

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.

Adirondack Park Agency

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Access to Agency Records

I.D. No. APA-39-16-00030-P

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

Proposed Action: Repeal of section 587.1; and addition of new section 587.1 to Title 9 NYCRR. This rule was previously proposed as a consensus rule making under I.D. No. APA-09-16-00005-P.

Statutory authority: Executive Law, section 804(9); Public Officers Law, section 87

Subject: Access to Agency Records.

Purpose: To conform Adirondack Park Agency rules to the Public Officers Law and rules promulgated by the Committee on Open Government.

Public hearing(s) will be held at: 7:00 p.m., Nov. 15, 2016 at Adirondack Park Agency, 1133 Rte. 86, Ray Brook, NY; 11:00 a.m., Nov. 14, 2016 at Department of Environmental Conservation, 625 Broadway, Albany, NY.

Interpreter Service: Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Text of proposed rule: Section 587.1 is repealed and a new section 587.1 is adopted to read as follows:

587.1 Access to agency records.

(a) *Purpose.* The agency shall provide access to records in conformance with the requirements and procedures set forth in Article 6 of the Public Officers Law, entitled "Freedom of Information Law," and its implementing regulations in 21 NYCRR Part 1401. This section provides regulations specific to the agency's responsibilities under those authorities. Additional information about the agency's implementation of the Freedom of Information Law is on the agency's website at www.apa.ny.gov.

(b) *Records access officer.* One or more designated project administrators shall be the agency's records access officer(s) with the responsibilities set forth herein and in 21 NYCRR Part 1401. The business address for the records access officer is: Adirondack Park Agency, P.O. Box 99, Ray Brook, New York 12977, and the email address is: FOIL@apa.ny.gov. In the absence of the records access officer, any agency attorney except the counsel may be designated to serve in that capacity.

(c) *Requests for access to records.* Requests for access to records may be submitted to the agency in writing by email, mail or in person. Record request forms are available at the Adirondack Park Agency, 1133 NYS Route 86, Ray Brook, New York and on the agency's website at www.apa.ny.gov. Oral requests for access to records may also be allowed, although the agency may require a written request. The agency shall respond to requests for access to records in conformance with 21 NYCRR Part 1401. The agency will provide requested records by email or mail, or make them available for inspection at the Adirondack Park Agency, 1133 NYS Route 86, Ray Brook, New York.

(d) *Hours for public inspection.* The agency shall accept requests for access to records and produce records during all regular business hours. Except on State holidays, or during weather or other emergencies, regular business hours are 8:30 a.m. to 5:00 p.m., Monday through Friday.

(e) *Fees.* (1) No fee will be charged for electronic copies of records; (2) Fees of 25 cents per page may be charged for photocopies of more than fifty pages of records not exceeding 9 by 14 inches in size; and (3) Other fees may be charged for the actual cost of reproducing records in accordance with 21 NYCRR Part 1401.

(f) *Requests for exceptions from disclosure of records.* Requests for exceptions from disclosure of records shall be governed by section 89(5) of the Freedom of Information Law. A person submitting records to the agency may identify information therein for which an exception from disclosure is requested pursuant to that section and shall specify the facts, in reasonable detail, supporting the request. The records access officer shall identify the person(s) within the agency who shall have custody and/or access to such information and the manner of safeguarding against unauthorized access to such information until fifteen days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction.

(g) *Appeals.* Appeals shall be governed by the Freedom of Information Law or 21 NYCRR Part 1401, as applicable. Any person denied access to records, or denied a requested exception from disclosure of records, in whole or in part, may appeal in writing to the agency's counsel. The business address of the agency's counsel is Adirondack Park Agency, P.O. Box 99, Ray Brook, New York 12977.

Text of proposed rule and any required statements and analyses may be obtained from: Paul Van Cott, Associate Attorney, Adirondack Park Agency, PO Box 99, Ray Brook, New York 12977, (518) 891-4050, email: APARuleMaking@apa.ny.gov

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

Public comment will be received until: Five days after the last scheduled public hearing.

Consensus Withdrawal Objection

The proposed rule responds to comments provided to Agency staff by three members of the New York State Assembly during the public comment period for proposed consensus rule I.D. No. APA-09-16-00005-P. Due to these comments, the proposed consensus rule is withdrawn in favor of a formal rulemaking process.

Staff had developed the original draft rule with input from the Committee on Open Government (COG). That agency complimented the brevity of staff's draft rule and indicated that it met the substantive requirements of the Freedom of Information Law (FOIL).

The Agency proposed the draft as a consensus rule after obtaining constructive feedback and support on the rule from Adirondack local government and environmental representatives.

In their comment letter on the consensus rule, the Assembly members requested clarification of the different appeal processes applicable to denials of (1) requests for access to records and (2) requests for exceptions to disclosure. They also requested that a subdivision be added to the rule concerning fees applicable to FOIL requests. Finally, the Assembly members noted that the Agency's existing rules are more open to oral requests for documents than the proposed consensus rule, and suggested that the Agency should offer additional opportunity for public comment on that aspect of the rule.

The proposed rule responds to the comments provided by the Assembly members. It still advances the goal of updating the Agency's FOIL rules to eliminate requirements that duplicate those already set forth in FOIL and COG's rules in 21 NYCRR Part 1401.

The proposed rule will make it easier for the Agency to keep its FOIL rules current in the future, while maintaining the Agency's strong policy of openness and accessibility to the public.

Regulatory Impact Statement

1. Statutory authority:

The Adirondack Park Agency Act (APA Act), Executive Law Article 27, Section 804(9), authorizes the Agency "to adopt, amend and repeal...such rules and regulations...as it deems necessary to administer this article and to do any and all things necessary or convenient to carry out the purposes and policies of this article..." Pursuant to Article 6 of the Public Officers Law (Freedom of Information Law ("FOIL")), APA is required to adopt regulations, in addition to statewide rules implementing FOIL promulgated by the Committee on Open Government ("COG"), necessary for APA's implementation of FOIL.

2. Legislative objectives:

The goal of this rule making is to eliminate Agency FOIL rules that duplicate requirements and procedures of Article 6 of the Public Officers Law and COG's FOIL rules in 21 NYCRR Part 1401.

3. Needs and benefits:

FOIL is set forth in Article 6 of the Public Officers Law ("POL"). The statute empowers the Committee on Open Government to adopt rules for the administration of FOIL, which it has done in 21 NYCRR Part 1401. Other agencies and local governments, including APA, are required by FOIL to adopt rules that conform to FOIL and the rules set forth in 21 NYCRR Part 1401.

As currently written, most of 9 NYCRR § 587.1 duplicates FOIL and/or COG's rules, or no longer conforms with FOIL due to changes to the law that have occurred since 587.1 became effective in 1979. The proposed rules would ensure conformance with FOIL and COG's rules without duplication of those requirements and procedures, by limiting Agency FOIL regulations to those specifically necessary for the Agency's implementation of FOIL.

4. Costs:

There would be no costs associated with the proposed rules.

5. Paperwork:

There would be no increased paperwork associated with the proposed rules.

6. Local government mandates:

The proposed rules would not impose any responsibility on local governments.

7. Duplication:

The proposed rules would eliminate duplicative regulations.

8. Alternatives:

Alternatives to the proposed rules include updating existing APA FOIL rules to be consistent with all of the changes that have occurred to FOIL since 1979 or repealing and replacing the existing rules with uniform FOIL rules developed by COG. Both of these alternatives would duplicate rules in FOIL and/or 21 NYCRR Part 1401, requiring APA to continue to amend its regulations in the future to keep pace with amendments to FOIL and/or COG's rules implementing FOIL.

9. Federal standards:

The proposed regulations would not involve any federal statutory authority or standards.

10. Compliance schedule:

The proposed regulations would apply prospectively, effective immediately upon approval and filing.

Regulatory Flexibility Analysis

The proposed rules would not impose additional reporting, record keeping or other compliance requirements on small businesses and local governments.

The proposed rules would eliminate Adirondack Park Agency FOIL rules that duplicate requirements and procedures of Article 6 of the Public Officers Law and the Committee on Open Government's (COG) FOIL rules in 21 NYCRR Part 1401.

The proposed rules will only serve to improve the consistency of APA's FOIL rules with FOIL and 21 NYCRR Part 1401 for the benefit of small businesses and local governments.

Accordingly, a Regulatory Flexibility Analysis is not required for the proposed rules.

Rural Area Flexibility Analysis

The proposed rules, applicable throughout the Adirondack Park, would have the same effect whether the area is considered rural or not. The proposed rules impose no additional reporting, record keeping or other compliance requirements on small businesses, or on public or private entities in rural areas. Instead, they would eliminate existing rules in favor of existing statewide rules implementing Article 6 of the Public Officers Law ("FOIL") set forth at 21 NYCRR Part 1401. The Agency's rules would only include additional regulations specific to its implementation of FOIL. This would ensure Adirondack Park Agency rules governing access to records conform to state law and rules regarding FOIL.

Accordingly, a Rural Area Flexibility Analysis is not required for the proposed rules.

Job Impact Statement

A job impact statement (JIS) is not submitted for these proposed rules because they are not expected to create any substantial adverse impact upon jobs and employment opportunities in the Adirondack Park.

The goal of this rule making is to eliminate Agency FOIL rules that duplicate requirements and procedures of Article 6 of the Public Officers Law and the Committee on Open Government's (COG) FOIL rules in 21 NYCRR Part 1401. The proposed rules would ensure conformance with FOIL and COG's rules without duplication of those requirements and procedures, by limiting Agency FOIL regulations to those specifically necessary for the Agency's implementation of FOIL.

Section 201-a of SAPA defines job impact as a "change in the number of jobs and employment opportunities" attributable to the adoption of the rule. A "substantial adverse impact on jobs" is defined as "a decrease of more than 100 full-time annual jobs and employment opportunities."

There will be no change in employment opportunities due to the proposed rules. The proposed rules will only serve to improve the consistency of APA's FOIL rules with FOIL and 21 NYCRR Part 1401.

Accordingly, a JIS is not required for the proposed rules.

Office of Children and Family Services

NOTICE OF EMERGENCY ADOPTION

AND REVISED RULE MAKING NO HEARING(S) SCHEDULED

Requirements Regarding the Cooperation of School Districts with Investigations of Suspected Child Abuse or Maltreatment

I.D. No. CFS-23-16-00004-ERP

Filing No. 844

Filing Date: 2016-09-08

Effective Date: 2016-09-08

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

Action Taken: Amendment of section 432.3 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 421(3), 423(6) and 425(1)

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

Specific reasons underlying the finding of necessity: These regulations are necessary to protect the health, safety and welfare of children involved in a report of suspected child abuse or maltreatment. An oral order issued by the United States District Court for the Southern District of New York on August 19, 2015 pertaining to Phillips et al. v. County of Orange, et al. ("Phillips") granted a motion by the plaintiffs for summary judgment and

held that, in this case, the county engaged in an unconstitutional seizure of a child when the child was questioned in a public school without parental consent as part of a child protective services investigation. Although the oral determination was not part of a published decision, holds no precedential value, and went well beyond established case law, the determination created great confusion and anxiety for school districts and child protective services agencies alike.

In response to the order, some school districts have begun denying access to the child protective service (CPS) or requiring additional CPS actions prior to allowing CPS access to children in a school setting without parental consent. These obstructions are disparate in form and manner among school districts and have added dangerous and unnecessary delay and confusion to the investigatory process. These delays are creating danger to the health, safety and welfare of children.

The position of OCFs and SED was and remains that children who are alleged to have been abused or maltreated can be interviewed by CPS at school without parental permission or a court order in appropriate circumstances. The first duty of CPS in conducting a child protective services investigation is to see to the safety of the child. (Section 424(6)(a) of the Social Services Law and 18 NYCRR 432.2(b)(3)). Especially in a situation where a parent is alleged to have abused or maltreated a child and there is concern over the immediate health or safety of the child, the need to protect the health and safety of the child requires CPS to interview the child outside the presence of the parent who has allegedly abused or maltreated the child.

Regulations are necessary to clarify the requirements and standards around CPS access to children in schools. Emergency regulations are necessary to provide immediate protections for vulnerable children when CPS encounters circumstances during an investigation into suspected child abuse or maltreatment that warrant interviewing the child apart from family members or the home where child abuse or maltreatment allegedly occurred and without parental consent.

Subject: Requirements regarding the cooperation of school districts with investigations of suspected child abuse or maltreatment.

Purpose: To clarify requirements for the cooperation of school districts with investigations of suspected child abuse or maltreatment.

Text of emergency/revised rule: Existing subdivision (i) of section 432.3 of Title 18 of the NYCRR is amended to read as follows:

(i)(1) Commencing or causing the appropriate society for the prevention of cruelty to children to commence within 24 hours an appropriate investigation or family assessment response on all reports of suspected child abuse and maltreatment in accordance with the provisions of sections 432.2(b)(3) and section 432.13 of this Part.

(2) *Request and receive, as provided for in subdivision 1 of Section 425 of the Social Services Law, when applicable, from departments, boards, bureaus, or other agencies of the state, or any of its political subdivisions including school districts (as that term is defined in subdivision 2 of Section 1980 of the Education Law), and charter schools operated pursuant to Article 56 of the Education Law, or any duly authorized agency, or any other agency providing services under the local child protective services plan, such assistance and data as will enable the local child protective service to fulfill its responsibilities properly, including providing such assistance and data to members of a multi-disciplinary team established pursuant to subdivision 6 of Section 423 of the Social Services Law when such members accompany a representative of the child protective service. Such assistance and data includes, but is not limited to:*

(i) *access to records relevant to the investigation of suspected abuse or maltreatment; and*

(ii) *access to any child named as a victim in a report of suspected abuse or maltreatment or any sibling or other child residing in the same home as the named victim. Such access includes conducting an interview of such child without a court order or the consent of the parent, guardian or other person legally responsible for the child when the child protective service encounters circumstances that warrant interviewing the child apart from family or other household members or the home or household where child abuse or maltreatment allegedly occurred. The representative of the child protective service and other members of a multi-disciplinary team accompanying a representative of the child protective service may be asked to provide their photographic employment identification or, if they lack photographic employment identification, an alternate form of government issued photographic identification, and to identify the child or children to be interviewed, but may not be asked for or required to provide any other information or documentation as a condition of having access to a child or children. Nothing contained herein shall preclude a school, school district or other program or facility operated by a department, board, bureau, or other agency of the state or any of its political subdivisions, or by a duly authorized agency or other agency providing services under the local child protective services plan from authorizing a staff member of the school or other such program or facility to observe the*

interview of the child, either from the same or another room, at the discretion of the school, school district or other such program or facility. Nothing contained herein shall preclude a school, school district or other such program or facility from requiring that representatives of the child protective service or other members of a multi-disciplinary team accompanying a representative of the child protective service comply with the reasonable visitor policies or procedures of the school, school district or other such program or facility, unless such policies or procedures are contrary to the requirements of this paragraph.

This notice is intended to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on June 8, 2016, I.D. No. CFS-23-16-00004-EP. The emergency rule will expire December 6, 2016.

Emergency rule compared with proposed rule: Substantial revisions were made in section 432.3(i)(2).

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

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

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

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

Changes made to the last published rule do not necessitate revision to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

Assessment of Public Comment

Three public comments were received on the emergency regulations in response to the Notice of Emergency Adoption and Proposed Rulemaking.

Two comments were received from staff of local social services districts who are employed in child protective services (CPS). Both commented that there are schools that have refused to accept the official CPS identification issued by the local social services district when CPS caseworkers seek admission to schools to interview children, and have demanded that the CPS caseworkers produce driver's licenses to prove their identity. The schools then maintain copies of the driver's licenses, which have the CPS caseworkers' home addresses on them. Both commenters were concerned that if school personnel who had access to the copies of the driver's licenses were ever named in a report of suspected child abuse or maltreatment, the school personnel would then have access to the home addresses of the CPS caseworkers, thus creating a potential safety issue.

The regulations provide that a school or other institution may require proof of identification but do not address what would constitute sufficient identification. OCFs agrees that the employment photo identification issued to a CPS caseworker is sufficient to identify the caseworker to a school or other institution where a CPS caseworker might need to go to interview a child. Requiring that a CPS caseworker produce a driver's license or other identification that might have the caseworker's home address could be a means of attempting to discourage CPS caseworkers from conducting interviews at schools. The regulations have been revised to clarify that the school or other institution may ask that a CPS worker or other member of a multi-disciplinary team provide their employment photographic identification or, if they do not have an employment photographic identification, another form of government-issued identification.

One comment was received from a member of the public claiming that the proposed regulations are constitutionally impermissible. OCFs does not agree, and no changes were made to the regulations in response to this comment.

NOTICE OF ADOPTION

Child Day Care Safety Enforcement and Administrative Hearings Regulations

I.D. No. CFS-30-16-00001-A

Filing No. 864

Filing Date: 2016-09-13

Effective Date: 2016-09-28

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

Action taken: Amendment of sections 413.3 and 413.5 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 390(2)(d) and (2-a)

Subject: Child Day Care Safety Enforcement and Administrative Hearings Regulations.

Purpose: Amends child day care safety regulations and administrative hearing regulations pertaining to child day care safety enforcement.

Text of final rule: Paragraph one of subdivision (a) of 18 NYCRR section 413.3 is amended to read as follows:

(1) issuance of written inspection reports which include corrective action plans, *requests to submit a corrective action plan to the Office*, and notices of intention to initiate enforcement through the imposition of a fine or the limitation, suspension, termination, revocation, or denial of a license or registration;

Paragraphs nine and ten of subdivision (a) of 18 NYCRR section 413.3 are amended and new paragraphs eleven and twelve are added to read as follows:

(9) requests to the Attorney General to take such action as is necessary to collect civil penalties, seek criminal prosecution, or to bring about compliance with any outstanding hearing decision or order; [or]

(10) publication in local newspapers of the names and addresses of child day care licensees or registrants whose licenses, registrations or applications for licensure or registration have been rejected, denied, limited, suspended, terminated or revoked, or against whom a fine has been assessed after an administrative hearing[.];

(11) *referrals to law enforcement, including but not limited to District Attorneys, of any child day care provider that has been directed to cease and desist operations by the Office pursuant to existing law that has not ceased operations; or*

(12) *requests to the District Attorney to take such action as is necessary to seek criminal prosecution.*

Subdivision (d) of 18 NYCRR section 413.3 is amended to add a new paragraph six to read as follows:

(6) *When an enforcement action for suspension, limitation or revocation is commenced against a child care provider that owns multiple programs, the Office is authorized to assess the health and safety of the children in the other program(s) owned and/or operated by such provider and take appropriate action to protect the health and safety of children when warranted.*

Subparagraphs (ii) and (iii) of paragraph three of subdivision (f) of 18 NYCRR section 413.3 are amended to read as follows:

(ii) Class II violations are subject to a maximum fine of \$[250] 450 a day for first time offense and up to \$500 a day for subsequent offenses. A Class II violation is defined as any violation of a regulatory requirement which places a child at risk of physical, mental or emotional harm, including but not limited to:

(a) the use of corporal punishment or of frightening or humiliating methods of control or discipline;

(b) inadequate or incompetent supervision;

(c) inadequate light, ventilation, sanitation, food, water or heating; or

(d) providing care for more than the maximum number of children permitted by the facility's license or registration.

(iii) Class III violations are subject to a maximum fine of \$[100] 400 a day for a first time offense and no more than \$500 a day for a subsequent offense. A Class III violation is defined as any violation of a regulatory requirement other than those included under Class I or II violations.

Paragraph three of subdivision (g) of 18 NYCRR section 413.3 is amended and a new paragraph four is added to read as follows:

(3)(i) The Office [may] *shall* require the child day care program to immediately post upon receipt in a prominent place at the program that is visible to parents a copy of [any written] *the most recent* inspection [reports] *report* issued to the program by the Office.

(ii) *In the event that a child day care program is suspended or limited, the Office shall require the child day care program to immediately post the notice of suspension or limitation immediately upon receipt. Such notice shall be posted in a prominent place at the program that is visible to parents. A notice of suspension or limitation required by the Office to be posted by a child day care program must remain posted for a period of at least thirty days or at least until such time as the condition requiring suspension or limitation has been deemed by the Office to have been corrected or in the event that the condition is not deemed corrected by the Office, until the program's license, registration or permit has been revoked.*

(iii) *Any notice required to be posted pursuant to subparagraphs (i) or (ii) of this paragraph must also be posted on the child day care program's website, if possible.*

(4)(i) *Where investigation or inspection reveals that a program that must be licensed or registered as a child day care program is not duly licensed or registered, the Office shall provide notice in writing to the program indicating that the program is in violation of the licensing or registration requirements and the Office shall take such further action as*

is necessary to cause the program to comply with the law, including directing an unlicensed or unregistered program to cease operation immediately.

(ii) *The notice to the program required by subparagraph (i) of this paragraph shall advise parents that the program is closed for failure to comply with the applicable licensing or registration requirements, as applicable, and shall advise the program that the notice is required to be immediately posted in a prominent place at the program that is visible to parents and on the provider's website, if possible.*

Subdivision (a) of 18 NYCRR section 413.5 is amended to read as follows:

(a) Before any child care license or registration is suspended or revoked, or when an application for such license or registration is denied, or before civil penalties can be imposed the applicant, licensee or registrant for such registration or license is entitled to a hearing before the Office, pursuant to Social Services Law section twenty-two and these regulations. However, a license or registration shall be temporarily suspended or limited without a hearing upon written notice to the licensee or registrant following a finding that the public health, or an individual's safety or welfare, are in imminent danger[.] *based on a finding, in accordance with the regulations of the Office, that:*

(1) *serious physical injury or death of a child has occurred;*

(2) *a condition occurred or exists that places a child at risk of serious physical, mental or emotional harm, or risk of death, serious or protracted disfigurement or protracted impairment of physical or emotional health which may include, but not be limited to:*

(i) *inadequate supervision;*

(ii) *overcapacity;*

(iii) *inappropriate staff-to-child ratios;*

(iv) *corporal punishment of a child;*

(v) *failure to obtain appropriate medical treatment for a child, which may include the failure to call 911;*

(vi) *blocked exits or means of egress; or*

(vii) *failure to maintain adequate sanitation, heating, cooling or ventilation conditions within the program; or*

(3) *the program has prevented the Office from effectively assessing whether the public health, or an individual's safety or welfare, are in imminent danger as a result of a condition that occurred or exists in the program, by taking actions, which may include, but not be limited to:*

(i) *refusal to provide inspection staff with access to the child day care program, premise or children, as is otherwise required or authorized by law during the program's hours of operation; or*

(ii) *use of force or verbal or written threats of force made against inspection staff or staff of the Office.*

Paragraph three of subdivision (d) of 18 NYCRR section 413.5 is amended to read as follows:

(3) If the person does not cease operations, the Office may impose a civil penalty pursuant to subdivision eleven of Section 390 of the Social Services Law, seek an injunction pursuant to Section 391 of the Social Services Law, *refer the person to law enforcement, including District Attorneys, pursuant to 413.3(a)(11) and Penal Law Section 260.31, or [both] all three.*

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 413.3(g)(3) and 413.5(a)(2).

Text of rule and any required statements and analyses may be obtained from: Public Information Office, New York State Office of Children and Family Services, 52 Washington Street, Rensselaer, New York 12144, (518) 486-9563, email: info@ocfs.ny.gov

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

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

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2019, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

The Office of Children and Family Services (OCFS) received three comments from one responder, South Brooklyn Legal Services, on the Notice of Proposed Rule Making for the New York State Child Day Care Regulations, Parts 413.3 and 413.5 of Title 18 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR), included in the New York State Register dated July 27, 2016.

Referrals to Law Enforcement

Comments:

The responder's first comment relates to § 413.3(a)(11) which permits

OCFS to refer to law enforcement, including but not limited District Attorneys, any child day care provider that has been directed to cease and desist operations by the Office pursuant to existing law and that has not ceased operations. Responder comments, in sum, that the proposed regulation does not specify a timeframe for providers to comply with a cease and desist order before a referral is made to law enforcement; that the safety of children in care is in jeopardy by law enforcement intervention; and that it should be within the District Attorney’s discretion whether to notify law enforcement.

Response:

Pursuant to Social Services Law § 390(3)(d) and 18 NYCRR § 413.5(d), providers shall not operate a day care program after being directed to cease and desist operations. Furthermore, the term “law enforcement” may include entities such as the local or state police or the Attorney General. The proposed regulation provides OCFS with flexibility to contact the most appropriate law enforcement office or official under the circumstances. Finally, the safety of children in care is always a paramount consideration for OCFS, and the option to refer to law enforcement, including District Attorneys, is in keeping with that consideration.

