6.14, formerly Section 325-6.17, sets forth that the parties are subject to the dispute forum's rules.

Section 325-6.15 sets forth acceptable methods of service for pre-arbitration service and service of documents related to arbitration. Section 325-6.15 clarifies and expands the methods of service that are available to the parties for requests for reimbursement, payment, and objections, and for requests for arbitration. The language of the regulation contemplates and allows for other means of service of documents that may become available due to further technological advances.

Section 325-6.16 is added to permit health insurers and carriers to modify HIMP processes upon agreement.

Section 325-6.17 establishes a term of three years for arbitrators appointed by the Chair of the Workers' Compensation Board.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 325-5.2, 325-5.5, 325-5.8, 325-6.1, 325-6.2, 325-6.3 and 325-6.4.

Text of rule and any required statements and analyses may be obtained from: Heather MacMaster, Workers' Compensation Board, 328 State Street, Office of General Counsel, Schenectady, NY 12305-2318, (518) 486-9564, email: regulations@wcb.ny.gov

Revised Regulatory Impact Statement

A revised Regulatory Impact Statement is not required because the changes made to the last published rule do not necessitate revision to the previously published document. Most changes to the text are not substantial, do not change the meaning of any provision and therefore do not change any statements in the document. Specifically, most changes made were grammatical corrections and changes made to ensure consistency with other regulations. Further, one revision was made to clarify that the objection contained in 12 NYCRR § 325-6.4(b)(11) is only applicable to medical providers who are authorized by the Board to provide treatment to injured workers and who must adhere to the Medical Treatment Guidelines.

Revised Regulatory Flexibility Analysis

A revised Regulatory Flexibility Analysis for Small Business and Local Governments is not required because the changes made to the last published rule do not necessitate revision to the previously published document. Most changes to the text are not substantial, do not change the meaning of any provision and therefore do not change any statements in the document. Specifically, most changes made were grammatical corrections and changes made to ensure consistency with other regulations. Further, one revision was made to clarify that the objection contained in 12 NYCRR § 325-6.4(b)(11) is only applicable to medical providers who are authorized by the Board to provide treatment to injured workers and who must adhere to the Medical Treatment Guidelines.

Revised Rural Area Flexibility Analysis

A revised Rural Area Flexibility Analysis is not required because the changes made to the last published rule do not necessitate revision to the previously published document. Most changes to the text are not substantial, do not change the meaning of any provision and therefore do not change any statements in the document. Specifically, most changes made were grammatical corrections and changes made to ensure consistency with other regulations. Further, one revision was made to clarify that the objection contained in 12 NYCRR § 325-6.4(b)(11) is only applicable to medical providers who are authorized by the Board to provide treatment to injured workers and who must adhere to the Medical Treatment Guidelines.

Revised Job Impact Statement

A revised Statement in Lieu of Job Impact Statement is not required because the changes made to the last published rule do not necessitate revision to the previously published document. The changes to the text are not substantial, do not change the meaning of any provision and therefore do not change the statement that the rule making will not have an adverse impact on jobs. Specifically, most changes made were grammatical corrections and changes made to ensure consistency with other regulations. Further, one revision was made to clarify that the objection contained in 12 NYCRR § 325-6.4(b)(11) is only applicable to medical providers who are authorized by the Board to provide treatment to injured workers and who must adhere to the Medical Treatment Guidelines.

Assessment of Public Comment

The 45 day public comment period with respect to Proposed Rule I.D. No. WCB-14-15-00009-P, commenced on April 8, 2015 and expired on May 23, 2015. The Chair and the Workers' Compensation Board accepted formal written public comments on the proposed rule through May 23, 2015.

The Chair and the Board received four written comments. These comments were assessed and are discussed below. The comments are separated into comments about proposed regulatory changes and comments about language that existed in the prior regulation and has not been changed.

Comments on New Proposed Regulatory Language

One vendor objected to the annual reporting requirements because the new regulations require tracking the total number of HIMP-1 forms submitted, and there currently is no such tracking technology available. The Board believes tracking the use of the HIMP system is a valuable and integral tool and as such, no change will be made.

One group representing health insurers commented that the definition contained in § 325-5.2(b) was too vague. The Board does not believe this definition is vague as it identifies the forms as those prescribed by the Chair, presently consisting of the FROI/SROI. Accordingly, no change will be made.