No changes to the proposed regulation were made as a result of these comments.

Fines

Comments:

The responder’s second comment relates to § 413.3(f) which provides for increases in the maximum fines for Class II and Class III violations. Responder comments, in sum, that under the proposed regulation the fines are increased for licensed and registered providers, but not for unlicensed and unregistered providers and that the fines are too high which jeopardizes the ability of providers to stay in business.

Response:

Social Services Law § 390(11) places a statutory cap of \$500 per day on the amount of fines that may be assessed against licensed and registered and unlicensed and unregistered providers. 18 NYCRR § 413.3(e) already authorizes OCFS to charge the maximum amount of \$500 per day against a program that is operating without the requisite license or registration. The increase in allowable fines that may be assessed against licensed and registered programs under the proposed regulation appropriately permits OCFS to impose graduated sanctions, within the statutory cap, for providers that are repeatedly found to have committed the same offense.

No changes to the proposed regulation were made as a result of these comments.

Circumstances that the Warrant Temporary Suspension or Limitation

Comments:

The responder’s final comment relates to § 413.5(a) which clarifies those circumstances that warrant the temporary suspension or limitation without a hearing of a provider’s license or registration. Responder comments, in sum, that the language is overly broad, subject to numerous possible interpretations and fails to clarify the parameters for temporarily suspending or limiting a program without a hearing and that case-by-case judgment should continue to be employed prior to suspension without hearing.

Response:

The proposed regulation provides more clarity for inspectors and providers regarding circumstances that may constitute imminent danger, thereby providing for more consistent enforcement outcomes and better notice. As evidenced by the regulation’s language, most of the circumstances delineated may be considered and do not represent an exhaustive list. Moreover, the proposed regulation does not eliminate OCFS’ discretion, or case-by-case analysis, in determining whether a provider’s license or registration should be temporarily suspended or limited. Furthermore, the regulation would not change the statutory requirement contained within Social Services § 390(10) for a finding that the public health or an individual’s safety or welfare be in imminent danger for a child care program to be temporarily suspended or limited.

No changes to the proposed regulation were made as a result of these comments.

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

Provisions Relating to the Revocation, Suspension, Limitation or Denial of an Operating Certificate for an Adult Care Facility

I.D. No. CFS-39-16-00002-P

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

Proposed Action: Amendment of section 485.5 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 460 and 460-b

Subject: Provisions relating to the revocation, suspension, limitation or denial of an operating certificate for an adult care facility.

Purpose: To conform the provisions for actions taken on operating certificates for adult care facilities to State law.

Text of proposed rule: Subdivisions (o) and (p) of section 485.5 of Part 485 are amended to read as follows:

(o)(1) The operating certificate of any facility [shall] may be revoked, suspended[,] or limited, or an application for an operating certificate denied, if an individual operator, or a member of the board of directors, the executive director or chief administrative officer of a not-for-profit operator is or has been within 10 years:

(1)i convicted of a class A, B or C felony;

(2)ii convicted, in another state or in Federal court, of a crime which would, if committed in New York State, be considered a class A, B or C felony; or

(3)iii convicted of a felony or class A misdemeanor related to the provision of care [for]to dependent adults or children.

(2) Such revocation, suspension or limitation of an operating certificate, or denial of an application for an operating certificate, must be preceded by a determination that:

(i) there is a direct relationship between one or more of the criminal convictions and the fitness of the individual to perform related duties or responsibilities; or

(ii) granting the individual a license would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

(p) Each of the following factors must be considered in determining whether the findings stated in subparagraphs (i) and (ii) of paragraph (2) of subdivision (o) above apply:

(1) the public policy of the State to encourage the licensure of persons previously convicted of one or more criminal offenses;

(2) the specific duties and responsibilities necessarily related to the license sought or held by the person;

[Notwithstanding subdivision (n) of this section, revocation, suspension or limitation of an operating certificate or denial of an application shall not be automatic if the individual holds a valid certificate of relief from disabilities issued in accord with the State Correction Law. Any decision to take action to deny, revoke, suspend or limit a certificate in such instances shall be based on consideration of the following factors:]

(1)3 the bearing the criminal offense or offenses for which the individual was previously convicted will have on his or her fitness to perform related duties or responsibilities;

(2)4 the time which has elapsed since the occurrence of the criminal offense or offenses;

(3)5 the age of the individual at the time of the occurrence of the criminal offense or offenses;

(4)6 the seriousness of the criminal offense or offenses;

(5)7 any information produced by the individual to demonstrate rehabilitation and good conduct, including but not limited to a valid Certificate of Relief from Disabilities or Certificate of Good Conduct issued in accordance with the State Correction Law; and

(6)8 the interest of the department in protecting the safety and welfare of residents or potential residents of adult care facilities[,] as well as the general public.

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

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

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

Regulatory Impact Statement

1. Statutory Authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Office of Children and Family Services (OCFS) to establish rules and regulations to carry out its powers and duties pursuant to the provisions of the SSL.

Section 34(3)(f) of the SSL requires the Commissioner of OCFS to establish regulations for the administration of public assistance and care within the State both by the state itself and by the local governmental units, in accordance with the law.

Section 460 of the SSL among other things establishes comprehensive responsibility of OCFS, the Department of Health (DOH) and the Office of Temporary and Disability Assistance (OTDA) for residential care programs for adults.

Section 460-b of the SSL provides that no facility subject to inspection and supervision by OCFS, DOH or OTDA, except those operated by a State department or agency, or licensed or certified to operate by a State department or agency or authorized agency, shall be operated unless it possesses a valid operating certificate issued pursuant to Article 7 of the SSL.

2. Legislative Objectives:

The purpose of Section 460 of the SSL is to provide for the development and administration of programs, standards and methods of operation, and all other matters of state policy, with respect to residential care programs for adults and children, and all facilities and agencies, whether public or private, subject to the provisions of SSL Article 7, of the highest quality, efficiently produced and properly utilized at a reasonable cost. The purpose of Section 460-b of the SSL is to require that such facilities (except those operated by a state department or agency, or a facility which pursuant to law is licensed or certified to operate by a state department or agency or by an authorized agency) possess a valid operating certificate specifying who the operator of the facility shall be, the kind or kinds of care and services such facility is authorized to provide, the capacity of the facility, the location of the facility and, except in the case of a facility operated by an authorized agency, the duration of the period of its validity. The application shall be approved and an operating certificate shall be issued when it is established that the facility meets, and will be operated in accordance with, the requirements of law and regulations, including requirements as to the premises, equipment, personnel, care and services, rules, by-laws and administrative practices.

3. Needs and Benefits:

State Correction Law Article 23-A provides that it is the public policy of the State to encourage the employment and licensure of people with criminal convictions, consistent with public safety. Pursuant to that policy, as specified in State Correction Law Sections 752 and 753, a State agency, commission, board, department or other entity issuing occupational licenses with discretionary authority is required to issue a license, certification, registration or other official approval to work or practice an occupation or operate a business to an otherwise qualified applicant with prior criminal convictions unless (i) there is a direct relationship between one or more of the previous convictions and the duties required of the specific license; or (ii) granting the individual a license would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. The existing 18 NYCRR § 485.5 provides for a mandatory revocation, suspension, limitation or denial of an operating certificate for an adult care facility, based on a criminal conviction of an individual operator, or a member of the board of directors, the executive director or chief administrative officer of a not-for-profit operator, unless such individual holds a valid certificate of relief from disabilities, in which case a decision can be based on certain factors. This revision conforms and clarifies the provisions of § 485.5 consistent with State Correction Law Article 23-A by limiting a revocation, suspension, limitation or denial of an operating certificate for an adult care facility based on a criminal conviction of the cited persons to those instances in which there is a direct relationship between one or more of the previous criminal offenses and duties required of the certificate, or certifying the applicant would involve an unreasonable risk to property or the safety or welfare of a specific individual or the general public. In determining whether each of these apply, agencies are to consider each of the factors set out in State Correction Law § 753, which are listed for expediency's sake in § 485.5(p).

4. Costs:

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

To the extent that an operating certificate for an adult care facility may previously have, based on a criminal conviction of an individual operator, or a member of the board of directors, the executive director or chief administrative officer of a not-for-profit operator, been subject to a mandatory denial, revocation, suspension or limitation, this revision will provide such an applicant an opportunity to provide materials to establish that an operating certificate should not be denied, revoked, suspended or limited. There may be an additional unquantifiable cost to such applicants to gather and provide the materials to the department.

Cost to State and Local Government:

There will be no additional cost to the general public, state and local government, other than to the extent that potential applicants, who may have previously not applied for an operating certificate because of anticipated denial due to a mandatory bar, may now be more likely to submit applications to local social services districts.

Cost to the Department of Health, Office of Children and Family Services and Office of Temporary and Disability Assistance:

There will be no cost to the Department and Offices, other than to the extent that they could previously have taken automatic actions based on a criminal conviction but may now have to devote staff time to consider whether certain factors weigh against the presumption that a criminal conviction does not require denial, revocation, suspension or limitation of an operating certificate.

5. Local Government Mandates:

This revision does not create any additional mandates upon local governments.

6. Paperwork:

This revision does not create any new reporting or paperwork requirements.

7. Duplication:

This measure does not duplicate, overlap or conflict with a State or federal statute or rule.

8. Alternatives:

There are no other viable alternative approaches. This revision will more completely articulate the policy of encouraging employment and licensure of persons with prior criminal convictions, consistent with State Correction Law Article 23-A.

9. Federal Standards:

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

10. Compliance Schedule:

This proposed rule will go into effect upon publication of a Notice of Adoption in the State Register.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Business and Local Governments is not included in accordance with Section 202-b of the State Administrative Procedure Act (SAPA). This regulation does not impose an adverse economic impact, or reporting, recordkeeping or other compliance requirements on small businesses or local governments, other than to the extent that applications may be submitted by some who would not have previously applied because of anticipated automatic disqualification.

Cure Period

A cure period was not included in this rule. This proposal removes mandatory revocation, suspension, limitation or denial of an operating certificate for an adult care facility, thus offering opportunities for an operating certificate that were previously unavailable. A cure period would not be appropriate.

Rural Area Flexibility Analysis

Pursuant to section 202-bb of the State Administrative Procedure Act (SAPA), a rural area flexibility analysis is not required. These provisions apply uniformly throughout New York State, including all rural areas. The proposed rule will not impose any adverse economic impact on rural areas, nor will it impose any additional reporting, record keeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

A Job Impact Statement is not included in accordance with Section 201-a (2) of the State Administrative Procedure Act (SAPA), because as is apparent from its nature and purpose, this revision will not have a substantial adverse impact on jobs and employment opportunities.

Department of Civil Service

NOTICE OF EXPIRATION

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

Jurisdictional Classification

I.D. No.	Proposed	Expiration Date
CVS-36-15-00001-P	September 9, 2015	September 8, 2016

Jurisdictional Classification

I.D. No.	Proposed	Expiration Date
CVS-36-15-00006-P	September 9, 2015	September 8, 2016

Jurisdictional Classification

I.D. No.	Proposed	Expiration Date
CVS-36-15-00007-P	September 9, 2015	September 8, 2016

Department of Corrections and Community Supervision

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Parole Board Decision Making

I.D. No. CCS-39-16-00004-P

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

Proposed Action: Amendment of sections 8002.1, 8002.2 and 8002.3 of Title 9 NYCRR.

Statutory authority: Executive Law, sections 259-c(4), (11) and 259-i

Subject: Parole Board decision making.

Purpose: To clearly establish what the Board must consider when conducting an interview and rendering a decision.

Text of proposed rule: Sections 8002.1-8002.3 are repealed and new sections 8002.1-8002.3 are added to read as follows:

§ 8002.1 Parole release interview.

(a) Each inmate shall be scheduled for a parole release interview at least one month prior to the expiration of the minimum period of imprisonment or parole eligibility date as fixed by the Department of Corrections and Community Supervision, or upon such reconsideration date as previously set by the Board of Parole ("Board").

(b) The parole release interview shall be conducted by a panel of at least two members of the Board.

(c) The panel conducting the parole release interview shall discuss with the inmate each applicable factor set forth in section 8002.2 of this Part, excluding confidential information.

§ 8002.2 Parole release decision-making: factors to be considered.

(a) Risk and Needs Assessments: In making a release determination, the Board shall be guided by the inmate's risk and need scores as generated by the Correctional Offender Management Profiling for Alternative Sanction ("COMPAS") assessment if prepared by the Department of Corrections and Community Supervision. If a Board determination, denying release, departs from the COMPAS scores, an individualized reason for such departure shall be given in the decision. If other risk and need assessments or evaluations are prepared to assist in determining the inmate's treatment, release plan, or risk of reoffending, and such assessments or evaluations are made available for review at the time of the interview, the Board may consider these as well.

(b) Factors to be Considered: The Board shall consider the following factors in making a release determination:

(1) the institutional record, including program goals and accomplishments, a transitional accountability plan developed by the New York State Department of Corrections and Community Supervision as required under Section 71-a of the Correction Law academic achievements, vocational education training or work assignments, therapy and interactions with staff and inmates;

(2) performance, if any, as a participant in a temporary release program;

(3) release plans, including community resources, employment, education and training and support services available to the inmate;

(4) any deportation order issued by the Federal government against the inmate while in the custody of the Department of Corrections and Community Supervision and any recommendation regarding deportation made by the Commissioner of the Department of Corrections and Community Supervision pursuant to section 147 of the Correction Law;

(5) any statement made or submitted to the Board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated;

(6) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the Penal Law for a felony defined in article 220 or article 221 of the Penal Law;

(7) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney and the attorney who represented the inmate in connection with the conviction for which the inmate is currently incarcerated, the pre-sentence probation report, as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to the inmate's current confinement; and

(8) prior criminal record, including the nature and pattern of the inmate's offenses, age at the time of commitment of any prior criminal offense, adjustment to any previous periods of probation, community supervision and institutional confinement;

(c) Considerations for inmates serving a maximum sentence of life imprisonment for a crime committed prior to the inmate attaining 18 years of age ("minor offender"):

1. When making any parole release decision pursuant to section 259-i(2)(c)(A) of the Executive Law for a minor offender, the Board shall, in addition to the factors provided under paragraphs (a) and (b) of this section, consider the following:

i. The diminished culpability of youth; and

ii. Growth and maturity since the time of the commitment offense.

2. Evidence that the hallmark features of youth were causative of, or contributing factors to, a minor offender's commitment offense, should not, in itself, demonstrate lack of insight or minimization of the minor offender's role in the commitment offense. The hallmark features of youth include immaturity, impetuosity, a failure to appreciate risks and consequences, and susceptibility to peer and familial pressures.

§ 8002.3 Post-interview requirements and considerations.

(a) Granting of Release. If the Board grants the inmate release following its interview and deliberations, it shall impose the initial set of conditions that will govern his or her community supervision in accordance with the pertinent provisions of article 12-b of the Executive Law.

(b) Denial of Release. If parole is not granted, the inmate shall be informed in writing, within two weeks of his or her interview, of the decision denying him or her parole and the factors and reasons for such denial. Reasons for the denial of parole release shall be given in detail, and shall, in factually individualized and non-conclusory terms, address how the applicable factors listed in 8002.2 were considered in the individual's case. The Board shall specify in its decision a date for reconsideration of the release decision and such date shall be not more than 24 months from the interview.

Text of proposed rule and any required statements and analyses may be obtained from: Kathleen M. Kiley, Counsel to the Board of Parole, Department of Corrections and Community Supervision, 1220 Washington Avenue, Building 2, Albany, New York 12226, (518) 473-5671, email: Rules@Doccs.ny.gov

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

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

Regulatory Impact Statement

1. Statutory Authority: The authority for the proposed revision to Part 8002 of Title 9 of the New York Codes, Rules and Regulations (NYCRR), is derived from Section 259-c(11) of the New York State Executive Law, which states the State Board of Parole (the Board) shall: "make rules for the conduct of its work, a copy of such rules and of any amendments thereto to be filed by the chairman with the secretary of state." The laws that govern these regulations are Section 259-c(4) and Section 259-i.

2. Legislative Objectives: On March 31, 2011, The Division of Parole and Department of Correctional Services were merged into one State agency pursuant to Chapter 62 of the Laws of 2011, Part C, subpart A. Contained within that legislation were amendments to Article 12-b of the Executive Law. Among those amendments was a change to Executive Law § 259-c(4), which requires the Board to "establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the Board, the likelihood of success of such persons upon release, and assist members of the State Board of Parole in determining which inmates may be released to parole supervision." See Chapter 62 of the Laws of 2011, Part C, subpart A, § 38-b. The amendment to Executive Law § 259-c(4) became effective October 1, 2011. See Chapter 62 of the Laws of 2011, Part C, subpart A, § 49-f.

By memorandum dated October 5, 2011, Chairwoman Andrea W. Evans outlined the change made to Executive Law § 259-c(4). In addition, the Chairwoman's memorandum instructed the members of the Board how they should proceed in light of this legislative change when assessing the appropriateness of an inmate's possible release to parole supervision. On July 30, 2014, the aforementioned regulations that had been amended to distill the Board's written procedures into regulations went into effect.

The purpose of amending these rules is to further define the Board's role in conducting interviews and their decision making process.

Under current regulations, the Board shall consider the factors of New York Executive Law § 259-i, as well as the transitional accountability plan referenced in New York Correction Law § 71-a as well as the most current risk and needs assessment that may have been prepared by the Department of Corrections and Community Supervision when conducting an interview and rendering a subsequent decision.

3. Needs and Benefits: The proposed amendments to the regulations

contained within Part 8002 of Title 9 of the NYCRR further define the Board's interview and decision process. The intent is to have the Board discuss each applicable factor with the inmate as set forth in what would be the new 9 NYCRR 8002.2, including the risk and needs assessments as described in the aforementioned NY Executive Law § 259-c(4). In its decision making process, the Board will be guided by the Correctional Offender Management Profiling for Alternative Sanction ("COMPAS"), the risk and needs assessment currently prepared by the Department of Corrections and Community Supervision. If a Board denial decision departs from the COMPAS, the Board shall render individualized reasons for the departure. The regulations also allow the Board to consider other risk and need assessments or evaluations if such assessments or evaluations have been made available for review at the time of the interview. The Board shall also consider and discuss with the individual each applicable factor as listed in New York Executive Law § 259-i (2)(c)(A) as well as the transitional accountability plan, also known as the case plan, as referred to in New York Correction Law § 71-a. In addition, in order to comply with recent United States Supreme Court jurisprudence, including *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), regarding individuals serving a maximum life sentence for crimes committed when they were under the age of 18 Section 8002.2(c) of the new regulations contain additional factors that the Board must consider when making release determinations for such individuals. Finally, in 8002.3, if the Board decides to deny release to Community Supervision, the Board shall provide individualized factual reasons stated in detail as to why, addressing the applicable factors in 8002.2.

The benefit of this will be that the Board will conduct more thorough interviews and produce more individualized, detailed decisions in instances where release to Community Supervision is denied.

4. Costs: The proposed rulemaking will not impose any additional costs.
5. Local Government Mandates: The proposed amendment does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other district.
6. Paperwork: This amendment should not generate any additional paperwork either for the Board or by the Board.
7. Duplication: There are no relevant State regulations which duplicate, overlap or conflict with the proposed amendment since the regulations are governed by Article 12-B of the New York State Executive Law.
8. Alternatives: Because this refers to Board functions, there are no alternatives other than change the regulations.
9. Federal Standards: There are no federal standards governing the subject matter of the proposed rulemaking.
10. Compliance Schedule: The proposed rulemaking shall be effective upon the filing of a notice of adoption.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Business and Local Government is not being submitted with this notice, for the proposed rule changes will have no adverse impact upon small businesses and local governments, nor do the rule changes impose any reporting, record keeping or other compliance requirements upon small businesses and local governments. Small businesses and local governments have no role in the Parole Board's parole release decision-making function. The proposed rule making with only affect the Parole Board's decision-making practices for inmates confined in State correctional facilities.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice, for the proposed rules will have no adverse impact upon rural areas, nor do the proposed rules impose any reporting, record keeping or other compliance requirements upon rural areas. The proposed rules will only affect the Parole Board's decision-making practices for inmates confined in State correctional facilities.

Job Impact Statement

A Job Impact Statement is not being submitted with this notice, for the proposed rules will have no adverse impact upon jobs or employment opportunities, nor do the proposed rules impose any reporting, record keeping or other compliance requirements upon employers. The proposed rules only affect the decision-making practices of the Parole Board for inmates confined in State correctional facilities.

Education Department

EMERGENCY RULE MAKING

Annual Professional Performance Reviews (APPR) of Classroom Teachers and Building Principals

I.D. No. EDU-26-16-00015-E

Filing No. 846

Filing Date: 2016-09-12

Effective Date: 2016-09-12

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

Action taken: Amendment of section 30-2.3 and Subpart 30-3 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 215(not subdivided), 305(1), (2), 3009(1), 3012-c and 3012-d; L. 2015, ch. 20, subpart C, section 3; L. 2015, ch. 56, part EE, subpart E, sections 1 and 2

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

Specific reasons underlying the finding of necessity: The purpose of the proposed amendment is to provide districts and BOCES with additional options for measures to use in the student performance category and greater flexibility in scoring observations in the observation category. It also seeks to clarify that the Department may require changes to a collective bargaining agreement in a corrective action plan subject to collective bargaining under Article 14 of the Civil Service Law and that teacher/principal improvement plans are required to negotiated, to the extent required under Article 14 of the Civil Service Law.

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 State Administrative Procedure Act (SAPA) section 202(4-a), would be the September 12-13, 2016 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the September meeting, would be September 28, 2016, the date a Notice of Adoption would be published in the State Register.

Emergency action at the July 2016 Regents meeting is therefore necessary for the preservation of the general welfare in order to immediately adopt revisions to the proposed amendment to provide immediate notice to districts of the additional allowable measures in the student performance category, the increased flexibility in scoring observations in the observation category and to clarify the collective bargaining requirements surrounding teacher/principal improvement plans and to clarify that corrective action plans may require changes to collective bargaining agreements, subject to negotiation under Article 14 of the Civil Service Law, while they are negotiating their annual professional performance review plans under Education Law § 3012-d for the 2016-2017 school year. It is also necessary to ensure that the emergency rule adopted at the May 2016 Regents meeting remains continuously in effect until it can be adopted as a permanent rule at the September 2016 Regents meeting.

Subject: Annual Professional Performance Reviews (APPR) of classroom teachers and building principals.

Purpose: Technical Amendments.

Text of emergency rule: 1. Subdivision (c) of section 30-2.3 shall be amended, effective September 12, 2016, to read as follows:

(c)(1) Subject to the provisions of Education Law 3012-c(2)(k), the entire annual professional performance review shall be completed and provided to the teacher or the principal as soon as practicable but in no case later than September 1st of the school year next following the school year for which the teacher or principal's performance is being measured. The teacher's and principal's score and rating on the locally selected measures subcomponent, if available, and on the other measures of teacher and principal effectiveness subcomponent for a teacher's or principal's annual professional performance review shall be computed and provided to the teacher or principal, in writing, by no later than the last day of the school year for which the teacher or principal is being measured, but in no case later than September 1st of the school year next following the school year for which the teacher or principal's performance is measured. Nothing in this subdivision shall be construed to authorize a teacher or principal to commence the appeal process prior to receipt of their composite ef-

fectiveness score and rating. Each such annual professional performance review shall be based on the State assessments or other comparable measures subcomponent, the locally selected measures of student achievement subcomponent and the other measures of teacher and principal effectiveness subcomponent, determined in accordance with the applicable provisions of Education Law section 3012-c and this Subpart, for the school year for which the teacher's or principal's performance is measured.

(2) *Notwithstanding any provisions in this subdivision to the contrary, for the 2015-16 school year, teachers or principals whose annual professional performance reviews are based, in whole or in part, on the results of the grades 3-8 English language arts or mathematics State assessments and/or State-provided growth scores on Regents examinations shall be provided with their annual professional performance review transition scores and ratings computed pursuant to section 30-2.14 of this Subpart as soon as practicable but in no case later than September 1st of the school year next following the school year for which the teacher or principal's performance is being measured. During the 2015-16 school year, such teachers and principals shall also be provided with their original composite rating computed pursuant to section 3012-c of the Education Law and this Subpart by September 1st of the school year next following the school year for which the teacher or principal's performance is being measured, or as soon as practicable thereafter.*

2. Subdivision (c) of section 30-3.3 of the Rules of the Board of Regents, effective September 12, 2016, is amended to read as follows:

(c)(1) [The] *Except as otherwise provided in paragraph (2) of this subdivision, the entire annual professional performance review shall be completed and provided to the teacher or the principal as soon as practicable but in no case later than September 1st of the school year next following the school year for which the teacher or principal's performance is measured. The teacher's and principal's score and rating on the observation/school visit category and in the student performance category, if available, shall be computed and provided to the teacher or principal, in writing, by no later than the last day of the school year for which the teacher or principal is being measured, but in no case later than September 1st of the school year next following the school year for which the teacher or principal's performance is measured. Nothing in this subdivision shall be construed to authorize a teacher or principal to commence the appeal process prior to receipt of his or her overall rating. Districts shall ensure that there is a complete evaluation for all classroom teachers and building principals, which shall include scores and ratings on the subcomponent(s) of the student performance category and the observation/school visit category and the combined category scores and ratings, determined in accordance with the applicable provisions of Education Law section 3012-d and this Subpart, for the school year for which the teacher's or principal's performance is measured.*

(2) *Notwithstanding any provisions in this subdivision to the contrary, during the 2015-16 through 2018-19 school years, teachers or principals whose annual professional performance reviews are based, in whole or in part, on the results of the grades 3-8 English language arts or mathematics State assessments and/or State-provided growth scores on Regents examinations shall be provided with their annual professional performance review transition scores and ratings computed pursuant to section 30-3.17 of this Subpart as soon as practicable but in no case later than September 1st of the school year next following the school year for which the teacher or principal's performance is being measured. During the 2015-16 through 2018-19 school years, such teachers and principals shall also be provided with their original composite rating computed pursuant to section 3012-d of the Education Law and this Subpart by September 1st of the school year next following the school year for which the teacher or principal's performance is being measured, or as soon as practicable thereafter.*

3. Subparagraph (ii) of paragraph (1) of subdivision (b) of section 30-3.4 of the Rules of the Board of Regents is amended, effective September 12, 2016, to read as follows:

(ii) for a teacher whose course does not end in a State-created or administered test or where less than 50 percent of the teacher's students are covered by a State-provided growth measure, such teacher shall have a student learning objective (SLO) developed and approved by his/her superintendent or his or her designee, using a form prescribed by the commissioner, consistent with the SLO process determined or developed by the commissioner, that results in a student growth score; provided that, for any teacher whose course ends in a State-created or administered assessment for which there is no State-provided growth model, such assessment must be used as the underlying assessment for such SLO. *Provided, however, that during the 2015-16 school year, while the Department transitions to a new computer based examination, the district shall determine whether to use the New York State Alternate Assessment (NYSAA) as the underlying assessment for such SLO. In instances where a district determines not to use the NYSAA, the district must determine whether to use SLOs based on a list of approved student assessments, or a*

district- or BOCES-wide or school- or program-wide group, team, or linked results based on State/Regents assessments, or other assessments approved by the Department, as defined by the commissioner in guidance. The SLO process determined by the commissioner shall include a minimum growth target of one year of expected growth, as determined by the superintendent or his or her designee. Such targets, as determined by the superintendent or his or her designee, may take the following characteristics into account: poverty, students with disabilities, English language learners status and prior academic history. SLOs shall include the following SLO elements, as defined by the commissioner in guidance:

- (a) . . .
- (b) . . .
- (c) . . .
- (d) . . .
- (e) . . .
- (f) . . .
- (g) . . .
- (h) . . .

4. Subparagraph (iii) of paragraph (1) of subdivision (b) of section 30-3.4 of the Rules of the Board of Regents is amended, effective September 12, 2016, to read as follows:

(iii) for a teacher whose course does not end in a State-created or administered test or where a State-provided growth measure is not determined, districts may determine whether to use SLOs based on a list of approved student assessments, or a [school-or-BOCES-wide] *district or BOCES-wide or school or program-wide group, team, or linked results based on State/Regents assessments or other student assessments approved by the Department, as defined by the commissioner in guidance.*

5. Paragraph (2) of subdivision (b) of Section 30-3.4 of the Rules of the Board of Regents is amended, effective September 12, 2016, to read as follows:

(2) Optional second subcomponent. A district may locally select a second measure that shall be applied in a consistent manner, to the extent practicable, across the district based on the State/Regents assessments or State-designed assessments and be either:

(i) a second State-provided growth score on a state-created or administered test; provided that the State-provided growth measure is different than that used in the required subcomponent of the student performance category, which may include one or more of the following measures:

(a) a teacher-specific growth score computed by the State based on percentage of students who achieve a State-determined level of growth (e.g., percentage of students whose growth is above the median for similar students);

(b) school-wide growth results based on a State-provided school-wide growth score for all students attributable to the school who took the State English language arts or math assessment in grades 4-8;

(c) *district- or BOCES-wide or school-wide, group, team, or linked growth results using available State-provided growth scores that are locally-computed; or*

(ii) a growth score based on a State-designed supplemental assessment, calculated using a State-provided or approved growth model. Such growth score may include [school] *district- or BOCES-wide or school- or program-wide group, team, or linked results where the State-approved growth model is capable of generating such a score.*

6. Subparagraph (xii) of paragraph (2) of subdivision (d) of section 30-3.4 of the Rules of the Board of Regents is amended, effective September 12, 2016, to read as follows:

(xii) Each *subcomponent of the observation category* shall be evaluated on a 1-4 scale based on a State-approved rubric aligned to the New York State teaching standards and an overall score for [each] *the observation category* shall be generated between 1-4. *Such subcomponent scores shall incorporate all evidence collected and observed over the course of the school year. [Multiple] Scores for each [observations] subcomponent of the observation category shall be combined using a weighted average pursuant to subparagraph (xiv) of this paragraph, producing an overall observation category score between 1-4. In the event that a teacher earns a score of 1 on all rated components of the practice rubric across all observations, a score of 0 will be assigned.*

7. Subparagraph (ii) of paragraph (1) of subdivision (b) of section 30-3.5 of the Rules of the Board of Regents is amended, effective September 12, 2016, to read as follows:

(ii) for a principal where less than 30 percent of his/her students are covered under the State-provided growth measure, such principal shall have a student learning objective (SLO), on a form prescribed by the commissioner, consistent with the SLO process determined or developed by the commissioner, that results in a student growth score; provided that, for any principal whose building or program includes courses that end in a State-created or administered assessment for which there is no State-provided growth model, such assessment must be used as the underlying

assessment for such SLO. *Provided, however, that during the 2015-16 school year, while the Department transitions to a new computer based examination, the district shall determine whether to use the New York State Alternate Assessment (NYSAA) as the underlying assessment for such SLO. In instances where a district determines not to use the NYSAA, the district must determine whether to use SLOs based on a list of approved student assessments, or a district- or-BOCES-wide or school- or program-wide group, team, or linked results based on State/Regents assessments, or other assessments approved by the Department, as defined by the commissioner in guidance.* The SLO process determined by the commissioner shall include a minimum growth target of one year of expected growth, as determined by the superintendent or his or her designee. Such targets, as determined by the superintendent or his or her designee, may take the following characteristics into account: poverty, students with disabilities, English language learners status and prior academic history. SLOs shall include the following SLO elements, as defined by the commissioner in guidance:

- (a) . . .
- (b) . . .
- (c) . . .
- (d) . . .
- (e) . . .
- (f) . . .
- (g) . . .
- (h) . . .

(8) Subparagraph (iii) of paragraph (1) of subdivision (b) of section 30-3.5 of the Rules of the Board of Regents is amended, effective September 12, 2016, to read as follows:

(iii) For a principal of a building or program whose courses do not end in a State-created or administered test or where a principal growth score is not determined, districts shall use SLOs based on a list of State-approved student assessments. *SLOs set for courses in the principal's building which do not end in a State-created or administered test may incorporate district or BOCES-wide or school or program-wide results from State-created or administered tests, or other student assessments approved by the Department.*

(9) A new subparagraph (iv) of paragraph (1) of subdivision (b) of section 30-3.5 of the Rules of the Board of Regents is added, effective September 12, 2016, to read as follows:

(iv) *districts shall develop back-up SLOs for all principals whose buildings or programs contain courses that end in a State-created or administered test for which there is a State-provided growth model, to use in the event that no State-provided growth score can be generated for such principals.*

(10) Paragraph (2) of subdivision (b) of section 30-3.5 of the Rules of the Board of Regents is amended, effective September 12, 2016, to read as follows:

(2) Optional second subcomponent. A district may select one or more other measures for the student performance category that shall be applied in a consistent manner, to the extent practicable, across the district based on either:

(i) a second State-provided growth score on a State-created or administered test; provided that a different measure is used than that for the required subcomponent in the student performance category, which may include one or more of the following measures:

(a) principal-specific growth computed by the State based on the percentage of students who achieve a State-determined level of growth (e.g., percentage of students whose growth is above the median for similar students);

(b) *district- or BOCES-wide or school- or program -wide growth results using available State-provided growth scores that are locally-computed; or*

(ii) a growth score based on a State-designed supplemental assessment, calculated using a State-approved growth model. Such growth score may include [school] *district- or BOCES-wide or school- or program-wide group, team, or linked measures where the State-approved growth model is capable of generating such a score.*

(11) Paragraph (13) of subdivision (d) of section 30-3.5 of the Rules of the Board of Regents is amended, effective September 12, 2016, to read as follows:

(13) Each *subcomponent of the school visit category* shall be evaluated on a 1-4 scale based on a state-approved rubric aligned to the ISLLC standards and an overall score for [each] *the school visit category* shall be generated between 1-4. *Such subcomponent scores must incorporate all evidence collected and observed over the course of the school year in that subcomponent. [Multiple] Scores for each [observations] subcomponent of the school visit category shall be combined using a weighted average, producing an overall [observation] school visit category score between 1-4. In the event that a principal earns a score of 1 on all rated components of the practice rubric across all school visits, a score of 0 will be assigned.*

Weighting of Subcomponents with Principal School Visit Category. The weighting of the subcomponents within the principal school visit category shall be established locally within the following constraints:

- (i)...
- (ii)...
- (iii)...

(12) Subdivision (b) of section 30-3.11 shall be amended, effective September 12, 2016, to read as follows:

(b) Such improvement plan shall be developed by the superintendent or his or her designee in the exercise of their pedagogical judgment, *and subject to collective bargaining to the extent required under article 14 of the Civil Service Law*, and shall include, but need not be limited to, identification of needed areas of improvement, a timeline for achieving improvement, the manner in which the improvement will be assessed, and, where appropriate, differentiated activities to support a teacher's or principal's improvement in those areas.

(13) Subdivision (c) of section 30-3.13 of the Rules of the Board of Regents, effective September 12, 2016, is amended to read as follows:

(c) Corrective action plans may require changes to a collective bargaining agreement, *subject to collective bargaining under article 14 of the Civil Service Law.*

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-26-16-00015-EP, Issue of June 29, 2016. The emergency rule will expire November 10, 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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

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

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

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

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

Education Law 3012-c establishes requirements for the conduct of annual professional performance reviews (APPR) of classroom teachers and building principals employed by school districts and boards of cooperative educational services (BOCES).

Education Law 3012-d, as added by Section 2 of Subpart E of Part EE of Chapter 56 of the Laws of 2015 establishes a new evaluation system for classroom teachers and building principals employed by school districts and BOCES for the 2015-16 school year and thereafter.

2. LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above authority vested in the Regents and Commissioner to carry into effect State educational laws and policies and Ch.56, L.2015, as amended by Ch.20, L.2015, and is necessary to support the commitment made by the Legislature, the Governor, the Regents and Commissioner to ensure effective evaluation of classroom teachers and building principals. The proposed rule is necessary to provide immediate notice to districts of the additional allowable measures in the student performance category, the increased flexibility in scoring observations in the observation category and to clarify the collective bargaining requirements surrounding teacher/principal improvement plans and to clarify that corrective action plans may require changes to collective bargaining agreements, subject to negotiation under Article 14 of the Civil Service Law, while they are negotiating their annual professional performance review plans under Education Law § 3012-d for the 2016-2017 school year.

3. NEEDS AND BENEFITS:

In September 2015, Governor Andrew Cuomo formed the Common Core Task Force to undertake a comprehensive review of the current status and use of the Common Core State Standards and assessments in New York and to recommend potential reforms to the system. Following multiple meetings, the Task Force reviewed and discussed information presented at public sessions and submitted through the website, and has

made a number of recommendations regarding the implementation of the Common Core Standards.

On December 10, 2015, the Task Force released their report, affirming that New York must have rigorous, high quality education standards to improve the education of all of our students and hold our schools and districts accountable for students' success but recommended that the Common Core standards be thoroughly reviewed and revised consistent as reflected in the report and that the State assessments be amended to reflect such revisions. In addition, the Task Force recommended that until the new system is fully phased in, the results from the grades 3-8 English language arts and mathematics State assessments and the use of any State-provided growth model based on these tests or other State assessments shall not have consequence for teachers or students. Specifically, Recommendation 21 from the Task Force's Final Report ("Report") provides as follows:

"...State-administered standardized ELA and Mathematics assessments for grades three through eight aligned to the Common Core or updated standards shall not have consequences for individual students or teachers. Further, any growth model based on these Common Core tests or other state assessments shall not have consequences and shall only be used on an advisory basis for teachers. The transition phase shall last until the start of the 2019-2020 school year".

The Department has continued to solicit feedback and input from the various stakeholder groups regarding the implementation of the requirements of Subpart 30-3 of the Rules of the Board of Regents generally. The proposed amendment reflects areas where there has been consistent feedback from stakeholders requesting a revision to the regulations.

Proposed amendment

In an effort to provide districts and BOCES with greater flexibility in implementing the provisions of Education Law § 3012-d and Subpart 30-3 of the Rules of the Board of Regents, the proposed amendment makes the following changes:

- Sections 30-2.3(c) and 30-3.3(c) are amended to clarify that transition scores and ratings, calculated pursuant to Sections 30-2.14 and 30-3.17, must be provided to teachers and principals, no later than September 1st of the school year immediately following the school year for which the teacher or principal's performance is evaluated during the transition period (2015-16 through 2018-19 school years). Original final ratings for such teachers and principals must be provided by September 1st, or as soon as practicable thereafter, during the transition period. Educators whose APPRS are not based on 3-8 ELA/math State assessments or State-provided growth scores and do not receive transition scores and ratings shall continue to receive their final APPR ratings no later than September 1st. Sections 30-3.4 and 30-3.5 are amended to clarify the measures that may be used in the student performance category of a teacher's or principal's evaluation, and the methodology by which subcomponent and overall scores must be calculated in the teacher observation and principal school visit categories. Section 30-3.4 applies to teacher's evaluations under Education Law § 3012-d, and section 30-3.5 of the Regents Rules applies to principal's evaluations under Education Law § 3012-d.

- The amendments to sections 30-3.4 and 30-3.5 provide that in the first mandatory subcomponent of the student performance category of a teacher's or principal's evaluation, for a teacher or principal whose courses do not end in a State-created or administered test or where a State-provided growth score is not determined, the SLOs set for such courses may incorporate district or BOCES-wide or school or program-wide results from State-created or administered tests, or other student assessments approved by the Department. Where a course does end in a State-created or administered assessment for which there is no State-provided growth model, such assessment must be used as the underlying assessment for such SLO. Provided, however, that during the 2015-16 school year, while the Department transitions to a new computer based examination, the district shall determine whether to use the New York State Alternate Assessment (NYSAA) as the underlying assessment for such SLO. In instances where a district determines not to use the NYSAA, the district must determine whether to use SLOs based on a list of approved student assessments, or district- or-BOCES-wide results based on State/Regents assessments, or other assessments approved by the Department, as defined by the commissioner in guidance.

- Section 30-3.5 is amended to require districts to develop back-up SLOs for all principals whose buildings or programs contain courses that end in a State-created or administered test for which there is a State-provided growth model, to use in the event that no State-provided growth score can be generated for such principals.

- The amendments to sections 30-3.4 and 30-3.5 also provide that in the optional second subcomponent of the student performance category, if a measure based on a second State-provided growth score on a state-created or administered test is selected, this measure may incorporate district- or BOCES-wide or school- or program-wide, group, team, or linked growth

results using available State-provided growth scores that are locally-computed. If a growth score based on a State-designed supplemental assessment, calculated using a State-provided or approved growth model is selected, such growth score may include district- or BOCES-wide or school- or program-wide group, team, or linked results where the State-approved growth model is capable of generating such a score.

- Sections 30-3.4 and 30-3.5 are further amended to clarify that each observation or school visit must be evaluated based on a State-approved rubric aligned to the New York State teaching standards or ISLLC standards (as applicable) and an overall score for each teacher observation category or principal school visit category subcomponent (i.e., principal/supervisor or other trained administrator, impartial independent trained evaluator(s), and trained peer observer) shall be generated between 1-4. Such teacher observation category or principal school visit category subcomponent scores must incorporate all evidence collected and observed over the course of the school year and shall also generate scores between 1-4. Scores for each subcomponent of the observation or school visit category shall be combined using a weighted average computed within the constraints of Subpart 30-3 of the Rules of the Board of Regents, producing an overall observation or school visit category score between 1-4.

- Based on comments from the field, section 30-3.11 is amended to clarify that teacher and principal improvement plans shall be subject to collective bargaining to the extent required under Article 14 of the Civil Service Law.

- Section 30-3.13 is amended to clarify that corrective action plans may require changes to a collective bargaining agreement subject to collective bargaining under Article 14 of the Civil Service Law.

4. COSTS:

- a. Costs to State government: The amendment provides districts and BOCES with greater flexibility in their implementation of Education Law section 3012-d and does not impose any costs on State government, including the State Education Department, beyond those costs imposed by the statute.

- b. Costs to local government: Education Law section 3012-d, as added by Chapter 56 of the Laws of 2015, establishes requirements for the conduct of annual professional performance reviews (APPR) of classroom teachers and building principals employed by school districts and boards of cooperative educational services (BOCES) for the 2015-2016 school year and thereafter. The amendment provides districts and BOCES with greater flexibility in their implementation of Education Law section 3012-d and does not impose any costs on local government, beyond those costs imposed by the statute.

5. LOCAL GOVERNMENT MANDATES:

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

6. PAPERWORK:

The proposed amendment will not increase reporting or recordkeeping requirements beyond existing requirements.

7. DUPLICATION:

The rule does not duplicate existing State or Federal requirements.

8. ALTERNATIVES:

The proposed amendment is necessary to provide districts and BOCES greater flexibility in their implementation of Education Law § 3012-d and, therefore, no alternatives were considered.

9. FEDERAL STANDARDS:

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

10. COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

(a) Small businesses:

The proposed amendment provides school districts and boards of cooperative educational services (BOCES) with greater flexibility in implementing the provisions of Education Law §§ 3012-c and 3012-d, and Subparts 30-2 and 30-3 of the Rules of the Board of Regents consistent with feedback from stakeholders requesting revisions to the regulations. The proposed amendment provides flexibility by authorizing districts and BOCES to use additional measures in the student performance category, increased flexibility in scoring observations in the observation category, clarifying the collective bargaining requirements surrounding teacher/principal improvement plans, and clarifying that corrective action plans may require changes to collective bargaining agreements, subject to negotiation under Article 14 of the Civil Service Law. The rule does not impose any reporting, recordkeeping or other compliance requirements, and will not have an adverse economic impact, on small business. Because it is evident from the nature of the rule that it does not affect small businesses, no further steps were needed to ascertain that fact and one were

taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local governments:

1. EFFECT OF RULE:

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

2. COMPLIANCE REQUIREMENTS:

In September 2015, Governor Andrew Cuomo formed the Common Core Task Force to undertake a comprehensive review of the current status and use of the Common Core State Standards and assessments in New York and to recommend potential reforms to the system. Following multiple meetings, the Task Force reviewed and discussed information presented at public sessions and submitted through the website, and has made a number of recommendations regarding the implementation of the Common Core Standards.

On December 10, 2015, the Task Force released their report, affirming that New York must have rigorous, high quality education standards to improve the education of all of our students and hold our schools and districts accountable for students' success but recommended that the Common Core standards be thoroughly reviewed and revised consistent as reflected in the report and that the State assessments be amended to reflect such revisions. In addition, the Task Force recommended that until the new system is fully phased in, the results from the grades 3-8 English language arts and mathematics State assessments and the use of any State-provided growth model based on these tests or other State assessments shall not have consequence for teachers or students. Specifically, Recommendation 21 from the Task Force's Final Report ("Report") provides as follows:

"...State-administered standardized ELA and Mathematics assessments for grades three through eight aligned to the Common Core or updated standards shall not have consequences for individual students or teachers. Further, any growth model based on these Common Core tests or other state assessments shall not have consequences and shall only be used on an advisory basis for teachers. The transition phase shall last until the start of the 2019-2020 school year".

The Department has continued to solicit feedback and input from the various stakeholder groups regarding the implementation of the requirements of the transition period, and of the implementation of the requirements of Subpart 30-3 of the Rules of the Board of Regents generally. The proposed amendment reflects areas where there has been consistent feedback from stakeholders requesting a revision to the regulations.

Proposed amendment

In an effort to provide districts and BOCES with greater flexibility in implementing the provisions of Education Law §§ 3012-c and 3012-d, and Subparts 30-2 and 30-3 of the Rules of the Board of Regents, the proposed amendment makes the following changes:

- Sections 30-2.3(c) and 30-3.3(c) are amended to clarify that transition scores and ratings, calculated pursuant to Sections 30-2.14 and 30-3.17, must be provided to teachers and principals, no later than September 1st of the school year immediately following the school year for which the teacher or principal's performance is evaluated during the transition period (2015-16 through 2018-19 school years). Original final ratings for such teachers and principals must be provided by September 1st or as soon as practicable thereafter, during the transition period. Educators whose APPRs are not based on 3-8 ELA/math State assessments or State-provided growth scores and do not receive transition scores and ratings shall continue to receive their final APPR ratings no later than September 1st. Sections 30-3.4 and 30-3.5 are amended to clarify the measures that may be used in the student performance category of a teacher's or principal's evaluation, and the methodology by which subcomponent and overall scores must be calculated in the teacher observation and principal school visit categories. Section 30-3.4 applies to teacher's evaluations under Education Law § 3012-d, and section 30-3.5 of the Regents Rules applies to principal's evaluations under Education Law § 3012-d.

- The amendments to sections 30-3.4 and 30-3.5 provide that in the first mandatory subcomponent of the student performance category of a teacher's or principal's evaluation, for a teacher or principal whose courses do not end in a State-created or administered test or where a State-provided growth score is not determined, the SLOs set for such courses may incorporate district or BOCES-wide or school or program-wide results from State-created or administered tests, or other student assessments approved by the Department. Where a course does end in a State-created or administered assessment for which there is no State-provided growth model, such assessment must be used as the underlying assessment for such SLO. Provided, however, that during the 2015-16 school year, while the Department transitions to a new computer based examination, the district shall determine whether to use the New York State Alternate Assessment (NYSAA) as the underlying assessment for such SLO. In instances where a district determines not to use the NYSAA, the district must determine whether to use SLOs based on a list of approved student

assessments, or district- or-BOCES-wide results based on State/Regents assessments, or other assessments approved by the Department, as defined by the commissioner in guidance.

- Section 30-3.5 is amended to require districts to develop back-up SLOs for all principals whose buildings or programs contain courses that end in a State-created or administered test for which there is a State-provided growth model, to use in the event that no State-provided growth score can be generated for such principals.

- The amendments to sections 30-3.4 and 30-3.5 also provide that in the optional second subcomponent of the student performance category, if a measure based on a second State-provided growth score on a state-created or administered test is selected, this measure may incorporate district- or BOCES-wide or school- or program-wide, group, team, or linked growth results using available State-provided growth scores that are locally-computed. If a growth score based on a State-designed supplemental assessment, calculated using a State-provided or approved growth model is selected, such growth score may include district- or BOCES-wide or school- or program-wide group, team, or linked results where the State-approved growth model is capable of generating such a score.

- Sections 30-3.4 and 30-3.5 are further amended to clarify that each observation or school visit must be evaluated based on a State-approved rubric aligned to the New York State teaching standards or ISLLC standards (as applicable) and an overall score for each teacher observation category or principal school visit category subcomponent (i.e., principal/supervisor or other trained administrator, impartial independent trained evaluator(s), and trained peer observer) shall be generated between 1-4. Such teacher observation category or principal school visit category subcomponent scores must incorporate all evidence collected and observed over the course of the school year and shall also generate scores between 1-4. Scores for each subcomponent of the observation or school visit category shall be combined using a weighted average computed within the constraints of Subpart 30-3 of the Rules of the Board of Regents, producing an overall observation or school visit category score between 1-4.