The same group requested that health insurers be allowed to access the Board's eCase system in cases where there was an acceptance of the claim by the compensation carrier, and there was a full match, but no ANCR. The Board recognizes the issue, and the Board will make access to eCase available in such cases when and if technologically feasible.

The same group questioned whether the "must be served" as stated in 325-6.2(b) was intended to be "must be filed" because requiring service within three years would cause timeliness issues and contradict § 325-6.3(b)(2). The Board acknowledges this language may cause confusion and will change "must be served" to "must be filed."

The group suggested modification of the proposed language contained in § 325-6.3 to recognize that workers' compensation carriers already have 90 days to seek medical records, and the group suggested requiring carriers to provide proof that any request for medical records was initiated within 14 days of the date of the filing of the HIMP request by the health insurer. The Board met extensively with stakeholders and carefully considered these issues before drafting the proposed regulations. As such, no changes will be made.

The majority of the comments concerned changes to HIMP in relation to the Medical Treatment Guidelines (MTG). In general, commenters argued a cost shift from workers' compensation carriers to health insurance carriers would result if the proposed changes are enacted. Further, the commenters contended that the narrowing of the guidelines and the stricter timeframes of the matching program would make it more difficult for health insurers to recover costs for medical claims that were workplace injuries.

More specifically, commenters argued that the new objection contained in 12 NYCRR § 325-6.4(b)(11), "the treatment was not consistent with the applicable medical treatment guidelines adopted by the Board in Part 324.2(a)" makes the MTG applicable to health insurers or transmitting agents, which is contrary to the existing workers' compensation law.

The commenters argued that health insurers' standards are separate and distinct from the MTG standards. Health insurers pay for claims using the standard whether the claims demonstrate medically necessary care and care that is not excessive. The new regulations would impose a different standard on the health insurers, and the health insurers would not know the standard was applicable at the time of payment. The commenters further argued the workers' compensation medical fee schedule protects against excessive payments.

After considering the extensive comments about the proposed objection contained in 12 NYCRR § 325-6.4(b)(11), "the treatment was not consistent with the applicable medical treatment guidelines adopted by the Board in Part 324.2(a)," the Board will change the objection to read: "the treatment provided by a Board authorized provider was not consistent with the applicable medical treatment guidelines adopted by the Board in Part 324.2(a)" to make the provision only applicable to medical providers who are authorized and regulated by the Board and who must adhere to the MTG.

Comments about Regulatory Provisions where there is no Change in Proposal

The Board reviews the following comments about regulatory language that was not changed in the repeal and proposal emphasizing that these regulations were originally enacted in 1993 and last amended in 2008. The Board stresses that the parties have worked with the regulations contained herein and health insurers have been able to recover significant reimbursements from carriers pursuant to these provisions.

Commenters requested modification to the proposed language contained in § 325-6.4(a) to ensure that carriers do not attempt to circumvent the HIMP process by filing a C-8.1 objection to the treatments outlined in the HIMP request. Furthermore, the Board has worked with its administrative law judges to ensure that improperly filed C-8.1s are denied. In every instance that a health insurer or vendor has identified an improperly filed C-8.1, the Board has intervened to ensure that such C-8.1 is denied.

The group expressed concern about the existing and proposed regulations because pursuant to 325-6.4(b)(8), health insurers are prohibited from directly seeking payments from health care providers who have also been paid by carriers. The Board notes that pursuant to WCL § 13(h), health insurers or other payors may use the information gained from the HIMP process to seek reimbursement only from carriers or employers, but may not use the information to seek reimbursement directly from health care providers. Therefore, the changes requested by the group are outside the scope and jurisdiction of the regulations. The Board also reiterates its clear directive to all HIMP participants to notify the Board upon finding that a medical provider is consistently billing the health insurer instead of the compensation carrier.

The group objected to omitting language presently contained in § 325-6.4(b)(4), which is an objection stating, "The treatment, services or hospitalization for which the health insurer made payments were not furnished on an emergency basis…" The group argues that health insurers must be able to argue the services, treatment or hospitalization was incidental. The group objects to language contained in § 325-6.4(b)(3) for the same reason that consequential treatment may be related in the workers' compensation injury, and the health insurers must be able to show that the treatment was related to the workers' compensation injury. The Board met extensively with stakeholders and carefully considered these issues before drafting the proposed regulations. As such, no changes will be made.