- Based on comments from the field, section 30-3.11 is amended to clarify that teacher and principal improvement plans shall be subject to collective bargaining to the extent required under Article 14 of the Civil Service Law.

- Section 30-3.13 is amended to clarify that corrective action plans may require changes to a collective bargaining agreement subject to collective bargaining under Article 14 of the Civil Service Law.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

There are no additional costs imposed by the proposed amendment, beyond those imposed by statute.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The rule does not impose any additional technological requirements on school districts or BOCES. Economic feasibility is addressed in the Costs section of the Summary of the Regulatory Impact Statement submitted herewith.

6. MINIMIZING ADVERSE IMPACT:

The rule is necessary to provide districts and BOCES with greater flexibility in implementing the provisions of Education Law §§ 3012-c and 3012-d. Because Education Law §§ 3012-c and 3012-d apply to all school districts and BOCES in the State, the Department did not establish differing compliance or reporting requirements or timetables or exempt schools in rural areas from coverage by the proposed amendment.

7. LOCAL GOVERNMENT PARTICIPATION:

The proposed amendment is submitted in direct response to feedback and comments provided by various stakeholder groups, including representatives of school districts and BOCES State-wide. Such stakeholder groups have consistently requested greater flexibility in implementing the provisions of Education Law §§ 3012-c and 3012-d in the areas addressed by the proposed amendment.

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

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed rule applies to all school districts and boards of cooperative educational services (BOCES) in the State, including those located in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

In September 2015, Governor Andrew Cuomo formed the Common Core Task Force to undertake a comprehensive review of the current status

and use of the Common Core State Standards and assessments in New York and to recommend potential reforms to the system. Following multiple meetings, the Task Force reviewed and discussed information presented at public sessions and submitted through the website, and has made a number of recommendations regarding the implementation of the Common Core Standards.

On December 10, 2015, the Task Force released their report, affirming that New York must have rigorous, high quality education standards to improve the education of all of our students and hold our schools and districts accountable for students' success but recommended that the Common Core standards be thoroughly reviewed and revised consistent as reflected in the report and that the State assessments be amended to reflect such revisions. In addition, the Task Force recommended that until the new system is fully phased in, the results from the grades 3-8 English language arts and mathematics State assessments and the use of any State-provided growth model based on these tests or other State assessments shall not have consequence for teachers or students. Specifically, Recommendation 21 from the Task Force's Final Report ("Report") provides as follows:

"...State-administered standardized ELA and Mathematics assessments for grades three through eight aligned to the Common Core or updated standards shall not have consequences for individual students or teachers. Further, any growth model based on these Common Core tests or other state assessments shall not have consequences and shall only be used on an advisory basis for teachers. The transition phase shall last until the start of the 2019-2020 school year".

The Department has continued to solicit feedback and input from the various stakeholder groups regarding the implementation of the requirements of Subpart 30-3 of the Rules of the Board of Regents generally. The proposed amendment reflects areas where there has been consistent feedback from stakeholders requesting a revision to the regulations.

Proposed amendment

In an effort to provide districts and BOCES with greater flexibility in implementing the provisions of Education Law §§ 3012-d and Subparts 30-2 and 30-3 of the Rules of the Board of Regents, the proposed amendment makes the following changes:

- Sections 30-2.3(c) and 30-3.3(c) are amended to clarify that transition scores and ratings, calculated pursuant to Sections 30-2.14 and 30-3.17, must be provided to teachers and principals, no later than September 1st of the school year immediately following the school year for which the teacher or principal's performance is evaluated during the transition period (2015-16 through 2018-19 school years). Original final ratings for such teachers and principals must be provided by September 1st, or as soon as practicable thereafter, during the transition period. Educators whose APPRS are not based on 3-8 ELA/math State assessments or State-provided growth scores and do not receive transition scores and ratings shall continue to receive their final APPR ratings no later than September 1st. Sections 30-3.4 and 30-3.5 are amended to clarify the measures that may be used in the student performance category of a teacher's or principal's evaluation, and the methodology by which subcomponent and overall scores must be calculated in the teacher observation and principal school visit categories. Section 30-3.4 applies to teacher's evaluations under Education Law § 3012-d, and section 30-3.5 of the Regents Rules applies to principal's evaluations under Education Law § 3012-d.

- The amendments to sections 30-3.4 and 30-3.5 provide that in the first mandatory subcomponent of the student performance category of a teacher's or principal's evaluation, for a teacher or principal whose courses do not end in a State-created or administered test or where a State-provided growth score is not determined, the SLOs set for such courses may incorporate district or BOCES-wide or school or program-wide results from State-created or administered tests, or other student assessments approved by the Department. Where a course does end in a State-created or administered assessment for which there is no State-provided growth model, such assessment must be used as the underlying assessment for such SLO. Provided, however, that during the 2015-16 school year, while the Department transitions to a new computer based examination, the district shall determine whether to use the New York State Alternate Assessment (NYSAA) as the underlying assessment for such SLO. In instances where a district determines not to use the NYSA, the district must determine whether to use SLOs based on a list of approved student assessments, or district- or-BOCES-wide results based on State/Regents assessments, or other assessments approved by the Department, as defined by the commissioner in guidance.

- Section 30-3.5 is amended to require districts to develop back-up SLOs for all principals whose buildings or programs contain courses that end in a State-created or administered test for which there is a State-provided growth model, to use in the event that no State-provided growth score can be generated for such principals.

- The amendments to sections 30-3.4 and 30-3.5 also provide that in the

optional second subcomponent of the student performance category, if a measure based on a second State-provided growth score on a state-created or administered test is selected, this measure may incorporate district- or BOCES-wide or school- or program-wide, group, team, or linked growth results using available State-provided growth scores that are locally-computed. If a growth score based on a State-designed supplemental assessment, calculated using a State-provided or approved growth model is selected, such growth score may include district- or BOCES-wide or school- or program-wide group, team, or linked results where the State-approved growth model is capable of generating such a score.

- Sections 30-3.4 and 30-3.5 are further amended to clarify that each observation or school visit must be evaluated based on a State-approved rubric aligned to the New York State teaching standards or ISLLC standards (as applicable) and an overall score for each teacher observation category or principal school visit category subcomponent (i.e., principal/supervisor or other trained administrator, impartial independent trained evaluator(s), and trained peer observer) shall be generated between 1-4. Such teacher observation category or principal school visit category subcomponent scores must incorporate all evidence collected and observed over the course of the school year and shall also generate scores between 1-4. Scores for each subcomponent of the observation or school visit category shall be combined using a weighted average computed within the constraints of Subpart 30-3 of the Rules of the Board of Regents, producing an overall observation or school visit category score between 1-4.

- Based on comments from the field, section 30-3.11 is amended to clarify that teacher and principal improvement plans shall be subject to collective bargaining to the extent required under Article 14 of the Civil Service Law.

- Section 30-3.13 is amended to clarify that corrective action plans may require changes to a collective bargaining agreement subject to collective bargaining under Article 14 of the Civil Service Law.

3. COSTS:

The proposed amendment will not impose any additional costs beyond those imposed by, or inherent in, the statute.

4. MINIMIZING ADVERSE IMPACT:

The rule is necessary to provides districts and BOCES with greater flexibility in their implementation of Education Law §§ 3012-c and 3012-d. Because Education Law §§ 3012-c and 3012-d apply to all school districts and BOCES in the State, the Department did not prescribe differing compliance or reporting requirements for rural areas of the State.

5. RURAL AREA PARTICIPATION:

The proposed amendment provides districts and BOCES with greater flexibility in their implementation of Education Law §§ 3012-c and 3012-d and Subparts 30-2 and 30-3 of the Rules of the Board of Regents. The proposed amendments are submitted in response, in part, to comments received from rural school districts and BOCES.

The Department has solicited comments on the proposed amendment from the Rural Area Advisory Council, whose members live or work in rural areas of this State.

Job Impact Statement

The purpose of proposed rule is necessary to provide districts and BOCES' State-wide with a broader range of options with respect to their APPR plans through additional available measures in the student performance category, increased flexibility in scoring observations in the observation category and to clarify the collective bargaining requirements surrounding teacher/principal improvement plans and to clarify that corrective action plans may require changes to collective bargaining agreements, subject to negotiation under Article 14 of the Civil Service Law, while they are negotiating their annual professional performance review plans under Education Law § 3012-d for the 2016-2017 school year. Because it is evident from the nature of the proposed rule that it will have no impact on the number of jobs or employment opportunities in New York State, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

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

**EMERGENCY
RULE MAKING**

Teacher Certification in Career and Technical Education

I.D. No. EDU-26-16-00016-E

Filing No. 847

Filing Date: 2016-09-12

Effective Date: 2016-09-12

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

Action taken: Amendment of section 80-3.5 of Title 8 NYCRR.

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

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

Specific reasons underlying the finding of necessity: The proposed amendment to section 80-3.5 is necessary to provide additional pathway options for a Transitional A certification in the CTE subjects for candidates who meet the requirements in one of the following pathway options:

- Option G. Have a minimum of two years of experience in the CTE subject area of certificate sought and hold an industry-related credential or pass an industry accepted examination as approved by the Department and an offer of employment from a school district
- Option H. Are enrolled in an approved CTE teacher preparation program and have either a minimum of one year of related work experience and/or take and pass an industry accepted examination
- Option I. Are currently certified 7-12 grade teachers in any CTE subject area with two years of documented work experience or who hold industry-recognized credentials, where available, in the related CTE area

A Notice of Proposed Rule Making will be published in the State Register on June 29, 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 September Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the September meeting, would be September 28, 2016, the date a Notice of Adoption would be published in the State Register.

Emergency action is therefore necessary to allow those who do not meet the current requirements but who possess industry experience, credentials, or are in the process of completing certification, but meet one of the three proposed new pathways, to begin teaching at the grade 7-12 level as early as possible during the 2016-2017 school year and to ensure that the emergency rule adopted at the June Regents meeting remains continuously in effect until it can be adopted as a permanent rule.

Subject: Teacher certification in career and technical education.

Purpose: Establishes a new pathway for Transitional A certificate.

Text of emergency rule: 1. New paragraphs (5), (6), and (7) are added to subdivision (b) of section 80-3.5 of the Regulations of the Commissioner of Education, effective September 12, 2016, to read as follows:

(5) *Option G: The requirements of this paragraph are applicable to candidates who seek an initial certificate and who hold an industry acceptable credential in a career and technical education subject and have at least two years of acceptable work experience in the certificate area to be taught or in a closely related subject area acceptable to the department. The candidate shall meet the requirements in each of the following subparagraphs:*

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

(ii) *Examination. The candidate shall submit evidence of having achieved a satisfactory level of performance on the New York State Teacher Certification Examination content specialty test(s) in the area of the certificate.*

(iii) *Industry Related Credential or Industry Accepted Examination. The candidate shall either:*

(a) *hold an industry related credential in the certificate area taught or in a closely related subject area acceptable to the department; or*

(b) *receive a passing score on an industry accepted career and technical examination that demonstrates mastery in the career and technical education subject for which a certificate is sought or a closely related area as approved by the department through a request for qualifications process.*

(iv) *Experience. The candidate shall have at least two years of satisfactory work experience in the career and technical education subject for which a certificate is sought or a closely related subject area, as determined by the Commissioner;*

(v) *Employment and support commitment. The candidate shall submit evidence of having a commitment for three years of employment as a teacher in grades 7 through 12 in a public or nonpublic school or BOCES, which shall include a mentored experience for the first year that will consist of daily supervision by an experienced teacher during the first 20 days of teaching, except that such mentoring shall not be required if the candidate has two years of satisfactory employment as a teacher of students in grades 5 through 12 in a public or nonpublic school or BOCES.*

(6) *Option H: The requirements of this paragraph are applicable to candidates who seek an initial certificate and who are enrolled in an approved career and technical education program registered pursuant to section 52.21 of this Title, or its equivalent in the certificate area to be taught or in a closely related subject area acceptable to the department; and have either at least one year of satisfactory experience in the career and technical area to be taught or in a closely related area or receive a passing score on an industry accepted career and technical examination that demonstrates mastery in the career and technical education subject for which a certificate is sought or a closely related area as approved by the department through a request for qualifications process. The candidate shall meet the requirements in each of the following subparagraphs:*

(i) *Education.*

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

(b) *the candidate shall be enrolled in an approved career and technical education program registered pursuant to section 52.21 of this Title.*

(ii) *Examination. The candidate shall submit evidence of having achieved a satisfactory level of performance on the New York State Teacher Certification Examination content specialty test(s) in the area of the certificate.*

(iii) *Experience and/or Examination. The candidate shall either:*

(a) *have at least one year of satisfactory work experience in the career and technical education subject for which a certificate is sought or a closely related area, as determined by the Commissioner; or*

(b) *receive a passing score on an industry accepted career and technical examination that demonstrates mastery in the career and technical education subject for which a certificate is sought or a closely related area as approved by the department through a request for qualifications process.*

(iv) *Employment and support commitment. The candidate shall submit evidence of having a commitment for three years of employment as a teacher in grades 7 through 12 in a public or nonpublic school or BOCES, which shall include a mentored experience for the first year that will consist of daily supervision by an experienced teacher during the first 20 days of teaching, except that such mentoring shall not be required if the candidate has two years of satisfactory employment as a teacher of students in grades 5 through 12 in a public or nonpublic school or BOCES.*

(7) *Option I: The requirements of this paragraph are applicable to candidates who seek an initial certificate and who are currently certified as a teacher in grades 7-12 in the career and technical education subject to be taught or in a closely related subject area acceptable to the department, and who either: hold an industry related credential the career and technical education subject to be taught or in a closely related subject area acceptable to the department or have two years of satisfactory experience in the certificate area sought or a closely related subject area, as*

determined by the Commissioner. The candidate shall meet the requirements in each of the following subparagraphs:

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

(ii) *Examination.* The candidate shall submit evidence of having achieved a satisfactory level of performance on the New York State Teacher Certification Examination content specialty test(s) in the area of the certificate.

(iii) *Certification as a Career and Technical Education Teacher in grades 7-12.* The candidate shall hold certification as a teacher in grades 7-12 in the career and technical education subject to be taught or in a closely related subject area pursuant to Part 80 of this Title, that is acceptable to the department.

(iv) *Experience or Industry Related Credential.* The candidate shall either:

(a) hold an industry related credential in the certificate area sought or in a related area, as determined by the Department; or

(b) have at least two years of documented and satisfactory work experience in the career and technical education subject for which a certificate is sought, or a related area, as determined by the Commissioner.

(v) *Employment and support commitment.* The candidate shall submit evidence of having a commitment for three years of employment as a teacher in grades 7 through 12 in a public or nonpublic school or BOCES, which shall include a mentored experience for the first year that will consist of daily supervision by an experienced teacher during the first 20 days of teaching, except that such mentoring shall not be required if the candidate has two years of satisfactory employment as a teacher of students in grades 5 through 12 in a public or nonpublic school or BOCES.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-26-16-00016-EP, Issue of June 29, 2016. The emergency rule will expire November 10, 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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

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

Education Law 3001(2) establishes the qualifications of teachers in the State and requires that such teachers possess a teaching certificate issued by the Department.

Education Law 3004(1) authorizes the Commissioner to promulgate regulations, subject to approval by the Board of Regents, regulations governing the certification and examination requirements for teachers employed in public schools.

Education Law 3006(1) authorizes the Commissioner to issue temporary certificates to teachers.

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

2. LEGISLATIVE OBJECTIVES:

The proposed rule establishes three new certification pathway options for candidates to obtain a Transitional A certificate who do not meet the current requirements but who possess industry experience, credentials, or are in the process of completing certification in a CTE field to address concerns raised by school districts and Board of Cooperative Educational Services (BOCES) that have expressed difficulty in filling CTE positions.

3. NEEDS AND BENEFITS:

Currently, a Transitional A certificate in a specific career and technical subject is issued to permit the employment of an individual in a specific career and technical education title who does not meet the requirements for an initial certificate, but who possesses the requisite occupational experience. This certificate is valid for three years, and the candidate

would complete the additional requirements for an initial certificate during the three years.

The three options available for a Transitional A certificate at this time are:

- Option A. Candidates who possess an associate's degree (or its equivalent) in the career and technical field in which the certificate is sought, and who have at least two years of documented and satisfactory work experience in the career and technical education subject for which a certificate is sought;

- Option B. Candidates who possess a high school diploma or its equivalent (but who do not possess an associate's degree or its equivalent in the certificate area), and who have at least four years of documented and satisfactory work experience in the career and technical education subject for which a certificate is sought; and

- Option C. Candidates who possess an associate's degree (or its equivalent) in the career and technical field in which the certificate is sought, and who have at least two years of documented and satisfactory teaching experience at the postsecondary level (excluding experience as a teaching assistant) in the career and technical education subject for which a certificate is sought.

All three Transitional A pathways described above also require:

(1) Coursework training in identification of and reporting of child abuse or maltreatment, school violence prevention and intervention, and harassment, bullying and discrimination prevention and intervention;

(2) Evidence of having achieved a satisfactory level of performance on the New York State Teacher Certification Exam Content Specialty Test in the area of the certificate, and

(3) An employment and support commitment—the candidate must submit evidence of having a commitment for three years of employment as a teacher in a public or nonpublic school or BOCES, which includes a mentored experience for the first year consisting of daily supervision by an experienced teacher during the first 20 days. However, the mentoring is not required if the candidate has two years of satisfactory employment as a teacher of students in grades 7-12 in a public or nonpublic school or BOCES.

In addition, at the May 2016 Board of Regents meeting, the Board adopted by Emergency action a new pathway option for those issued a full license to teach in licensed private career schools and who have two years of teaching experience under such license, to qualify for a Transitional A certificate. If adopted at the September 2016 Board of Regents meeting, this will allow those candidates to teach CTE during the 2016-2017 school year.

Proposed Amendment:

Based on feedback from the field, it appears that several school districts are having difficulty finding CTE teachers to fill positions at the secondary level, particularly the New York City School District. While the Board of Regents has already made the effort to expand the pathways available to obtain a Transitional A certificate in 2013 and at the May 2016 Board meeting, this amendment would create additional pathways for those individuals who do not meet current requirements.

In order to address this issue, the proposed amendment to 80-3.5 of the Regulations of the Commissioner of Education allows additional opportunities for individuals who possess industry experience, credentials, or are in the process of completing certification in a CTE field to obtain a Transitional A teaching certificate in their area of expertise, thus allowing them to teach CTE subjects at the secondary school level. This will help to increase the supply of qualified, certified teachers in the career and technical education field to satisfy the increasing demand for those teachers. Candidates must meet one of the following requirements:

- Have a minimum of two years of work experience in the CTE subject area of the certificate sought and hold an industry-related credential, where available, or pass an industry accepted examination as approved by the Department and have an employment and support commitment

- Are enrolled in an approved CTE teacher preparation program and have either a minimum of one year of related work experience and/or take and pass an industry accepted examination and have an employment and support commitment

- Are currently certified 7-12 grade teachers in any CTE subject area with two years of documented work experience or who hold industry-recognized credentials, where available, in the related CTE area and have an employment and support commitment

4. COSTS:

a. Costs to State government: The amendment does not impose any costs on State government, including the State Education Department.

b. Costs to local government: The amendment does not impose any costs on local government, including school districts and BOCES.

c. Costs to private regulated parties: The amendment does not impose any costs on private regulated parties.

(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.

6. PAPERWORK:

Any candidate interested in pursuing this certification pathway must submit evidence of having a commitment for three years of employment as a teacher in a public or nonpublic school or BOCES, which includes a mentored experience for the first year consisting of daily supervision by an experienced teacher during the first 20 days.

7. DUPLICATION:

The rule does not duplicate existing State or Federal requirements.

8. ALTERNATIVES:

No alternatives were considered.

9. FEDERAL STANDARDS:

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

10. COMPLIANCE SCHEDULE:

It is anticipated that schools districts and BOCES will be able to comply by the stated effective date.

Regulatory Flexibility Analysis

(a) Small businesses:

The purpose of the proposed amendment is to address concerns raised by school districts and Board of Cooperative Educational Services (BOCES), and particularly the New York City school district, wherein they have expressed difficulty filling Career and Technical Education (CTE) positions at the secondary level. The proposed amendment will create three new pathway options for candidates to obtain a Transitional A certificate who do not meet the current requirements but who possess industry experience, credentials, or are in the process of completing certification in a CTE field.

The amendment does not impose any new 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:

If adopted by the Board of Regents at the September 2016 Board of Regents meeting, commencing with the 2016-2017 school year, the proposed amendment creates three new pathway options to address immediate shortage areas for candidates who meet one of the following three requirements:

- Have a minimum of two years of work experience in the CTE subject area of the certificate sought and hold an industry-related credential, where available, or pass an industry accepted examination as approved by the Department and have an employment and support commitment
- Are enrolled in an approved CTE teacher preparation program and have either a minimum of one year of related work experience and/or take and pass an industry accepted examination and have an employment and support commitment
- Are currently certified 7-12 grade teachers in any CTE subject area with two years of documented work experience or who hold industry-recognized credentials, where available, in the related CTE area and have an employment and support commitment

2. COMPLIANCE REQUIREMENTS:

Currently, a Transitional A certificate in a specific career and technical subject is issued to permit the employment of an individual in a specific career and technical education title who does not meet the requirements for an initial certificate, but who possesses the requisite occupational experience. This certificate is valid for three years, and the candidate would complete the additional requirements for an initial certificate during the three years.

The three options available for a Transitional A certificate at this time are:

- Option A. Candidates who possess an associate's degree (or its equivalent) in the career and technical field in which the certificate is sought, and who have at least two years of documented and satisfactory work experience in the career and technical education subject for which a certificate is sought;
- Option B. Candidates who possess a high school diploma or its equivalent (but who do not possess an associate's degree or its equivalent in the certificate area), and who have at least four years of documented and satisfactory work experience in the career and technical education subject for which a certificate is sought; and
- Option C. Candidates who possess an associate's degree (or its equivalent) in the career and technical field in which the certificate is sought, and who have at least two years of documented and satisfactory teaching experience at the postsecondary level (excluding experience as a teaching assistant) in the career and technical education subject for which a certificate is sought.

All three Transitional A pathways described above also require:

(1) Coursework training in identification of and reporting of child abuse or maltreatment, school violence prevention and intervention, and harassment, bullying and discrimination prevention and intervention;

(2) Evidence of having achieved a satisfactory level of performance on the New York State Teacher Certification Exam Content Specialty Test in the area of the certificate, and

(3) An employment and support commitment—the candidate must submit evidence of having a commitment for three years of employment as a teacher in a public or nonpublic school or BOCES, which includes a mentored experience for the first year consisting of daily supervision by an experienced teacher during the first 20 days. However, the mentoring is not required if the candidate has two years of satisfactory employment as a teacher of students in grades 7-12 in a public or nonpublic school or BOCES.

In addition, at the May 2016 Board of Regents meeting, the Board adopted by Emergency action a new pathway option for those issued a full license to teach in licensed private career schools and who have two years of teaching experience under such license, to qualify for a Transitional A certificate. If adopted at the September 2016 Board of Regents meeting, this will allow those candidates who qualify to teach CTE during the 2016-2017 school year and address immediate shortages.

Proposed Amendment:

Based on feedback from the field, it appears that several school districts are having difficulty finding CTE teachers to fill positions at the secondary level, particularly the New York City School District. While the Board of Regents has already made the effort to expand the pathways available to obtain a Transitional A certificate in 2013 and at the May 2016 Board meeting, this amendment would create three additional pathways for those who do not meet current requirements but who possess industry experience, credentials, or are in the process of completing certification in a CTE field.

In order to address this issue, the proposed amendment to 80-3.5 of the Regulations of the Commissioner of Education allows additional opportunities for individuals with specific technical and career experience, credentials, or who are in the process of completing certification to obtain a Transitional A teaching certificate in their area of expertise, thus allowing them to teach CTE subjects at the secondary school level. This will help to increase the supply of qualified, certified teachers in the career and technical education field to satisfy the increasing demand for those teachers. The proposed pathways allow candidates to meet one of the following requirements:

- Have a minimum of two years of work experience in the CTE subject area of the certificate sought and hold an industry-related credential, where available, or pass an industry accepted examination as approved by the Department and have an employment and support commitment
- Are enrolled in an approved CTE teacher preparation program and have either a minimum of one year of related work experience and/or take and pass an industry accepted examination and have an employment and support commitment
- Are currently certified 7-12 grade teachers in any CTE subject area with two years of documented work experience or who hold industry-recognized credentials, where available, in the related CTE area and have an employment and support commitment

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

There are no additional compliance costs on local governments.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The rule does not impose any additional technological requirements on districts or BOCES.

6. MINIMIZING ADVERSE IMPACT:

The rule seeks to address the issue school districts and BOCES have expressed relating to difficulties finding certified teachers to serve as CTE teachers at the secondary level. The proposed amendment seeks to provide flexibility to these school districts by providing additional certification pathways for teachers in CTE in grades 7-12.

7. LOCAL GOVERNMENT PARTICIPATION:

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

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

If adopted by the Board of Regents at the September 2016 Board of Regents meeting, commencing with the 2016-2017 school year, the proposed amendment creates three new pathway options for candidates to obtain a Transitional A certificate who do not meet the current requirements but who possess industry experience, credentials, or are in the pro-

cess of completing certification in a CTE field. This would allow those who qualify to teach CTE subjects at the secondary level.

This amendment applies to all districts and BOCES in New York, including those in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

Currently, a Transitional A certificate in a specific career and technical subject is issued to permit the employment of an individual in a specific career and technical education title who does not meet the requirements for an initial certificate, but who possesses the requisite occupational experience. This certificate is valid for three years, and the candidate would complete the additional requirements for an initial certificate during the three years.

The three options currently available for a Transitional A certificate at this time are:

- Option A. Candidates who possess an associate’s degree (or its equivalent) in the career and technical field in which the certificate is sought, and who have at least two years of documented and satisfactory work experience in the career and technical education subject for which a certificate is sought;
- Option B. Candidates who possess a high school diploma or its equivalent (but who do not possess an associate’s degree or its equivalent in the certificate area), and who have at least four years of documented and satisfactory work experience in the career and technical education subject for which a certificate is sought; and
- Option C. Candidates who possess an associate’s degree (or its equivalent) in the career and technical field in which the certificate is sought, and who have at least two years of documented and satisfactory teaching experience at the postsecondary level (excluding experience as a teaching assistant) in the career and technical education subject for which a certificate is sought.

All three Transitional A pathways described above also require:

- (1) Coursework training in identification of and reporting of child abuse or maltreatment, school violence prevention and intervention, and harassment, bullying and discrimination prevention and intervention;
- (2) Evidence of having achieved a satisfactory level of performance on the New York State Teacher Certification Exam Content Specialty Test in the area of the certificate, and
- (3) An employment and support commitment—the candidate must submit evidence of having a commitment for three years of employment as a teacher in a public or nonpublic school or BOCES, which includes a mentored experience for the first year consisting of daily supervision by an experienced teacher during the first 20 days. However, the mentoring is not required if the candidate has two years of satisfactory employment as a teacher of students in grades 7-12 in a public or nonpublic school or BOCES.

In addition, at the May 2016 Board of Regents meeting, the Board adopted by Emergency action a new pathway option for those issued a full license to teach in licensed private career schools and who have two years of teaching experience under such license, to qualify for a Transitional A certificate. If adopted at the September 2016 Board of Regents meeting, this will allow those candidates to teach CTE during the 2016-2017 school year.

Proposed Amendment:

Based on feedback from the field, it appears that several school districts are having difficulty finding CTE teachers to fill positions at the secondary level, particularly the New York City School District. While the Board of Regents has already made the effort to expand the pathways available to obtain a Transitional A certificate in 2013 and at the May 2016 Board meeting, this amendment would create an additional pathway for those who hold a full license to teach in licensed private career schools, who also have two years of teaching experience under such license.

In order to address this issue, the proposed amendment to 80-3.5 of the Regulations of the Commissioner of Education allows additional opportunities for individuals with specific technical and career experience, credentials, or who are in the process of completing certification to obtain a Transitional A teaching certificate in their area of expertise, thus allowing them to teach CTE subjects at the secondary school level. This will help to increase the supply of qualified, certified teachers in the career and technical education field to satisfy the increasing demand for those teachers. Candidates must meet one of the following requirements:

- Have a minimum of two years of work experience in the CTE subject area of the certificate sought and hold an industry-related credential, where available, or pass an industry accepted examination as approved by the Department and have an employment and support commitment
- Are enrolled in an approved CTE teacher preparation program and have either a minimum of one year of related work experience and/or take and pass an industry accepted examination and have an employment and support commitment

- Are currently certified 7-12 grade teachers in any CTE subject area with two years of documented work experience or who hold industry-recognized credentials, where available, in the related CTE area and have an employment and support commitment

3. COSTS:

The proposed amendment does not impose any costs on candidates for the Transitional A certificate, school districts or BOCES across the State, including those located in rural areas of the State.

4. MINIMIZING ADVERSE IMPACT:

The rule seeks to provide additional flexibility to school districts by addressing the issue raised by school districts who were having difficulty finding CTE teachers to fill positions at the secondary level, as this concern was raised by the field.

5. RURAL AREA PARTICIPATION:

Copies of the rule have been provided to Rural Advisory Committee for review and comment.

Job Impact Statement

The purpose of proposed amendment is to address concerns raised by school districts and Board of Cooperative Educational Services (BOCES) that have expressed difficulty in filling Career and Technical Education (CTE) positions at the secondary level. The proposed amendment will create three new pathway options for candidates to obtain a Transitional A certificate who do not meet the current requirements but who possess industry experience, credentials, or are in the process of completing certification in a CTE field.

Because the proposed amendment seeks to address an issue raised by the field in employing CTE teachers at the secondary level, 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, and no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

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

**EMERGENCY
RULE MAKING**

Superintendent Determination As to Academic Proficiency for Certain Students with Disabilities to Graduate with a Local Diploma

I.D. No. EDU-27-16-00002-E

Filing No. 859

Filing Date: 2016-09-13

Effective Date: 2016-09-18

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

Action taken: Amendment of section 100.5(d)(7) and addition of section 100.5(d)(12) to 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), 3204(3) and (4)

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

Specific reasons underlying the finding of necessity: All students with disabilities must be held to high expectations and be provided meaningfully opportunities to participate and progress in the general education curriculum to prepare them to graduate with a regular high school diploma. The majority of students with disabilities can meet the State’s learning standards for graduation. However, there are some students who, because of their disabilities, are unable to demonstrate their proficiency on standard State assessments, even with testing accommodations. For these students, the proposed amendment, which was adopted by the Board of Regents at its June 2016 meeting provides a superintendent review option in order for certain students with disabilities to graduate with a local diploma, beginning with students graduating in June 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 30-day public comment period provided for a revised rule making under the State Administrative Procedure Act would be the December 2016 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if revised and adopted at the December meeting, would be December 28, 2016, the date a Notice of Adoption would be published in the State Register.

However, the proposed amendment provides a superintendent review option in order for certain students with disabilities to graduate with a local diploma, beginning with students graduating in June 2016.

Therefore, emergency action is necessary at the September 2016 Regents meeting for the preservation of the general welfare in order to ensure that the emergency rule adopted by the Board of Regents at its June 2016 meeting remains continuously in effect until it can be adopted as a permanent rule so that certain students with disabilities who are graduating from high school are aware that if they do not meet the graduation standards through the existing appeal and safety net options, that the superintendent will make a determination as to whether the student has met the academic standards and is eligible for a diploma if the student meets the requirements of the proposed amendment. It is also necessary to ensure that superintendents are on notice that they must make a determination as to whether certain students with disabilities are eligible for local diploma if the student meets the requirements of the proposed amendment.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the December 2016 Regents meeting, which is the first scheduled meeting after expiration of the 30 day public comment period prescribed in the State Administrative Procedure Act for State agency rule makings.

Subject: Superintendent determination as to academic proficiency for certain students with disabilities to graduate with a local diploma.

Purpose: To expand the safety net options for students with disabilities to graduate with local diplomas when certain conditions are met.

Text of emergency rule: A new paragraph (12) shall be added to subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education, effective September 18, 2016, to read as follows:

(12) Superintendent determination pathway for certain students with disabilities for eligibility for a local diploma. School districts, registered nonpublic high schools and charter schools shall ensure that every student who is identified as a student with a disability as defined in Education Law section 4401(1) and section 200.1(zz) of this Title and who does not meet the assessment requirements for graduation through the existing appeal and safety net options available through this section but is otherwise eligible to graduate in June 2016 and thereafter shall be considered for a local diploma through the superintendent determination pathway in accordance with the requirements of this clause, provided that the student:

(i) has a current individualized education program and is receiving special education programs and/or related services pursuant to Education Law section 4402 and section 200.4 of this Title; and

(ii) took the English Regents examination required for graduation pursuant to this section and achieved a minimum score of 55 or successfully appealed a score of between 52 and 54 on such examination pursuant to paragraph (7) of this subdivision; and

(iii) took a mathematics Regents examination required for graduation pursuant to this section and achieved a minimum score of 55 or successfully appealed a score of between 52 and 54 on such examination pursuant to paragraph (7) of this subdivision; and

(iv) participated in the remaining assessments required for graduation pursuant to clauses (c), (d), (e) and (f) of subparagraph (a)(5)(i) of this section, provided that if the student was unable to achieve a passing score on one or more of the remaining assessments required for graduation or to successfully appeal a score of between 52 and 54 on one or more such examinations pursuant to paragraph (7) of this subdivision, or did not initiate such an appeal pursuant to paragraph (7) of this subdivision, or to use the compensatory score option for one or more such examinations pursuant to clause (b)(7)(vi)(c) of this section, then the superintendent shall determine whether the student has otherwise demonstrated proficiency in the knowledge, skills and abilities measured by the relevant Regents examination(s) and shall document such determination in accordance with the following:

(a) the superintendent shall consider evidence that the student attained a grade for the course 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. Such evidence shall include but need not be limited to the student's final course grade, student work completed throughout the school year and/or any interim grades on homework, projects, class work, quizzes and tests; and

(b) with respect to subparagraph (iv) of this paragraph, the superintendent shall consider the extent to which the student participated in such examination(s); and

(c) the superintendent shall, as soon as practicable, in a form and manner prescribed by the commissioner, document the evidence reviewed for an eligible student with disability under this paragraph and make a determination as to whether the student met the requirements for issuance of a local diploma pursuant to this clause and certify that the information provided is accurate; and

(d) the superintendent shall, as soon as practicable, provide each student(s) and parent or person in parental relation to the student with a copy of the completed form and must place a copy of the completed form in the student's record; and

(e) the superintendent shall, no later than August 31 of each year, provide the commissioner with a copy of the completed form for each student; and

(f) the commissioner may conduct audits of compliance with the requirements of this clause.

2. Clause (c) of subparagraph (i) of paragraph (7) of subdivision (d) of section 100.5 of the Regulations of the Commissioner is amended, effective June 13, 2016, as follows:

(c) A student who is otherwise eligible to graduate in January 2016 or thereafter, is identified as a student with a disability as defined in section 200.1(zz) of this Title, and fails, after at least two attempts, to attain a score of 55 or above on up to two of the required Regents examinations for graduation shall be given an opportunity to appeal such score in accordance with the provisions of this paragraph for purposes of graduation with a local diploma, provided that the student:

(1) has scored within three points of a score of 55 on the required Regents examination under appeal and has attained at least a 65 course average in the subject area of the Regents examination under appeal; and

(2) has met the criteria specified in subclauses (a)(2)-(4) 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.]

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-27-16-00002-EP, Issue of July 6, 2016. The emergency rule will expire November 11, 2016.

Text of rule and any required statements and analyses may be obtained from: Kirti Goswami, New York State Education Department, 89 Washington Avenue, Room 148, (518) 474-8966, Albany, NY 12234, (518) 474-8966, email: legal@nysed.gov

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Education Law section 207 empowers the 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.

Education Law 3204(3) and (4) sets forth the course of study and requires students with disabilities to receive a free appropriate public education.

2. LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the authority conferred by the above statutes and is necessary to implement policy enacted by the Regents relating to a superintendent review option for students with disabilities to graduate with a local diploma.

3. NEEDS AND BENEFITS:

All students with disabilities must be held to high expectations and be provided meaningful opportunities to participate and progress in the general education curriculum to prepare them to graduate with a regular high school diploma. The majority of students with disabilities can meet the State's learning standards for graduation. However, there are some students who, because of their disabilities, are unable to demonstrate their proficiency on standard State assessments, even with testing accommodations. For these students, the State is providing a superintendent review option for eligible students to graduate with a local diploma.

The proposed amendment to current regulations has been developed to ensure that students with disabilities have demonstrated that they have met the State's learning standards for graduation. As such, the school principal and superintendent must review, document and provide a written certification/assurance that there is evidence that the student has otherwise met the standards for graduation with a local high school diploma. Because ELA and math are foundation skills for which there must be a standardized measure of achievement, this option does require a minimum score on the ELA and math Regents exams. However, for the other three exams required for graduation, this option allows review of other documentation of proficiency when the student cannot pass one or more of these exams. The conditions of the review are detailed below:

Applicability

This option would be open to students with disabilities with a current Individualized Education Program (IEP) only. It does not apply to students with section 504 accommodation plans or students who have been declassified from special education.

Process

Beginning with students with disabilities who are otherwise eligible to graduate in June 2016 and thereafter, a school superintendent (or the principal of a registered nonpublic school or charter school, as applicable) has the responsibility to determine if a student with a disability has otherwise met the standards for graduation with a local diploma when such student has not been successful, because of his/her disability, at demonstrating his/her proficiency on the Regents exams required for graduation.

Automatic Review

The superintendent must ensure that every student with a disability who does not meet the graduation standards through the existing appeal and safety net options is considered for the superintendent determination. This option does not need to be formally requested by the student or parent.

Condition

1. The student has a current IEP and is receiving special education programs and/or related services.

2. The student did not meet the graduation requirements through the low pass (55-64) safety net option¹ or the compensatory option² [section 100.5(b)(7)(vi)(c) and (d)(7)].

3. The student must have earned the required course credits and have passed, in accordance with district policy, all courses required for graduation, including the Regents courses to prepare for the corresponding required Regents exam areas (ELA, math, social studies, and science).

4. The student must have received a minimum score of 55 on both the Regents ELA and math exams or a successful appeal of a score between 52 and 54.

5. There must be evidence that the student participated in the other exams required for graduation pursuant to section 100.5(a)(5), but has not passed one or more of these as required for graduation.

6. In a subject area where the student was not able to demonstrate his/her proficiency of the State's learning standards through the assessment required for graduation, there must be evidence that the student has otherwise demonstrated graduation level proficiency in the subject area.

Review and Documentation

In conducting a review to ensure the student has met the academic standards, the superintendent must consider evidence that demonstrates that the student:

1. Passed courses culminating in the exam required for graduation, in accordance with the grading policies of the district. In making this determination, the superintendent must consider the student's final course grade as well as student work completed throughout the school year and/or interim grades on homework, projects, class work, quizzes, tests, etc., that demonstrate that the student has met the learning standards for the course; and

2. Actively participated in the exam required for graduation.

The school principal and superintendent must sign a document, on a form prescribed by the Commissioner, which describes the evidence reviewed and the decision rendered by the superintendent. The student and the parent of the student must receive a copy of this documentation and written notification of the superintendent's determination. Where the superintendent determines that the student has not met requirements for graduation, the notice must inform the student that he/she has the right to

attend school until receipt of a local or Regents diploma or until the end of the school year in which the student turns age 21, whichever shall occur first.³

The superintendent must sign an assurance on the form that certifies that the information is accurate and the superintendent attests that the student has met graduation requirements. A copy of the form must be placed in the student's record and a copy must be submitted to the Department no later than by August 31st following the student's graduation.

Decision

A determination by the superintendent is final.

Audit

The Commissioner shall periodically audit the determinations granted by superintendents to ensure that conditions described above are being met.

Allowance of Low Pass Appeal in Addition to Compensatory Option

Under current regulations, students with disabilities who make use of the compensatory option described above are not eligible to also make use of the low pass appeal wherein they are able to appeal scores of 52-54. The proposed amendment removes this prohibition and allows these students to make use of both options in meeting graduation requirements.

4. COSTS:

(a) Costs to State: none.

(b) Costs to local governments: There may be costs associated with extending the population of students with disabilities can earn a local diploma. School districts, BOCES and registered non-publics may also incur costs for the superintendent review and with recording the evidence reviewed and the decision rendered by the superintendent in these reviews. However, these costs are anticipated to be minimal and capable of being absorbed by districts using existing staff and resources.

In the long term, the proposed amendment is expected to be a cost-saving measure in that it will boost the graduation rate, allowing more students to access higher education or enter the workforce with a high school diploma. Both of these outcomes will in turn stimulate workforce productivity and economic performance in local communities.

(c) Costs to private regulated parties: See (b) above.

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

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment was developed to ensure that students with disabilities have demonstrated that they have met the State's learning standards for graduation. As such, the school principal and superintendent must review, document and provide a written certification/assurance that there is evidence that the student has otherwise met the standards for graduation with a local high school diploma. Because ELA and math are foundation skills for which there must be a standardized measure of achievement, this option does require a minimum score on the ELA and math Regents exams. However, for the other three exams required for graduation, this allows review of other documentation of proficiency when the student cannot pass one or more of these exams. This only applies to students with disabilities with a current Individualized Education Program (IEP) only.

Beginning with students with disabilities who are otherwise eligible to graduate in June 2016 and thereafter, a school superintendent (or the principal of a registered nonpublic school or charter school, as applicable) must determine if a student with a disability has otherwise met the standards for graduation with a local diploma when such student has not been successful, because of his/her disability, at demonstrating proficiency on the Regents exams required for graduation. The superintendent must ensure that every student with a disability who does not meet the graduation standards through the existing appeal and safety net options is considered for the superintendent determination, and need not be formally requested by the student or parent.

6. PAPERWORK:

The proposed rule does not impose any significant paperwork requirements, upon local government, including school districts or BOCES. However, when a superintendent makes a determination that a student has met the requirements for a local diploma, he/she must sign an assurance certifying that the information is accurate and attesting that the student has met graduation requirements. A copy of the form must be placed in the student's record and a copy must be submitted to the Department no later than by August 31st following the student's graduation.

7. DUPLICATION:

The proposed rule does not duplicate any existing State or federal requirements.

8. ALTERNATIVES:

There were no significant alternatives and none were considered. The proposed rule is necessary to implement Regents policy relating to safety net options for students with disabilities to graduate with a local diploma.

9. FEDERAL STANDARDS:

There are no related federal standards in this area.

10. COMPLIANCE SCHEDULE:

Beginning with students with disabilities who are otherwise eligible to graduate in June 2016 and thereafter, a school superintendent (or the principal of a registered nonpublic school or charter school, as applicable) has the responsibility to determine if a student with a disability has otherwise met the standards for graduation with a local diploma when such student has not been successful, because of his/her disability, at demonstrating his/her proficiency on the Regents exams required for graduation.

¹ A student also has the option to appeal a score of 52-54 on up to two Regents exams pursuant to section 100.5(b)(7)(vi)(c). While the appeal option exists, it is not required in order for a student to be considered for the superintendent's determination option.

² A student also has the option to appeal the ELA and/or math scores pursuant to section 100.5(d)(7). While the appeal option exists, it is not required in order for a student to be considered for the superintendent's determination option.

³ A student with a disability who has not yet earned a diploma and who has not reached the age of 21 may reenroll in school and graduate through this option, provided the student has a current IEP, is participating in the required coursework and is receiving special education programs and services.

Regulatory Flexibility Analysis

(a) Small businesses:

The proposed amendment is necessary to implement policy enacted by the Board of Regents relating to the expansion of the available safety net options for students with disabilities to graduate with a local diploma upon the determination of the superintendent that such student has met certain other conditions for graduation. The proposed amendment requires the school principal and superintendent to review, document and provide a written certification/assurance that there is evidence that the student has otherwise met the standards for graduation with a local high school diploma. Because ELA and math are foundation skills for which there must be a standardized measure of achievement, this option does require a minimum score on the ELA and math Regents exams. However, for the other three exams required for graduation, this option allows review of other documentation of proficiency when the student cannot pass one or more of these exams.

Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local governments:

1. 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.

2. COMPLIANCE REQUIREMENTS:

All students with disabilities must be held to high expectations and be provided meaningful opportunities to participate and progress in the general education curriculum to prepare them to graduate with a regular high school diploma. The majority of students with disabilities can meet the State's learning standards for graduation. However, there are some students who, because of their disabilities, are unable to demonstrate their proficiency on standard State assessments, even with testing accommodations. For these students, the State is providing a superintendent review option for eligible students to graduate with a local diploma.

The proposed amendment to current regulations has been developed to ensure that students with disabilities have demonstrated that they have met the State's learning standards for graduation. As such, the school principal and superintendent must review, document and provide a written certification/assurance that there is evidence that the student has otherwise met the standards for graduation with a local high school diploma. Because ELA and math are foundation skills for which there must be a standardized measure of achievement, this option does require a minimum score on the ELA and math Regents exams. However, for the other three exams required for graduation, this option allows review of other documentation of proficiency when the student cannot pass one or more of these exams. The conditions of the review are detailed below:

Applicability

This option would be open to students with disabilities with a current Individualized Education Program (IEP) only. It does not apply to students with section 504 accommodation plans or students who have been declassified from special education.

Process

Beginning with students with disabilities who are otherwise eligible to graduate in June 2016 and thereafter, a school superintendent (or the principal of a registered nonpublic school or charter school, as applicable) has the responsibility to determine if a student with a disability has otherwise met the standards for graduation with a local diploma when such student has not been successful, because of his/her disability, at demonstrating his/her proficiency on the Regents exams required for graduation.

Automatic Review

The superintendent must ensure that every student with a disability who does not meet the graduation standards through the existing appeal and safety net options is considered for the superintendent determination. This option does not need to be formally requested by the student or parent.

Condition

1. The student has a current IEP and is receiving special education programs and/or related services.

2. The student did not meet the graduation requirements through the low pass (55-64) safety net option¹ or the compensatory option² [section 100.5(b)(7)(vi)(c) and (d)(7)].

3. The student must have earned the required course credits and have passed, in accordance with district policy, all courses required for graduation, including the Regents courses to prepare for the corresponding required Regents exam areas (ELA, math, social studies, and science).

4. The student must have received a minimum score of 55 on both the Regents ELA and math exams or a successful appeal of a score between 52 and 54.

5. There must be evidence that the student participated in the other exams required for graduation pursuant to section 100.5(a)(5), but has not passed one or more of these as required for graduation.

6. In a subject area where the student was not able to demonstrate his/her proficiency of the State's learning standards through the assessment required for graduation, there must be evidence that the student has otherwise demonstrated graduation level proficiency in the subject area.

Review and Documentation

In conducting a review to ensure the student has met the academic standards, the superintendent must consider evidence that demonstrates that the student:

1. Passed courses culminating in the exam required for graduation, in accordance with the grading policies of the district. In making this determination, the superintendent must consider the student's final course grade as well as student work completed throughout the school year and/or interim grades on homework, projects, class work, quizzes, tests, etc., that demonstrate that the student has met the learning standards for the course; and

2. Actively participated in the exam required for graduation.

The school principal and superintendent must sign a document, on a form prescribed by the Commissioner, which describes the evidence reviewed and the decision rendered by the superintendent. The student and the parent of the student must receive a copy of this documentation and written notification of the superintendent's determination. Where the superintendent determines that the student has not met requirements for graduation, the notice must inform the student that he/she has the right to attend school until receipt of a local or Regents diploma or until the end of the school year in which the student turns age 21, whichever shall occur first.³

The superintendent must sign an assurance on the form that certifies that the information is accurate and the superintendent attests that the student has met graduation requirements. A copy of the form must be placed in the student's record and a copy must be submitted to the Department no later than by August 31st following the student's graduation.

Decision

A determination by the superintendent is final.

Audit

The Commissioner shall periodically audit the determinations granted by superintendents to ensure that conditions described above are being met.

Allowance of Low Pass Appeal in Addition to Compensatory Option

Under current regulations, students with disabilities who make use of the compensatory option described above are not eligible to also make use of the low pass appeal wherein they are able to appeal scores of 52-54. The proposed amendment removes this prohibition and allows these students to make use of both options in meeting graduation requirements.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

There may be costs associated with extending the population of students with disabilities can earn a local diploma. School districts, BOCES and registered non-publics may also incur costs for the superintendent review and with recording the evidence reviewed and the decision rendered by

the superintendent in these reviews. However, these costs are anticipated to be minimal and capable of being absorbed by districts using existing staff and resources.

In the long term, the proposed amendment is expected to be a cost-saving measure in that it will boost the graduation rate, allowing more students 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.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement Regents policy relating to the expansion of the available safety net options for students with disabilities to graduate with a local diploma upon the determination of the superintendent that such student has met certain other conditions for graduation.