The group proposed additional language for the objection contained in § 325-6.4(b)(7), "the carrier cannot determine from the documentation served whether it is responsible for payment." The group requests adding a provision to require carriers to provide a detailed explanation why it cannot determine from the documentation whether it is responsible for the payment. The Board met extensively with stakeholders and carefully considered these issues before drafting the proposed regulations. As such, no changes will be made.

The group argued that changes should be made to § 325-6.12 to allow health insurers to be awarded attorneys' fees in order to curb dilatory tactics by carriers. The Board met extensively with stakeholders and carefully considered these issues before drafting the proposed regulations. As such, no changes will be made.

The group suggested imposing penalties in the event carriers fail to pay within 30 days after an arbitration decision, because currently, the health insurers' only recourse is a costly and time consuming action in Supreme Court under Article 75. The Board met extensively with stakeholders and carefully considered these issues before drafting the proposed regulations. As such, no changes will be made. The Board notes that the American Arbitration Association Rules for NY Workers' Compensation Health Insurers' Match Program (HIMP) govern the process required in the event of non-payment, and according to Rule 25, the party seeking enforcement may enter a judgment pursuant to the Workers' Compensation Law § 26.

Commenters requested clarification for the provision contained in § 325-6.4(d)(1) as it lists issues that may not be identified as objections to requests for reimbursement and the first item states, "the failure of the provider to seek prior authorization for treatment pursuant to section 13-a(5) of the WCL…" The commenters contend that bills paid by health insurers that are found to be the responsibility of the carrier through the HIMP process would not have been presented for prior authorization. The Board met extensively with stakeholders and carefully considered these issues before drafting the proposed regulations. As such, no changes will be made.

CHANGES TO THE REGULATION:

The Regulation that is being adopted contains the following insubstantial changes from the proposed rule published in the April 8, 2015 State Register:

- In § 325-5.2(b), "form" is changed to "format prescribed by the Chair." The sentence reads "Acceptance of the claim shall mean the filing of notice in the format prescribed by the Chair of the carrier's acceptance of a claim of benefits."
- In § 325-5.2(d), "conciliator" is added to the list of decisions. The sentence is changed to "… and in the case of Board determinations shall include those made by a member or panel of the Board, by a Workers' Compensation Law Judge, conciliator or by the Full Board."
- In § 325-5.2(e), "or" is added. The sentence now reads, "Carrier shall mean a self-insured or uninsured employer, or workers' compensation insurance carrier …"
- In § 325-5.5(g)(1) the clause, "if technologically feasible" is added. The sentence is changed to "… and the workers' compensation claim has been established by a Board finding of ANCR or, if technologically feasible, by acceptance of a claim…"

- In § 325-5.8, an "a" is added to the last line. The last line now reads "such individual or entity's status as a HIMP agent."
- In § 325-6.1(a), "form" is changed to "format prescribed by the Chair." The sentence, is changed to, "Acceptance of claim shall mean the filing of notice in the format prescribed by the Chair of the carrier's acceptance of a claim of benefits."
- § 325-6.1(d) is changed to add "conciliator" to the list of decisions. The sentence is changed to read "… and in the case of Board determinations shall include those made by a member or panel of the Board, by a Workers' Compensation Law Judge, conciliator or by the Full Board."
- In § 325-6.1(e), a grammatical error is corrected by adding an "or." The sentence is changed to "Carrier shall mean a self-insured or uninsured employer, or workers' compensation insurance carrier…"
- The heading and first line of § 325-6.2(b) is changed to change "Serving" and "served" to "Filing" and "filed." The heading is now "Filing Requests for Reimbursement" and the first line is "Claims for reimbursement must be filed within three years…"
- In § 325-6.3(c), the word "form" is replaced the last two sentences with "document" and "documentation." The sentences now read "All requests for reimbursement served on the carrier before establishment of ANCR must contain documentation indicating acceptance of the claim. The name of the claimant (or, in the case of death, the decedent) on such document must be the same as that of the person on whose behalf the health insurer made the payments for which reimbursement is being sought."
- In § 325-6.4(b)(11), the sentence "the treatment was not consistent with the applicable medical treatment guidelines adopted by the Board in Part 324.2(a)," is changed to "the treatment provided by a Board authorized provider was not consistent with the applicable medical treatment guidelines adopted by the Board in Part 324.2(a)" in order to make the provision only applicable to medical providers who are authorized by the Board to provide treatment to injured workers and who are subject to the MTG.
- The effective date of the regulation is established to be June 1, 2016.