Because the Regents policy upon which the proposed amendment is based applies to all school districts in the State, it is not possible to establish differing compliance or reporting requirements or timetables or to exempt school districts from coverage by the proposed amendment. The proposed amendment does not directly impose any additional compliance requirements or costs on school districts. It is anticipated that any indirect costs associated with the proposed amendment will be minimal and capable of being absorbed using existing school resources.

7. LOCAL GOVERNMENT PARTICIPATION:

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

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

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed rule is necessary to implement long-range Regents policy providing for an additional safety net option for students with disabilities to graduate with a local diploma when certain conditions are met. 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 Emergency Adoption published herewith, and must be received within 45 days of the State Register publication date of the Notice.

¹ A student also has the option to appeal a score of 52-54 on up to two Regents exams pursuant to section 100.5(b)(7)(vi)(c). While the appeal option exists, it is not required in order for a student to be considered for the superintendent's determination option.

² A student also has the option to appeal the ELA and/or math scores pursuant to section 100.5(d)(7). While the appeal option exists, it is not required in order for a student to be considered for the superintendent's determination option.

³ A student with a disability who has not yet earned a diploma and who has not reached the age of 21 may reenroll in school and graduate through this option, provided the student has a current IEP, is participating in the required coursework and is receiving special education programs and services.

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:

All students with disabilities must be held to high expectations and be provided meaningful opportunities to participate and progress in the general education curriculum to prepare them to graduate with a regular high school diploma. The majority of students with disabilities can meet the State's learning standards for graduation. However, there are some students who, because of their disabilities, are unable to demonstrate their proficiency on standard State assessments, even with testing accommodations. For these students, the State is providing a superintendent review option for eligible students to graduate with a local diploma.

The proposed amendment to current regulations has been developed to ensure that students with disabilities have demonstrated that they have met the State's learning standards for graduation. As such, the school principal and superintendent must review, document and provide a written certification/assurance that there is evidence that the student has otherwise met the standards for graduation with a local high school diploma. Because ELA and math are foundation skills for which there must be a standardized measure of achievement, this option does require a minimum score on the ELA and math Regents exams. However, for the other three exams required for graduation, this option allows review of other documentation of proficiency when the student cannot pass one or more of these exams. The conditions of the review are detailed below:

Applicability

This option would be open to students with disabilities with a current Individualized Education Program (IEP) only. It does not apply to students with section 504 accommodation plans or students who have been declassified from special education.

Process

Beginning with students with disabilities who are otherwise eligible to graduate in June 2016 and thereafter, a school superintendent (or the principal of a registered nonpublic school or charter school, as applicable) has the responsibility to determine if a student with a disability has otherwise met the standards for graduation with a local diploma when such student has not been successful, because of his/her disability, at demonstrating his/her proficiency on the Regents exams required for graduation.

Automatic Review

The superintendent must ensure that every student with a disability who does not meet the graduation standards through the existing appeal and safety net options is considered for the superintendent determination. This option does not need to be formally requested by the student or parent.

Condition

1. The student has a current IEP and is receiving special education programs and/or related services.

2. The student did not meet the graduation requirements through the low pass (55-64) safety net option¹ or the compensatory option² [section 100.5(b)(7)(vi)(c) and (d)(7)].

3. The student must have earned the required course credits and have passed, in accordance with district policy, all courses required for graduation, including the Regents courses to prepare for the corresponding required Regents exam areas (ELA, math, social studies, and science).

4. The student must have received a minimum score of 55 on both the Regents ELA and math exams or a successful appeal of a score between 52 and 54.

5. There must be evidence that the student participated in the other exams required for graduation pursuant to section 100.5(a)(5), but has not passed one or more of these as required for graduation.

6. In a subject area where the student was not able to demonstrate his/her proficiency of the State's learning standards through the assessment required for graduation, there must be evidence that the student has otherwise demonstrated graduation level proficiency in the subject area.

Review and Documentation

In conducting a review to ensure the student has met the academic standards, the superintendent must consider evidence that demonstrates that the student:

1. Passed courses culminating in the exam required for graduation, in accordance with the grading policies of the district. In making this determination, the superintendent must consider the student's final course grade as well as student work completed throughout the school year and/or interim grades on homework, projects, class work, quizzes, tests, etc., that demonstrate that the student has met the learning standards for the course; and

2. Actively participated in the exam required for graduation.

The school principal and superintendent must sign a document, on a form prescribed by the Commissioner, which describes the evidence reviewed and the decision rendered by the superintendent. The student and the parent of the student must receive a copy of this documentation and written notification of the superintendent's determination. Where the superintendent determines that the student has not met requirements for graduation, the notice must inform the student that he/she has the right to attend school until receipt of a local or Regents diploma or until the end of the school year in which the student turns age 21, whichever shall occur first.³

The superintendent must sign an assurance on the form that certifies that the information is accurate and the superintendent attests that the student has met graduation requirements. A copy of the form must be placed in the student's record and a copy must be submitted to the Department no later than by August 31st following the student's graduation.

Decision

A determination by the superintendent is final.

Audit

The Commissioner shall periodically audit the determinations granted by superintendents to ensure that conditions described above are being met.

Allowance of Low Pass Appeal in Addition to Compensatory Option
Under current regulations, students with disabilities who make use of the compensatory option described above are not eligible to also make use of the low pass appeal wherein they are able to appeal scores of 52-54. The proposed amendment removes this prohibition and allows these students to make use of both options in meeting graduation requirements.

3. COMPLIANCE COSTS:

There may be costs associated with extending the population of students with disabilities can earn a local diploma. School districts, BOCES and registered non-publics may also incur costs for the superintendent review and with recording the evidence reviewed and the decision rendered by the superintendent in these reviews. However, these costs are anticipated to be minimal and capable of being absorbed by districts using existing staff and resources.

In the long term, the proposed amendment is expected to be a cost-saving measure in that it will boost the graduation rate, allowing more students 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:

There were no significant alternatives and none were considered. The proposed rule is necessary to implement Regents policy relating to safety net options for students with disabilities to graduate with a local diploma.

5. RURAL AREA PARTICIPATION:

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

¹ A student also has the option to appeal a score of 52-54 on up to two Regents exams pursuant to section 100.5(b)(7)(vi)(c). While the appeal option exists, it is not required in order for a student to be considered for the superintendent's determination option.

² A student also has the option to appeal the ELA and/or math scores pursuant to section 100.5(d)(7). While the appeal option exists, it is not required in order for a student to be considered for the superintendent's determination option.

³ A student with a disability who has not yet earned a diploma and who has not reached the age of 21 may reenroll in school and graduate through this option, provided the student has a current IEP, is participating in the required coursework and is receiving special education programs and services.

Job Impact Statement

All students with disabilities must be held to high expectations and be provided meaningful opportunities to participate and progress in the general education curriculum to prepare them to graduate with a regular high school diploma. The majority of students with disabilities can meet the State's learning standards for graduation. However, there are some students who, because of their disabilities, are unable to demonstrate their proficiency on standard State assessments, even with testing accommodations. For these students, the proposed amendment requires a superintendent review option for eligible students to graduate with a local diploma. The proposed amendment requires the school principal and superintendent to review, document and provide a written certification/assurance that there is evidence that the student has otherwise met the standards for graduation with a local high school diploma. Because ELA and math are foundation skills for which there must be a standardized measure of achievement, this option does require a minimum score on the ELA and math Regents exams. However, for the other three exams required for graduation, this option allows review of other documentation of proficiency when the student cannot pass one or more of these exams.

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

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on July 6, 2016, the State Education Department (SED) received the following comments on the proposed amendment.

1. COMMENT:

Provision of additional graduation pathway for students with disabilities is welcome policy change. Pleased SED and Board of Regents (BOR) continue discussing graduation pathways providing students with disabilities flexibility to satisfy graduation requirements. Appreciate district

responsibility for eligibility determinations as families are not aware of different/confusing Regents exam appeal options. Number of commenters supported proposal and multiple pathways, which recognizes some student's inability to demonstrate proficiency on high-stakes tests, but recommended modifications. Proposal creates opportunity for students with individualized education programs (IEPs) to earn local diploma.

DEPARTMENT RESPONSE:

Comments are generally supportive; no response necessary.

2. COMMENT:

Comments opposing proposal indicate it: endorses lower standards; removes parents/students/committee on special education(CSE), who know child best, from process; removes right of individual with a disability to choose path; does not consider student's IEP goals/transition plan; allows superintendent to make subjective determination; does not provide opportunity for families to review determination and confirm exiting is in student's best interests; does not require CSE review of student's IEP before receiving a diploma [see OSERS Letter to Richards, IDELR 288]. After student is determined eligible, require CSE to review IEP and all pertinent documents related to IEP/transition plan prior to determination to ensure needs/goals are considered. CSE is familiar with, and is best positioned to assess, student's skills and continued need for special education. CSE discussion informs students/parents of implications of graduation with local versus Regents diploma. Require CSE's recommendation and superintendent's review of recommendation and IEP considering student's transition needs/goals, when making determination. Replace superintendent with CSE recommendation regarding proposed graduation based on proposed regulation standards; allow parent and/or staff initiation. Power rests with uninformed superintendent; forcing early graduation and not allowing students to become independent members of society. Superintendent determination is final; there is no recourse or appeal mechanism. Depriving students opportunity to earn Regents diploma, a benefit their peers enjoy, is discriminatory and violates Section 504 of the Rehabilitation Act of 1973 and Americans with Disabilities Act.

DEPARTMENT RESPONSE:

It is anticipated proposed rule will go back to BOR at their October 2016 meeting. SED will consider whether revisions should be made to proposed rule in response to these comments.

3. COMMENT

May inadvertently open door for districts to prematurely push students with disabilities out of system as cost savings or remove challenging students; limits student's work toward IEP goals by denying entitlement to free appropriate public education(FAPE); may impact classification rate and increase due process regarding eligibility or declassification if parents view special education as increasing likelihood of graduation.

DEPARTMENT RESPONSE:

It is anticipated proposed rule will go back to BOR at their October 2016 meeting. SED will consider whether revisions should be made to proposed rule in response to these comments.

4. COMMENT:

Proposal undermines objectives for students with disabilities to leave school prepared for independence, post-secondary education and employment; ignores district's policies for college readiness. BOR documented lack of college/career readiness of students awarded local diplomas based on higher standards than superintendent determination. Students face remedial courses, tuition debt, reduced chances of completing degree; and minimal employment opportunities. State University of New York predicts college readiness by scores of 75 on English Language Arts (ELA) and 80 on math Regents exams and is proposing to eliminate remedial programs. Reducing passing rate creates situations where students are unable to function in college and will not have access to remedial support.

DEPARTMENT RESPONSE:

SED does not agree proposal will result in students not being college and career ready. The proposed rule was developed to ensure students with disabilities meet State's learning standards for graduation. Because ELA and math are foundation skills for which there must be standardized measures of achievement, this option requires 55 minimum score on ELA and math Regents exams. For other three required exams, superintendent must review, document and provide written certification/assurance there is evidence student has otherwise met graduation standards for a local diploma.

5. COMMENT:

Without family's consent, students' rights under Individuals with Disabilities Education Act and to FAPE can be denied. Families should be consulted throughout process and have equal say in child's educational needs and not be decided just by superintendent. Require family notification once potential eligibility is identified, provide student opportunity to accept or forgo/defer this pathway and remain eligible to stay in school until 21. Not having this right is unfair; has long-term impact on student's future. Allow parents to accept diploma but decline termination of special education services. Suggest form contain statement that student accepts

determination. Require districts to inform parents/students of this option and that parent and/or student request superintendent's review. Recommend Superintendent's Determination is initiated by student, parent/guardian, teacher/principal, or CSE similar to appeals process. Add limited resolution period to dispute determination and still meet August 31 timeline for submission to SED.

DEPARTMENT RESPONSE:

It is anticipated proposed rule will go back to BOR at their October 2016 meeting. SED will consider whether revisions should be made to proposed rule in response to these comments.

6. COMMENT:

Procedure to provide parent with prior written notice (PWN) regarding pending change in placement when district intends to graduate student before age 21 [See 34 CFR section 300.102(a)(3)(iii)] not incorporated into regulatory changes. Require legally sufficient PWN be issued to parent regarding all aspects of superintendent determination, providing clear explanation for decision. Due process demands student's right to challenge superintendent's unilateral, subjective determination as graduation with local diploma is change in educational placement. Graduation is subject to stay-put provisions; parent can invoke due process and student remains eligible for special education services until proceedings conclude.

DEPARTMENT RESPONSE:

In accordance with section 200.5(a)(5)(ii) of Commissioner's Regulations districts are required to provide PWN to parent prior to student's graduation with local or Regents diploma. Such notice must indicate student is no longer eligible to receive FAPE. As with any district proposal to change educational program or placement of a student with a disability, parents may seek to resolve disagreements with proposal to graduate student through all appropriate means, including mediation and due process hearing proceedings.

7. COMMENT:

Requiring students only to actively participate in exams may send message students do not have to try to pass exams. Unlikely students will be able to demonstrate graduation level proficiency yet not minimal proficiency on State assessments. Limit range of failing scores acceptable for superintendent determination. Provide students with extremely low scores (i.e., 0-35) option for continued eligibility for FAPE.

DEPARTMENT RESPONSE:

It is anticipated proposed rule will go back to BOR at their October 2016 meeting. SED will consider whether revisions should be made to proposed rule in response to these comments.

8. COMMENT:

Reevaluate students prior to termination of services.

DEPARTMENT RESPONSE:

In accordance with section 200.4(c)(4) of Commissioner's regulations, districts are not required to conduct student reevaluations before termination of student's eligibility due to graduation with local or Regents diploma.

9. COMMENT:

Eliminate requirement that students participate in exams other than ELA and math required for graduation as they can be demoralizing, discouraging and result in undue stress.

DEPARTMENT RESPONSE:

The proposed rule was developed to ensure students with disabilities meet State's learning standards for graduation; therefore, for other three required exams, superintendent must review, document and provide written certification/assurance there is evidence student has otherwise met graduation standards for a local diploma.

10. COMMENT:

Charter schools are only required to meet same health/safety, civil rights, and student assessment requirements applicable to public schools; because superintendent determination does not fit these categories, BOR does not have statutory authority to mandate charter schools consider this option. Charter School Act does not provide BOR regulatory power regarding graduation safety nets; charter schools have option to grant diploma created by BOR but are not required to. Only amendment to Charter Schools Act or schools charter could mandate this. If charter school chooses to utilize new safety net option would it be required to follow procedures outlined in new superintendent determination for each student with a disability? Request that "Charter school" be removed from superintendent determination regulations.

DEPARTMENT RESPONSE:

Pursuant to Education Law § 2854(1)(b) and (d), charter schools shall meet the same student assessment requirements applicable to other public schools and may grant regents and local diplomas to the same extent as other public schools.

11. COMMENT:

To be equitable, extend superintendent determination to students with Section 504 Accommodation Plans, declassified students, multilingual learners and to all students as students with IEPs are not the only students

struggling with Regents exams; no student should be penalized for not demonstrating mastery of NYS standards on high-stakes standardized tests. Superintendent determination pathway operates with one-size-fits-all framework unfairly penalizing students struggling with high-stakes standardized tests. Urge NYS to create multiple instructional/assessment pathways to diploma (e.g., performance-based assessments; project-based assessments) for students unable to demonstrate proficiency on State assessments; hold all students to high expectations. Hold Statewide public hearings/listening tour regarding high-stakes Regents exam graduation requirements and alternative pathways to diploma. Over 60% of states don't require exit exams for graduation. Reevaluate mindset that local diploma is a "less than" diploma. State policy should acknowledge students are able to show achievement in ways besides standardized tests. Overemphasis on passing Regents exams detracts from well-rounded education. Diploma path should not be tied to standardized written exams.

DEPARTMENT RESPONSE:

It is anticipated proposed rule will go back to BOR at their October 2016 meeting. SED will consider whether revisions should be made to proposed rule in response to these comments.

12. COMMENT:

Clarify when parents must receive written notice of superintendent's determination.

DEPARTMENT RESPONSE:

Notice of a superintendent's determination should be provided at the same time the district provides prior written notice that the students educational eligibility is terminating because the student met the requirements for a regular high school diploma. Such notice must be provided in a reasonable timeframe before the district proposes to graduate the student.

13. COMMENT:

Having a separate local diploma for students with disabilities is discriminatory [See Letter to White, OSEP, 63 IDELR 230 (7/2/14)] and discloses person's disability to potential colleges/employers. Revise regulations to permit award of local diploma to all students, regardless of disability.

DEPARTMENT RESPONSE:

This is not a separate type of diploma. The local diploma is currently available to all students, not just students with disabilities. Under current regulations, all students who satisfactorily appeal two Regents test scores may earn local diploma.

14. COMMENT:

Concerned that earning a CDOS is not available with the Superintendent Determination.

DEPARTMENT RESPONSE:

Nothing in the proposed rule prohibits students from earning the CDOS credential as supplement to local diploma through superintendent determination pathway or using the credential to meet 5th assessment requirement for local diploma (see 100.5[d][11]).

15. COMMENT:

Proposal was passed without sufficient opportunity for thoughtful review and public comment. SED publicized regulations during summer when stakeholders are less connected to school issues and did not conduct hearings. Public is largely unaware of proposal; public comment period is very short and should be lengthened.

DEPARTMENT RESPONSE:

Following discussion at the June BOR meeting, in accordance with requirements of the State Administrative Procedure Act (SAPA), proposed rule was published in NYS Register and public comment was accepted for 45 days. Additional guidance for schools/parents on superintendent determination is posted on Office of Special Education's website (<http://www.p12.nysed.gov/specialed/publications/superintendent-determination-of-graduation-with-a-local-diploma.htm>).

It is anticipated proposed rule will go back to BOR at their October 2016 meeting. SED will consider whether revisions should be made to proposed rule in response to these comments.

16. COMMENT:

Reopen application process for consortium schools allowing all high schools to apply to be public consortium schools using authentic project-based assessments, which has been successful model for student success.

DEPARTMENT RESPONSE:

Comment is beyond scope of proposed rulemaking.

**EMERGENCY
RULE MAKING**

Annual Professional Performance Reviews (APPR) of Classroom Teachers and Building Principals

I.D. No. EDU-27-16-00003-E

Filing No. 856

Filing Date: 2016-09-13

Effective Date: 2016-09-18

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

Action taken: Amendment of sections 30-3.4 and 30-3.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 215(not subdivided), 305(1), (2), 3009(1), 3012-c and 3012-d; L. 2015, ch. 20, subpart C, section 3; L. 2015, ch. 56, part EE, subpart E, sections 1 and 2

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

Specific reasons underlying the finding of necessity: The purpose of the proposed amendment is to provide districts and BOCES with a hardship waiver commencing with the 2016-2017 school year from certain aspects of the independent observation requirements under Education Law § 3012-d for both teacher and principal evaluations.

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 State Administrative Procedure Act (SAPA) section 202(4-a), would be the September 12-13, 2016 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the September meeting, would be September 28, 2016, the date a Notice of Adoption would be published in the State Register. However, the emergency measure taken at the June 2016 Regents meeting will expire on September 17, 2016.

Emergency action at the September 2016 Regents meeting is therefore necessary for the preservation of the general welfare in order to immediately adopt revisions to the proposed amendment to provide notice to districts of the ability to apply for a hardship waiver for districts who believe that using independent observers will create an undue burden on their districts and to ensure that districts can receive approval of their annual professional performance review plans by the September 1 deadline to receive State aid increases pursuant Education Law § 3012-d(12) for the 2016-2017 school year and to ensure that the emergency rule adopted at the July Regents meeting remains continuously in effect until it can be adopted as a permanent rule on September 28, 2016.

Subject: Annual Professional Performance Reviews (APPR) of classroom teachers and building principals.

Purpose: Provide districts and BOCES with a hardship waiver commencing with the 2016-2017 school year from independent evaluator.

Text of emergency rule: 1. Clause (b) of subparagraph (i) of paragraph (2) of subdivision (d) of section 30-3.4 of the Rules of the Board of Regents shall be amended, effective September 18, 2016, to read as follows:

(b) a second observation shall be conducted by either one or more impartial independent trained evaluator(s) selected and trained by the district or in cases where a hardship waiver is granted by the department pursuant to subclause (1) of this clause, a second observation shall be conducted by one or more evaluators selected and trained by the district, who are different than the evaluator(s) who conducted the evaluation pursuant to clause (a) of this paragraph; or in cases where a hardship waiver is granted by the department pursuant to subclause (2) of this subparagraph, a second observation shall be conducted as prescribed in subclause (2). An independent trained evaluator may be employed within the district, but may not be assigned to the same school building as the teacher being evaluated;

(1) . . .

(2) Commencing with the 2016-2017 school year, a school district may apply to the Department for a hardship waiver on an annual basis, in a timeframe and manner prescribed by the commissioner, if the school district believes that compliance with this clause would create an undue burden on the school district in one or more of the following areas: compliance with the independent evaluator requirement would result in financial hardship; the district lacks professionally trained staff to comply with the independent evaluator requirement; the district has a large number of teachers; and/or compliance with the independent evaluator requirement could impact safety and management of a building. A hard-

ship waiver granted by the Department under this subclause shall excuse, but not prohibit, school districts from conducting observations by impartial independent trained evaluators for teachers who received a rating of highly effective, effective, or developing in the preceding school year (e.g., school districts would be excused, but not prohibited, from conducting observations by impartial independent trained evaluators for the 2016-2017 school year for teachers who receive a rating of highly effective, effective, or developing for the 2015-2016 school year; school districts would be required to conduct observations by impartial independent trained evaluators for the 2016-2017 school year for, at a minimum, teachers who receive a rating of ineffective for the 2015-2016 school year). For teachers who are excused from the impartial independent trained evaluator requirement pursuant to a hardship waiver granted by the Department under this subclause, school districts shall conduct a second observation, provided that such second observation may be conducted by the building principal/supervisor or any individual selected and trained by the school district. The two observations for such teachers could be performed by the same individual. As part of its hardship waiver request, a school district shall submit a plan for conducting observations by the building principal or other individual selected and trained by the school district in lieu of the impartial independent trained evaluator subcomponent. For the other teachers in the district who must still receive a second observation by an impartial, independent trained evaluator (teachers who, at a minimum, received an ineffective rating in the preceding school year), the district must submit a plan for conducting such observations. Once a hardship waiver is approved by the Department, it shall be considered part of the school district's annual professional performance review plan for such school year.

2. Subparagraph (ii) of paragraph (1) of subdivision (d) of section 30-3.5 of the Rules of the Board of Regents shall be amended, effective September 18, 2016, to read as follows:

(ii) a second school visit shall be conducted by either one or more impartial independent trained evaluator(s) selected and trained by the district or in cases where a hardship waiver is granted by the department pursuant to clause (a) of this subparagraph, a second school visit shall be conducted by one or more evaluators selected and trained by the district, who are different than the evaluator(s) who conducted the evaluation pursuant to subparagraph (i) of this paragraph; or in cases where a hardship waiver is granted by the department pursuant to clause (b) of this subparagraph, a second school visit shall be conducted as prescribed in clause (b). An independent trained evaluator may be employed within the district, but may not be assigned to the same school building as the principal being evaluated;

(a) . . .

(b) Commencing with the 2016-2017 school year, a school district may apply to the Department for a hardship waiver on an annual basis, on a form and in a timeframe prescribed by the commissioner, if the school district believes that compliance with this clause would create an undue burden on the district in one or more of the following areas: compliance with the independent evaluator requirement would result in financial hardship; the district lacks professionally trained staff to comply with the independent evaluator requirement; the district has a large number of principals; and/or compliance with the independent evaluator requirement could impact safety and management of a building. A hardship waiver granted by the Department under this clause shall excuse, but not prohibit, school districts from conducting school visits by impartial independent trained evaluators for principals who received a rating of highly effective, effective, or developing in the preceding school year (e.g., school districts would be excused, but not prohibited, from conducting school visits by impartial independent trained evaluators for the 2016-2017 school year for principals who receive a rating of highly effective, effective, or developing for the 2015-2016 school year; school districts would be required to conduct school visits by impartial independent trained evaluators for the 2016-2017 school year for, at a minimum, principals who receive a rating of ineffective for the 2015-2016 school year). For principals who are excused from the impartial independent trained evaluator requirement pursuant to a hardship waiver granted by the Department under this clause, school districts shall conduct a second school visit, provided that such second school visit may be conducted by the principal's supervisor or any individual selected and trained by the school district. The two school visits for such principals could be performed by the same individual. As part of its hardship waiver request, a school district shall submit a plan for conducting school visits by the principal's supervisor or other individual selected and trained by the school district in lieu of the impartial independent trained evaluator subcomponent. For the other principals in the district who must still receive a second school visit by an impartial, independent trained evaluator (principals who, at a minimum, received an ineffective rating in the preceding school year), the district must submit a plan for conducting such school visits. Once a hardship waiver is approved by the Department, it shall be considered part of

the school district's annual professional performance review plan for such school year.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-27-16-00003-EP, Issue of July 6, 2016. The emergency rule will expire November 11, 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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

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

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

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

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

Education Law § 3012-d, as added by Section 2 of Subpart E of Part EE of Chapter 56 of the Laws of 2015 establishes a new evaluation system for classroom teachers and building principals employed by school districts and BOCES for the 2015-16 school year and thereafter.

2. LEGISLATIVE OBJECTIVES:

The proposed rule is necessary to provide immediate notice to districts of the increased flexibility in the observation category by providing for a hardship waiver from the independent evaluator requirement, while they are negotiating their annual professional performance review plans under Education Law § 3012-d for the 2016-2017 school year.

3. NEEDS AND BENEFITS:

On April 13, 2015, the Governor signed Chapter 56 of the Laws of 2015 to add a new Education Law § 3012-d, to establish a new evaluation system for classroom teachers and building principals. The Department implemented regulations to implement the new law in June 2015 and has revised those regulations over the course of the last year to provide school districts and BOCES with as much flexibility as possible to comply with the new law. Education Law § 3012-d(12) and the corresponding appropriation language require school districts to comply with the new law by September 1, 2016 in order to receive their State aid increases. The Department has received numerous concerns about the requirement for the use of independent evaluators in teacher observations and principal school visits, notwithstanding the fact that the Department revised the regulation in September 2015 to provide a hardship waiver for rural and single building school districts. In an effort to provide more flexibility to districts (particularly the large city school districts), the Department is proposing to revise the regulations even further to provide an additional hardship waiver from the independent evaluator requirement as follows:

The proposed amendment revises sections 30-3.4 and 30-3.5 of the Rules of the Board of Regents to provide a hardship waiver to school districts and BOCES commencing with the 2016-2017 school year who believe that compliance with the independent evaluator requirement would create an undue burden on the school district/BOCES in one or more of the following areas:

1. compliance with the independent evaluator requirement would result in financial hardship to the district or BOCES;
2. the district or BOCES lacks professionally trained staff to comply with the independent evaluator requirement;
3. the district or BOCES has a large number of teachers and principals; and/or
4. compliance with the independent evaluator requirement could impact safety and management of a building (e.g., would result in the principal being absent from the school building).

Any hardship waiver granted by the Department would excuse, but not prohibit, school districts/BOCES from conducting observations/school visits by impartial independent trained evaluators for teachers/principals who received an APPR rating of highly effective, effective, or developing in the preceding school year (e.g., school districts would be excused, but not prohibited, from conducting observations/school visits by impartial independent trained evaluators for the 2016-2017 school year for teachers/

principals who receive an APPR rating of highly effective, effective, or developing for the 2015-2016 school year; teachers/principals who, at a minimum, receive an APPR rating of ineffective for the 2015-2016 school year would continue to be subject to the requirement for evaluation by an independent evaluator for the 2016-2017 school year APPR process). However, teachers/principals who are not subject to the independent evaluator requirement pursuant to the hardship waiver must still receive a second observation/school visit. The second observation/school visit may be conducted by the building principal/supervisor or any individual selected and trained by the school district or BOCES. The two observations/school visits for such teachers/principals could be performed by the same individual.

As part of its hardship waiver request, a school district will be required to submit a plan for conducting observations/school visits by the building principal/supervisor or other trained administrators and for conducting the second observation/school visit by the building principal/supervisor or by an individual selected and trained by the school district or BOCES. For the other teachers/principals in the school district/BOCES who must still receive a second observation/school visit by an impartial, independent trained evaluator (those who, at a minimum, receive an APPR rating of ineffective in the preceding school year), the district/BOCES must submit a plan for conducting such observations/school visits. Once a hardship waiver is approved by the Department, it shall be considered part of the school district's annual professional performance review plan for such school year.

4. COSTS:

a. Costs to State government: The amendment provides districts and BOCES with greater flexibility in their implementation of Education Law § 3012-d 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: Education Law § 3012-d, as added by Chapter 56 of the Laws of 2015, establishes requirements for the conduct of annual professional performance reviews (APPR) of classroom teachers and building principals employed by school districts and boards of cooperative educational services (BOCES) for the 2015-2016 school year and thereafter. The amendment provides districts and BOCES with greater flexibility in their implementation of Education Law section 3012-d and does not impose any costs on local government, beyond those costs imposed by the statute.

5. LOCAL GOVERNMENT MANDATES:

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

6. PAPERWORK:

The proposed amendment will not increase reporting or recordkeeping requirements beyond existing requirements.

7. DUPLICATION:

The rule does not duplicate existing State or Federal requirements.

8. ALTERNATIVES:

The proposed amendment is necessary to provide districts and BOCES greater flexibility in their implementation of Education Law § 3012-d and, therefore, no alternatives were considered.

9. FEDERAL STANDARDS:

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

10. COMPLIANCE SCHEDULE:

The annual hardship waiver will be available commencing with the 2016-2017 school year.

Regulatory Flexibility Analysis

(a) Small businesses:

The purpose of proposed rule is to provide annual hardship waivers from the independent evaluator requirement for annual professional performance reviews for school districts and BOCES commencing with the 2016-2017 school year for school districts who believe that compliance with the independent evaluator requirement would create an undue burden on the school district/BOCES.

Any hardship waiver granted by the Department would excuse, but not prohibit, school districts/BOCES from conducting observations/school visits by impartial independent trained evaluators for teachers/principals who received an APPR rating of highly effective, effective, or developing in the preceding school year (e.g., school districts would be excused, but not prohibited, from conducting observations/school visits by impartial independent trained evaluators for the 2016-2017 school year for teachers/principals who receive an APPR rating of highly effective, effective, or developing for the 2015-2016 school year; teachers/principals who, at a minimum, receive an APPR rating of ineffective for the 2015-2016 school year would continue to be subject to the requirement for evaluation by an independent evaluator for the 2016-2017 school year APPR process).

However, teachers/principals who are not subject to the independent evaluator requirement pursuant to the hardship waiver must still receive a second observation/school visit.

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:

The rule applies to each of the approximately 689 school districts and 37 boards of cooperative educational services (BOCES) in the State.

2. COMPLIANCE REQUIREMENTS:

On April 13, 2015, the Governor signed Chapter 56 of the Laws of 2015 to add a new Education Law § 3012-d, to establish a new evaluation system for classroom teachers and building principals. The Department implemented regulations to implement the new law in June 2015 and has revised those regulations over the course of the last year to provide school districts and BOCES with as much flexibility as possible to comply with the new law. Education Law § 3012-d(12) and the corresponding appropriation language require school districts to comply with the new law by September 1, 2016 in order to receive their State aid increases. The Department has received numerous concerns about the requirement for the use of independent evaluators in teacher observations and principal school visits, notwithstanding the fact that the Department revised the regulation in September 2015 to provide a hardship waiver for rural and single building school districts. In an effort to provide more flexibility to districts (particularly the large city school districts), the Department is proposing to revise the regulations even further to provide an additional hardship waiver from the independent evaluator requirement as follows:

The proposed amendment revises sections 30-3.4 and 30-3.5 of the Rules of the Board of Regents to provide a hardship waiver to school districts and BOCES commencing with the 2016-2017 school year who believe that compliance with the independent evaluator requirement would create an undue burden on the school district/BOCES in one or more of the following areas:

1. compliance with the independent evaluator requirement would result in financial hardship to the district or BOCES;
2. the district or BOCES lacks professionally trained staff to comply with the independent evaluator requirement;
3. the district or BOCES has a large number of teachers and principals; and/or
4. compliance with the independent evaluator requirement could impact safety and management of a building (e.g., would result in the principal being absent from the school building).

Any hardship waiver granted by the Department would excuse, but not prohibit, school districts/BOCES from conducting observations/school visits by impartial independent trained evaluators for teachers/principals who received an APPR rating of highly effective, effective, or developing in the preceding school year (e.g., school districts would be excused, but not prohibited, from conducting observations/school visits by impartial independent trained evaluators for the 2016-2017 school year for teachers/principals who receive an APPR rating of highly effective, effective, or developing for the 2015-2016 school year; teachers/principals who, at a minimum, receive an APPR rating of ineffective for the 2015-2016 school year would continue to be subject to the requirement for evaluation by an independent evaluator for the 2016-2017 school year APPR process). However, teachers/principals who are not subject to the independent evaluator requirement pursuant to the hardship waiver must still receive a second observation/school visit. The second observation/school visit may be conducted by the building principal/supervisor or any individual selected and trained by the school district or BOCES. The two observations/school visits for such teachers/principals could be performed by the same individual.

As part of its hardship waiver request, a school district will be required to submit a plan for conducting observations/school visits by the building principal/supervisor or other trained administrators and for conducting the second observation/school visit by the building principal/supervisor or by an individual selected and trained by the school district or BOCES. For the other teachers/principals in the school district/BOCES who must still receive a second observation/school visit by an impartial, independent trained evaluator (those who, at a minimum, receive an APPR rating of ineffective in the preceding school year), the district/BOCES must submit a plan for conducting such observations/school visits. Once a hardship waiver is approved by the Department, it shall be considered part of the school district's annual professional performance review plan for such school year.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

There are no additional costs imposed by the proposed amendment, beyond those imposed by statute.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The rule does not impose any additional technological requirements on school districts or BOCES. Economic feasibility is addressed in the Costs section of the Summary of the Regulatory Impact Statement submitted herewith.

6. MINIMIZING ADVERSE IMPACT:

The rule is necessary to provide districts and BOCES with greater flexibility in implementing the provisions of Education Law § 3012-d. Because Education Law § 3012-d applies to all school districts and BOCES in the State, the Department did not establish differing compliance or reporting requirements or timetables or exempt schools in rural areas from coverage by the proposed amendment.

7. LOCAL GOVERNMENT PARTICIPATION:

The proposed amendment is submitted in direct response to feedback and comments provided by various stakeholder groups, including representatives of school districts and BOCES State-wide. Such stakeholder groups have consistently requested greater flexibility in implementing the provisions of Education Law § 3012-d in the areas addressed by the proposed amendment.

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

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed rule applies to all school districts and boards of cooperative educational services (BOCES) in the State, including those located in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

On April 13, 2015, the Governor signed Chapter 56 of the Laws of 2015 to add a new Education Law § 3012-d, to establish a new evaluation system for classroom teachers and building principals. The Department implemented regulations to implement the new law in June 2015 and has revised those regulations over the course of the last year to provide school districts and BOCES with as much flexibility as possible to comply with the new law. Education Law § 3012-d(12) and the corresponding appropriation language require school districts to comply with the new law by September 1, 2016 in order to receive their State aid increases. The Department has received numerous concerns about the requirement for the use of independent evaluators in teacher observations and principal school visits, notwithstanding the fact that the Department revised the regulation in September 2015 to provide a hardship waiver for rural and single building school districts. In an effort to provide more flexibility to districts (particularly the large city school districts), the Department is proposing to revise the regulations even further to provide an additional hardship waiver from the independent evaluator requirement as follows:

The proposed amendment revises sections 30-3.4 and 30-3.5 of the Rules of the Board of Regents to provide a hardship waiver to school districts and BOCES commencing with the 2016-2017 school year who believe that compliance with the independent evaluator requirement would create an undue burden on the school district/BOCES in one or more of the following areas:

1. compliance with the independent evaluator requirement would result in financial hardship to the district or BOCES;
2. the district or BOCES lacks professionally trained staff to comply with the independent evaluator requirement;
3. the district or BOCES has a large number of teachers and principals; and/or
4. compliance with the independent evaluator requirement could impact safety and management of a building (e.g., would result in the principal being absent from the school building).

Any hardship waiver granted by the Department would excuse, but not prohibit, school districts/BOCES from conducting observations/school visits by impartial independent trained evaluators for teachers/principals who received an APPR rating of highly effective, effective, or developing in the preceding school year (e.g., school districts would be excused, but not prohibited, from conducting observations/school visits by impartial independent trained evaluators for the 2016-2017 school year for teachers/principals who receive an APPR rating of highly effective, effective, or developing for the 2015-2016 school year; teachers/principals who, at a minimum, receive an APPR rating of ineffective for the 2015-2016 school year would continue to be subject to the requirement for evaluation by an independent evaluator for the 2016-2017 school year APPR process). However, teachers/principals who are not subject to the independent evaluator requirement pursuant to the hardship waiver must still receive a

second observation/school visit. The second observation/school visit may be conducted by the building principal/supervisor or any individual selected and trained by the school district or BOCES. The two observations/school visits for such teachers/principals could be performed by the same individual.

As part of its hardship waiver request, a school district will be required to submit a plan for conducting observations/school visits by the building principal/supervisor or other trained administrators and for conducting the second observation/school visit by the building principal/supervisor or by an individual selected and trained by the school district or BOCES. For the other teachers/principals in the school district/BOCES who must still receive a second observation/school visit by an impartial, independent trained evaluator (those who, at a minimum, receive an APPR rating of ineffective in the preceding school year), the district/BOCES must submit a plan for conducting such observations/school visits. Once a hardship waiver is approved by the Department, it shall be considered part of the school district's annual professional performance review plan for such school year.

3. COSTS:

The proposed amendment will not impose any additional costs beyond those imposed by, or inherent in, the statute.

4. MINIMIZING ADVERSE IMPACT:

The rule is necessary to provides districts and BOCES with greater flexibility in their implementation of Education Law § 3012-d. Because Education Law § 3012-d applies to all school districts and BOCES in the State, the Department did not prescribe differing compliance or reporting requirements for rural areas of the State.

5. RURAL AREA PARTICIPATION:

The proposed amendment provides districts and BOCES with greater flexibility in their implementation of Education Law § 3012-d and Subpart 30-3 of the Rules of the Board of Regents. The proposed amendments are submitted in response, in part, to comments received from rural school districts and BOCES.

The Department has solicited comments on the proposed amendment from the Rural Area Advisory Council, whose members live or work in rural areas of this State.

Job Impact Statement

The purpose of proposed rule is to provide annual hardship waivers from the independent evaluator requirement for annual professional performance reviews for school districts and BOCES commencing with the 2016-2017 school year for school districts who believe that compliance with the independent evaluator requirement would create an undue burden on the school district/BOCES.

Any hardship waiver granted by the Department would excuse, but not prohibit, school districts/BOCES from conducting observations/school visits by impartial independent trained evaluators for teachers/principals who received an APPR rating of highly effective, effective, or developing in the preceding school year (e.g., school districts would be excused, but not prohibited, from conducting observations/school visits by impartial independent trained evaluators for the 2016-2017 school year for teachers/principals who receive an APPR rating of highly effective, effective, or developing for the 2015-2016 school year; teachers/principals who, at a minimum, receive an APPR rating of ineffective for the 2015-2016 school year would continue to be subject to the requirement for evaluation by an independent evaluator for the 2016-2017 school year APPR process). However, teachers/principals who are not subject to the independent evaluator requirement pursuant to the hardship waiver must still receive a second observation/school visit.

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

Assessment of Public Comment

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

**EMERGENCY
RULE MAKING**

Social Studies Regents Examinations

I.D. No. EDU-27-16-00004-E

Filing No. 855

Filing Date: 2016-09-13

Effective Date: 2016-09-18

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

Action taken: Amendment of section 100.5(a)(5) to 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) and 309(not subdivided)

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

Specific reasons underlying the finding of necessity: In order to continue the extensive role played by NYS educators in the development of the new Social Studies Regents Exams, the first administrations of the new Regents Examination in Global History & Geography II will be shifted a year to allow for a transition year and will first be offered in June 2019. In effort to conform the current social studies examination requirements for a high diploma under section 100.5 of the Commissioner's regulations to reflect this shift and to provide some flexibility to districts during this transition period, the proposed amendment does the following:

- shifts the requirement for students to take and pass the new Regents Examination in Global History & Geography II for graduation (instead of the prior Regents Examination in global history and geography) for an additional year- so that it applies to students first entering grade nine on or after September 2017; and

- provides districts with flexibility during the transition period to the new Social Studies Regents Examination. For the June 2019, August 2019, January 2020 and June 2020 administrations of the social studies Regents Examinations, the proposed amendment provides local school districts or schools with discretion to determine whether to accept a passing score on the Transition Regents Examination in Global History & Geography 10 (with content ranging from approximately 1750 to the present) or the Global History & Geography II Regents Examination, or either examination, for the purpose of satisfying the general requirements for a diploma under section 100.5 of the Commissioner's regulations; in addition to accepting a passing score on the Regents Examination in U.S history and government.

Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for regular (non-emergency) adoption, after expiration of the required 45-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), would be the September 12-13, 2016 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the September meeting, would be September 28, 2016, the date a Notice of Adoption would be published in the State Register. However, the current regulations require students who are entering grade nine on or after September 1, 2016 to take and pass the new examinations and the emergency rule adopted at the June 2016 Regents meeting is set to expire on September 17, 2016.

Therefore, emergency action is necessary at the September 2016 Regents meeting for the preservation of the general welfare in order to ensure that students who are entering grade nine on or after September 1, 2016 are on notice of the shift in implementation of the new Social Studies Regents Examination and of the new diploma requirements that will be required of them so that they can adequately prepare for these new examination requirements and to ensure that the emergency rule adopted at the June Regents meeting remains continuously in effect until it can be adopted as a permanent rule.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the September 12-13, 2016 Regents meeting, which is the first scheduled meeting after expiration of the 45-day public comment period prescribed in the State Administrative Procedure Act for State agency rule makings.

Subject: Social Studies Regents examinations.

Purpose: To provide additional pathway options for passing the social studies Regents examinations for a diploma.

Text of emergency rule: Paragraph (5) of subdivision (a) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective September 18, 2016, to read as follows:

(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) United States history and government:

(1) ...

(2) ...

(3) for 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, by passing one of the following assessments:

(i) the Regents examination in United States history and government; or

(ii) *except as otherwise provided in item (iv)*, the Regents

examination in global history and geography (for students first entering grade nine prior to September [2016] 2017);

(iii) *except as otherwise provided in item (iv), the Regents examination in global history and geography II (1750 to present) (for students first entering grade nine in September [2016] 2017 and thereafter);*

(iv) *at the discretion of the applicable local school district or school, the Regents examination in global history and geography or the Regents examination in global history and geography II, for students who take and pass such assessments during the June 2019, August 2019, January 2020 and June 2020 administrations of these assessments; or*

[(iii)] (v) a department-approved alternative to either item (i) [or], (ii), (iii) or (iv) of this subclause; or

(4) ...

(5) ...

(d) ...

(e) Global history and geography:

(1) ...

(2) ...

(3) ...

(4) for 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, by passing one of the following assessments:

(i) the Regents examination in United States history and government; or

(ii) *except as otherwise provided in item (iv), the Regents examination in global history and geography (for students first entering grade nine prior to September [2016] 2017);*

(iii) *except as otherwise provided in item (iv), the Regents examination in global history and geography II (1750 to present) (for students first entering grade nine in September [2016] 2017 and thereafter);*

(iv) *at the discretion of the applicable local school district or school, the Regents examination in global history and geography or the Regents examination in global history and geography II, for students who take and pass such assessments during the June 2019, August 2019, January 2020 and June 2020 administrations of these assessments; or*

[(iii)] (v) a department-approved alternative to either item (i) [or], (ii), (iii) or (iv) of this subclause; or

(iii) ...

(f) ...

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-27-16-00004-EP, Issue of July 6, 2016. The emergency rule will expire November 11, 2016.

Text of rule and any required statements and analyses may be obtained from: Kirti Goswami, New York State Education Department, 89 Washington Avenue, Room 148, (518) 474-8966, Albany, NY 12234, (518) 474-8966, email: legal@nysed.gov

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Regents to appoint the Commissioner as chief administrative officer of the Department, which is charged 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 of Education to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the State Education Department by law.

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

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

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

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

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.

2. LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the authority conferred by the above statutes and is necessary to implement policy enacted by the Board of Regents relating to a transition period to the new Regents Examination in Global History & Geography II.

3. NEEDS AND BENEFITS:

The Office of State Assessment has been working closely with members of the Content Advisory Panel to develop the new Regents Examination in Global History and Geography II. This group has worked to develop claims, evidence and performance level indicators for the new assessment as well as suggested question format. Surveys detailing the suggested format of the new assessment and prototype test items have been issued to solicit feedback from educators. The Content Advisory Panel has taken a lead role in analyzing this feedback and working to incorporate educator input into the new assessment design.

In order to ensure a gradual transition to the new Social Studies frameworks, and to continue the extensive role played by NYS educators in the development of the new Social Studies Regents Exams, the Global History and Geography Exam administered in June 2018, August 2018, and January 2019 would be based on the existing test framework, but revised to measure content only from the second year of the course consistent with the delineation made in the new frameworks (i.e., content covering approximately 1751 to the present). The transition year will allow for educators to adjust their curriculum and instruction to a model in which the scope and sequence in the second year of the course culminates in the Regents Exam. A similar transition the following year would apply to the U.S. History & Government Exam. The new Regents Examination in Global History & Geography II would first be offered in June 2019 and the Regents Examination in United States History & Government (2014 Framework) would first be offered in June 2020. Not only will this transition year allow educators a more thoughtful and gradual shift to the new frameworks, but this will also provide time for additional educator involvement in the development of these Regents Examinations to ensure they measure the new Frameworks with quality and fidelity. Additionally, this will ensure an extended period for notice and time for students to be prepared to take the new Regents Examinations in Social Studies.

The Department expects to continue to engage and inform educators regarding the ongoing development process and will issue guidance regarding the transition from the current Regents Examinations in Social Studies to the new Regents Examinations in the coming months. This will include guidance on which instruction and assessments (current vs. new Framework) may be offered to students, based on their grade level during the applicable school year.

In an effort to conform the current diploma requirements to reflect the implementation of this transition year in 2017-18 and provide flexibility to school districts and students while the Department moves to the new Global History & Geography II Regents examination in 2018-19, the proposed amendment does the following:

- shifts the requirement for students to take and pass the new Regents Examination in Global History & Geography II for graduation (instead of the current Regents Examination in Global History Geography I) by one year to allow for the creation of a transition year - so that it applies to students first entering grade nine in September 2017 and thereafter; and

- provides local school districts or schools with the discretion to determine to accept a passing score on either the Global History & Geography I Regents examination (with content ranging from approximately 1751 to the present) or the Global History & Geography II Regents examination for the purpose of satisfying the general requirements for a diploma under section 100.5 of the Commissioner's regulations during a period when both examinations (the current exam, but with content ranging from approximately 1751 to the present, and the new exam based on the new Social Studies Frameworks) are being administered (the June 2019, August 2019, January 2020 and June 2020 administrations).

4. COSTS:

(a) Costs to State: 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.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to implement enacted by the Board of Regents relating to the new Regents Examination in Global History & Geography II and does not impose any additional program, service, duty or responsibility upon local governments. The proposed amendment delays the requirement for students to take and pass the new Regents Examination in Global History & Geography II examination for graduation (instead of the prior Regents examination in global history and geography)

for an additional year- so that it applies to students first entering grade nine on or after September 2017. It also provides flexibility for school districts during a transition period which includes the June 2019, August 2019, January 2020 and June 2020 administrations, by allowing school districts the discretion to determine whether to accept a passing score on the Global History & Geography I Regents examination or the Global History & Geography Regents examination II, or either examination, for the purpose of satisfying the general requirements for a diploma under section 100.5 of the Commissioner's regulations; in addition to accepting a passing score on the Regents examination in U.S history and government.

6. PAPERWORK:

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

7. DUPLICATION:

The proposed rule does not duplicate any existing State or federal requirements.

8. ALTERNATIVES:

There were no significant alternatives and none were considered. The proposed rule is necessary to implement Regents policy relating to delaying the requirement for students to take and pass the new Regents Examination in Global History & Geography II examination for graduation. The proposed rule also provides flexibility for school districts during the transition period to the new Social Studies Regents examination.

9. FEDERAL STANDARDS:

There are no related federal standards in this area.

10. COMPLIANCE SCHEDULE:

It is anticipated that regulated parties can achieve compliance with the proposed rule by its effective date. The first administrations of the new Regents Examination in Global History & Geography II will be offered in June 2019. For the transition period which will include the June 2019, August 2019, January 2020 and June 2020 administrations, school districts will have discretion to determine whether to accept a passing score on the Global History & Geography I Regents examination or the Global History & Geography Regents examination II, or either examination, for the purpose of satisfying the general requirements for a diploma under section 100.5 of the Commissioner's regulations; in addition to accepting a passing score on the Regents examination in U.S history and government.

Regulatory Flexibility Analysis

(a) Small businesses:

In order to continue the extensive role played by NYS educators in the development of the new Social Studies Regents Exams, the first administrations of the new Regents Examination in Global History & Geography II will be shifted a year to allow for a transition year and will first be offered in June 2019. In effort to conform the current social studies examination requirements for a high diploma under section 100.5 of the Commissioner's regulations to reflect this shift and to provide some flexibility to districts during this transition period, the proposed amendment does the following:

- shifts the requirement for students to take and pass the new Regents Examination in Global History & Geography II examination for graduation (instead of the prior Regents examination in global history and geography) for an additional year- so that it applies to students first entering grade nine on or after September 2017; and
- provides districts with flexibility during the transition period to the new Social Studies Regents examination. For the June 2019, August 2019, January 2020 and June 2020 administrations of the social studies Regents examinations, the proposed amendment provides local school districts or schools with discretion to determine whether to accept a passing score on the Global History & Geography I Regents examination (with content ranging from approximately 1751 to the present) or the Global History & Geography Regents examination II, or either examination, for the purpose of satisfying the general requirements for a diploma under section 100.5 of the Commissioner's regulations; in addition to accepting a passing score on the Regents examination in U.S history and government.

Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local governments:

1. 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.

2. COMPLIANCE REQUIREMENTS:

The Office of State Assessment has been working closely with members of the Content Advisory Panel to develop the new Regents Examination in Global History and Geography II. This group has worked to develop claims, evidence and performance level indicators for the new assessment

as well as suggested question format. Surveys detailing the suggested format of the new assessment and prototype test items have been issued to solicit feedback from educators. The Content Advisory Panel has taken a lead role in analyzing this feedback and working to incorporate educator input into the new assessment design.

In order to ensure a gradual transition to the new Social Studies frameworks, and to continue the extensive role played by NYS educators in the development of the new Social Studies Regents Exams, the Global History and Geography Exam administered in June 2018, August 2018, and January 2019 would be based on the existing test framework, but revised to measure content only from the second year of the course consistent with the delineation made in the new frameworks (i.e., content covering approximately 1751 to the present). The transition year will allow for educators to adjust their curriculum and instruction to a model in which the scope and sequence in the second year of the course culminates in the Regents Exam. A similar transition the following year would apply to the U.S. History & Government Exam. The new Regents Examination in Global History & Geography II would first be offered in June 2019 and the Regents Examination in United States History & Government (2014 Framework) would first be offered in June 2020. Not only will this transition year allow educators a more thoughtful and gradual shift to the new frameworks, but this will also provide time for additional educator involvement in the development of these Regents Examinations to ensure they measure the new Frameworks with quality and fidelity. Additionally, this will ensure an extended period for notice and time for students to be prepared to take the new Regents Examinations in Social Studies.

The Department expects to continue to engage and inform educators regarding the ongoing development process and will issue guidance regarding the transition from the current Regents Examinations in Social Studies to the new Regents Examinations in the coming months. This will include guidance on which instruction and assessments (current vs. new Framework) may be offered to students, based on their grade level during the applicable school year.

In an effort to conform the current diploma requirements to reflect the implementation of this transition year in 2017-18 and provide flexibility to school districts and students while the Department moves to the new Global History & Geography II Regents examination in 2018-19, the proposed amendment does the following:

- shifts the requirement for students to take and pass the new Regents Examination in Global History & Geography II for graduation (instead of the current Regents Examination in Global History Geography I) by one year to allow for the creation of a transition year - so that it applies to students first entering grade nine in September 2017 and thereafter; and
- provides local school districts or schools with the discretion to determine to accept a passing score on either the Global History & Geography I Regents examination (with content ranging from approximately 1751 to the present) or the Global History & Geography II Regents examination for the purpose of satisfying the general requirements for a diploma under section 100.5 of the Commissioner's regulations during a period when both examinations (the current exam, but with content ranging from approximately 1751 to the present, and the new exam based on the new Social Studies Frameworks) are being administered (the June 2019, August 2019, January 2020 and June 2020 administrations).

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

The proposed amendment does not impose any additional costs on local governments.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements on local governments. Economic feasibility is addressed in the Costs section above.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement Regents policy relating to delaying the requirement for students to take and pass the new Regents Examination in Global History & Geography II examination for graduation. The proposed rule also provides flexibility for local governments during the transition period to the new Social Studies Regents examination.

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

7. LOCAL GOVERNMENT PARTICIPATION:

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

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

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed rule is necessary to implement long-range Regents policy providing for a transition to the new Regents Examination in Global History & Geography II. The first administration of the new Regents Examination in Global History & Geography II will be in June 2019m and provides flexibility to school districts through the June 2020 administration. 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 Emergency Adoption 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.

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

The Office of State Assessment has been working closely with members of the Content Advisory Panel to develop the new Regents Examination in Global History and Geography II. This group has worked to develop claims, evidence and performance level indicators for the new assessment as well as suggested question format. Surveys detailing the suggested format of the new assessment and prototype test items have been issued to solicit feedback from educators. The Content Advisory Panel has taken a lead role in analyzing this feedback and working to incorporate educator input into the new assessment design.

In order to ensure a gradual transition to the new Social Studies frameworks, and to continue the extensive role played by NYS educators in the development of the new Social Studies Regents Exams, the Global History and Geography Exam administered in June 2018, August 2018, and January 2019 would be based on the existing test framework, but revised to measure content only from the second year of the course consistent with the delineation made in the new frameworks (i.e., content covering approximately 1751 to the present). The transition year will allow for educators to adjust their curriculum and instruction to a model in which the scope and sequence in the second year of the course culminates in the Regents Exam. A similar transition the following year would apply to the U.S. History & Government Exam. The new Regents Examination in Global History & Geography II would first be offered in June 2019 and the Regents Examination in United States History & Government (2014 Framework) would first be offered in June 2020. Not only will this transition year allow educators a more thoughtful and gradual shift to the new frameworks, but this will also provide time for additional educator involvement in the development of these Regents Examinations to ensure they measure the new Frameworks with quality and fidelity. Additionally, this will ensure an extended period for notice and time for students to be prepared to take the new Regents Examinations in Social Studies.

The Department expects to continue to engage and inform educators regarding the ongoing development process and will issue guidance regarding the transition from the current Regents Examinations in Social Studies to the new Regents Examinations in the coming months. This will include guidance on which instruction and assessments (current vs. new Framework) may be offered to students, based on their grade level during the applicable school year.

In an effort to conform the current diploma requirements to reflect the implementation of this transition year in 2017-18 and provide flexibility to school districts and students while the Department moves to the new Global History & Geography II Regents examination in 2018-19, the proposed amendment does the following:

- shifts the requirement for students to take and pass the new Regents Examination in Global History & Geography II for graduation (instead of the current Regents Examination in Global History Geography I) by one year to allow for the creation of a transition year - so that it applies to students first entering grade nine in September 2017 and thereafter; and
- provides local school districts or schools with the discretion to determine to accept a passing score on either the Global History & Geography I Regents examination (with content ranging from approximately 1751 to the present) or the Global History & Geography II Regents examination for the purpose of satisfying the general requirements for a diploma under section 100.5 of the Commissioner's regulations during a pe-

riod when both examinations (the current exam, but with content ranging from approximately 1751 to the present, and the new exam based on the new Social Studies Frameworks) are being administered (the June 2019, August 2019, January 2020 and June 2020 administrations).

3. COMPLIANCE COSTS:

The proposed amendment does not impose any additional costs on local governments.

4. MINIMIZING ADVERSE IMPACT:

Because the Regents policy upon which the proposed amendment is based applies to all 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, it is not possible to establish differing compliance or reporting requirements or timetables or to exempt schools in rural areas from coverage by the proposed amendment.

5. RURAL AREA PARTICIPATION:

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

Job Impact Statement

In order to continue the extensive role played by NYS educators in the development of the new Social Studies Regents Exams, the first administrations of the new Regents Examination in Global History & Geography II will be shifted a year to allow for a transition year and will first be offered in June 2019. In effort to conform the current social studies examination requirements for a high diploma under section 100.5 of the Commissioner's regulations to reflect this shift and to provide some flexibility to districts during this transition period, the proposed amendment does the following:

- shifts the requirement for students to take and pass the new Regents Examination in Global History & Geography II examination for graduation (instead of the prior Regents examination in global history and geography) for an additional year- so that it applies to students first entering grade nine on or after September 2017; and
- provides districts with flexibility during the transition period to the new Social Studies Regents examination. For the June 2019, August 2019, January 2020 and June 2020 administrations of the social studies Regents examinations, the proposed amendment provides local school districts or schools with discretion to determine whether to accept a passing score on the Global History & Geography I Regents examination (with content ranging from approximately 1751 to the present) or the Global History & Geography Regents examination II, or either examination, for the purpose of satisfying the general requirements for a diploma under section 100.5 of the Commissioner's regulations; in addition to accepting a passing score on the Regents examination in U.S history and government.

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

Assessment of Public Comment

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

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

Assessments for the New York State Career Development and Occupational Studies (CDOS) Commencement Credential

I.D. No. EDU-39-16-00033-EP

Filing No. 862

Filing Date: 2016-09-13

Effective Date: 2016-09-13

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

Proposed Action: Amendment of section 100.6(b)(4) 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) and 309(not subdivided)

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 to require that, on or after April 3, 2017, any work-readiness assessments used to meet the requirements for the New York State Career Development and Oc-

cupational Studies (CDOS) Commencement Credential shall be approved by the Commissioner and meet certain criteria and conditions prescribed by the Commissioner in regulations.

Because the Board of Regents meets at scheduled intervals, the earliest the proposed amendment could be presented for regular (non-emergency) adoption, after publication in the State Register on September 28, 2016 and expiration of the 45-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(1) and (5), is the December 12-13, 2016 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed amendment, if adopted at the December meeting, would be December 28, 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 in order to ensure that there is sufficient time for the Commissioner to approve work-readiness assessments pursuant to the criteria outlined in the proposed amendment so that affected students know which work-readiness assessments have been approved by the Commissioner so they can earn a NYS CDOS Commencement Credential on or after April 3, 2017.

It is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the December 2016 Regents meeting, after publication of the proposed amendment in the State Register and expiration of the 45-day public comment period prescribed by the State Administrative Procedure Act for State agency rule makings.

Subject: Assessments for the New York State Career Development and Occupational Studies (CDOS) Commencement Credential.

Purpose: Establish conditions and procedures for approval of work-readiness assessments for the CDOS credential.

Text of emergency/proposed rule: 1. Paragraph (4) of subdivision (b) of section 100.6 of the Regulations of the Commissioner of Education is amended, effective September 13, 2016, as follows:

(4)(i) Notwithstanding the provisions of paragraph (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 *prior to April 3, 2017* to a student who has met the requirements for a nationally-recognized work-readiness credential, including but not limited to SkillsUSA *Work Force Ready Employability Assessment*, the National Work Readiness Credential, the National Career Readiness Certificate – (ACT) WorkKeys and the Comprehensive Adult Student Assessment Systems Workforce Skills Certification System.

(ii) *On or after April 3, 2017, 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 received a satisfactory passing score on any work-readiness assessment approved by the commissioner pursuant to this subparagraph.*

(a) *Approval of work-readiness assessments by the commissioner. Each work work-readiness assessment approved by the commissioner shall meet the following criteria, in addition to any criteria set forth in any request for qualifications process:*

(1) *measure universal foundation knowledge, skills and abilities necessary for entry-level employment across multiple industries and occupations and the assessment shall be reviewed at least every five years and be updated accordingly;*

(2) *be designed in consultation with workforce experts, such as, but not limited to, employers, national business organizations, or federal or State labor agencies;*

(3) *be consistent with technical criteria for validity, reliability, and fairness in testing;*

(4) *be developed by an entity other than a local school or school district;*

(5) *be available for use by any school or school district in New York State; and*

(6) *be administered in accordance with assessment security conditions, directions and procedures established by the Commissioner.*

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 11, 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 policy enacted by the Regents to require that, effective April 3, 2017, work-readiness assessments used to meet the requirements for the New York State (NYS) Career Development and Occupational Studies (CDOS) Commencement Credential must be approved by the Commissioner and establish conditions and criteria by which such assessments may be approved.

NEEDS AND BENEFITS:

The NYS CDOS Commencement Credential is a credential recognized by the Board of Regents that certifies a student has the standards-based knowledge and skills necessary for entry-level employment. The requirements to earn the credential were developed consistent with research and the guiding principles established by the Regents. The requirements are rigorous in that the student must successfully complete additional courses of study and hours in work-based learning, demonstrate competency at the commencement level of the CDOS learning standards, participate in career planning and preparation and have an employability profile showing readiness for entry-level employment. There are two options available for students to earn the credential. Option 1 - Students must meet each of the following: development of a Career Plan; demonstrated achievement of the commencement level CDOS learning standards 1, 2 and 3a; successful completion of at least 216 hours of CTE coursework and/or work-based learning experiences (of which at least 54 hours must be in work-based learning experiences); and have a completed employability profile. Option 2 - In lieu of a student meeting the requirements of Option 1 to be awarded the NYS CDOS Commencement Credential, a district may award a student this credential if the student has met the requirements for one of the nationally recognized rigorous work readiness credentials, including but not limited to: National Work Readiness Credential; SkillsUSA Work Force Ready Employability Assessment; National Career Readiness Certificate WorkKeys - (ACT); and Comprehensive Adult Student Assessment Systems Workforce Skills Certification System.

In order to ensure that the assessments taken under Option 2 to earn the CDOS Commencement Credential measure universal foundation skills necessary for entry-level employment, are of sufficient rigor, meet requirements for validity and reliability, and are available to all NYS students, the proposed regulations require that, effective April 3, 2017, work-readiness assessments used to meet the requirements for the CDOS Commencement Credential must be approved by the Commissioner and establish conditions and criteria by which such assessments may be approved. The Department will be working to identify which work-readiness assessments meet the criteria established in regulations for use in the 2016-17 school year.

Section 100.6(b)(4), as amended, provides that, effective April 3, 2017,

any assessment of work-readiness used to meet the requirements for the CDOS Commencement Credential must be approved by the Commissioner and establishes the conditions and criteria by which such assessments may be approved.

COSTS:

- (a) Costs to State government: none.
- (b) Costs to local government: none.
- (c) Costs to private regulated parties: none.

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

The proposed amendment does not impose any additional costs on the State, school districts, charter schools, registered nonpublic schools or the State Education Department. The amendment implements Regents policy to require that, effective April 3, 2017, work-readiness assessments used to meet the requirements for the CDOS Commencement Credential must be approved by the Commissioner and establish conditions and criteria by which such assessments may be approved. There are many NYS school districts and Boards of Cooperative Educational Services (BOCES) that already provide students with opportunities to earn take work-readiness assessments to earn the CDOS Commencement Credential.

LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon school districts beyond those imposed by federal and State statutes and regulations. The proposed amendment merely implements Regents policy to require that, effective April 3, 2017, work-readiness assessments used to meet the requirements for the CDOS Commencement Credential must be approved by the Commissioner and establish conditions and criteria by which such assessments may be approved.

PAPERWORK:

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

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:

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 is necessary to implement policy enacted by the Regents to require that, effective April 3, 2017, work-readiness assessments used to meet the requirements for the New York State (NYS) Career Development and Occupational Studies (CDOS) Commencement Credential must be approved by the Commissioner and establish conditions and criteria by which such assessments may be approved.

The proposed amendment relates to State learning standards, State assessments, credential and diploma requirements and higher levels of student achievement, 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 to the extent that they offer instruction in the high school grades.

COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any additional compliance requirements on school districts, charter schools or registered nonpublic schools high schools. The amendment implements Regents policy to require that, effective April 3, 2017, work-readiness assessments used to meet the requirements for the CDOS Commencement Credential must be approved by the Commissioner and establish conditions and criteria by which such assessments may be approved. It would not change existing requirements that allow a student to take an assessment of work-readiness to earn a NYS CDOS Commencement Credential pursuant to section 100.6(b) of the Commissioner's Regulations.

Section 100.6(b)(4), as amended, provides that effective April 3, 2017, any assessment of work-readiness used to meet the requirements for the CDOS Commencement Credential must be approved by the Commissioner and establishes the conditions and criteria by which such assessments may be approved.

and establishes the conditions and criteria by which such assessments may be approved.

PROFESSIONAL SERVICES:

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

COMPLIANCE COSTS:

The proposed amendment does not impose any additional costs on school districts or charter schools. The amendment implements Regents policy to require that, effective April 3, 2017, work-readiness assessments used to meet the requirements for the CDOS Commencement Credential must be approved by the Commissioner and establish conditions and criteria by which such assessments may be approved. There are many NYS school districts and Boards of Cooperative Educational Services (BOCES) that already provide students with opportunities to earn take work-readiness assessments to earn the CDOS Commencement Credential.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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 does not impose any additional compliance requirements or significant costs and therefore would have no adverse impact on the regulated parties. The amendment implements Regents policy to require that, effective April 3, 2017, work-readiness assessments used to meet the requirements for the CDOS Commencement Credential must be approved by the Commissioner and establish conditions and criteria by which such assessments may be approved. It would not change existing requirements that allow a student to take an assessment of work-readiness to earn a NYS CDOS Commencement Credential pursuant to section 100.6(b) of the Commissioner's Regulations.

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 relating to State learning standards, State assessments, credential and diploma requirements and higher levels of student achievement. 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 does not impose any additional compliance requirements or professional services requirements on entities that are located in rural areas. The proposed amendment implements Regents policy to require that, April 3, 2017, work-readiness assessments used to meet the requirements for the New York State (NYS) Career Development and Occupational Studies (CDOS) Commencement Credential must be approved by the Commissioner and establish conditions and criteria by which such assessments may be approved. It would not change existing requirements that allow a student to take an assessment of work-readiness to earn a NYS CDOS Commencement Credential pursuant to section 100.6(b) of the Commissioner's Regulations.

Section 100.6(b)(4), as amended, provides that effective April 3, 2017, any assessment of work-readiness used to meet the requirements for the CDOS Commencement Credential must be approved by the Commissioner and establishes the conditions and criteria by which such assessments may be approved.

3. COMPLIANCE COSTS:

The proposed amendment will not impose any significant costs on schools located in rural areas. The proposed amendment implements Regents policy to require that, effective April 3, 2017, work-readiness assessments used to meet the requirements for the CDOS Commencement Credential must be approved by the Commissioner and establish conditions and criteria by which such assessments may be approved. There are many NYS school districts and Boards of Cooperative Educational Services (BOCES) that already provide students with opportunities to earn take work-readiness assessments to earn the CDOS Commencement Credential.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any additional compliance requirements or significant costs and therefore would have no adverse impact on the regulated parties. The amendment implements Regents policy to require that, effective April 3, 2017, work-readiness assessments used to meet the requirements for the CDOS Commencement Credential must be approved by the Commissioner and establish conditions and criteria by which such assessments may be approved. It would not change existing requirements that allow a student to take an assessment of work-readiness to earn a NYS CDOS Commencement Credential pursuant to section 100.6(b) of the Commissioner's Regulations.

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, 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 implement long-range Regents policy relating to State learning standards, State assessments, credential and diploma requirements and higher levels of student achievement. 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 here-with, 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 require that, effective April 3, 2017, work-readiness assessments used to meet the requirements for the New York State Career Development and Occupational Studies Commencement Credential must be approved by the Commissioner and establish conditions and criteria by which such assessments may be approved.

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

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

Teacher Certification in Career and Technical Education

I.D. No. EDU-26-16-00016-ERP

Filing No. 853

Filing Date: 2016-09-13

Effective Date: 2016-09-13

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

Action Taken: Amendment of section 80-3.5 of Title 8 NYCRR.

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

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

Specific reasons underlying the finding of necessity: The proposed amendment to section 80-3.5 is necessary to provide additional pathway options for a Transitional A certification in the CTE subjects for candidates who meet the requirements in one of the following pathway options:

- Option G. Have a minimum of two years of experience in the CTE subject area of certificate sought and hold an industry-related credential or pass an industry accepted examination as approved by the Department and an offer of employment from a school district
- Option H. Are enrolled in an approved CTE teacher preparation program and have either a minimum of one year of related work experience and/or take and pass an industry accepted examination
- Option I. Are currently certified 7-12 grade teachers in any subject area with two years of documented work experience or who hold industry-recognized credentials, where available, in the related CTE area

A Notice of Proposed Rule Making was published in the State Register on June 29, 2016. Since then the proposed amendment was revised and a Notice of Revised Rule Making will be published in the State Register on September 28, 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 30-day public comment period provided for in the State Administrative Procedure Act (SAPA) for a revised rulemaking, would be the November Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the November meeting, would be November 30, 2016, the date a Notice of Adoption would be published in the State Register. Therefore, emergency action is necessary is therefore necessary to allow those who do not meet the current requirements but who possess industry experience, credentials, or are in the process of completing certification, but meet one of the three proposed new pathways, to begin teaching at the grade 7-12 level as early as possible during the 2016-2017 school year and to ensure that the emergency rule adopted at the July Regents meeting, as revised, remains continuously in effect until it can be adopted as a permanent rule.

Subject: Teacher certification in career and technical education.

Purpose: Establishes a new pathway for Transitional A certificate.

Text of emergency/revised rule: 1. The emergency taken at the July 2016 Regents meeting to add new paragraphs (5), (6) and (7) to section 80-3.5 of the Regulations of the Commissioner of Education, is rescinded, effective September 13, 2016.

2. New paragraphs (5), (6), and (7) are added to subdivision (b) of section 80-3.5 of the Regulations of the Commissioner of Education, effective September 13, 2016, to read as follows:

(5) *Option G: The requirements of this paragraph are applicable to candidates who seek an initial certificate and who hold an industry acceptable credential in a career and technical education subject and have at least two years of acceptable work experience in the certificate area to be taught or in a closely related subject area acceptable to the department. The candidate shall meet the requirements in each of the following subparagraphs:*

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

(ii) *Examination. The candidate shall submit evidence of having achieved a satisfactory level of performance on the New York State Teacher Certification Examination content specialty test(s) in the area of the certificate.*

(iii) *Industry Related Credential or Industry Accepted Examination. The candidate shall either:*

(a) *hold an industry related credential in the certificate area taught or in a closely related subject area acceptable to the department; or*

(b) *receive a passing score on an industry accepted career and technical examination that demonstrates mastery in the career and technical education subject for which a certificate is sought or a closely related area as approved by the department through a request for qualifications process.*

(iv) *Experience. The candidate shall have at least two years of satisfactory work experience in the career and technical education subject for which a certificate is sought or a closely related subject area, as determined by the Commissioner;*

(v) *Employment and support commitment.* The candidate shall submit evidence of having a commitment for three years of employment as a teacher in grades 7 through 12 in a public or nonpublic school or BOCES, which shall include a mentored experience for the first year that will consist of daily supervision by an experienced teacher during the first 20 days of teaching, except that such mentoring shall not be required if the candidate has two years of satisfactory employment as a teacher of students in grades 7 through 12 in a public or nonpublic school or BOCES.

(6) *Option H:* The requirements of this paragraph are applicable to candidates who seek an initial certificate and who are enrolled in an approved career and technical education program registered pursuant to section 52.21 of this Title, or its equivalent in the certificate area to be taught or in a closely related subject area acceptable to the department; and have either at least one year of satisfactory experience in the career and technical area to be taught or in a closely related area or receive a passing score on an industry accepted career and technical examination that demonstrates mastery in the career and technical education subject for which a certificate is sought or a closely related area as approved by the department through a request for qualifications process. The candidate shall meet the requirements in each of the following subparagraphs:

(i) *Education.*

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

(b) the candidate shall be enrolled in an approved career and technical education program registered pursuant to section 52.21 of this Title.

(ii) *Examination.* The candidate shall submit evidence of having achieved a satisfactory level of performance on the New York State Teacher Certification Examination content specialty test(s) in the area of the certificate.

(iii) *Experience and/or Examination.* The candidate shall either:

(a) have at least one year of satisfactory work experience in the career and technical education subject for which a certificate is sought or a closely related area, as determined by the Commissioner; or

(b) receive a passing score on an industry accepted career and technical examination that demonstrates mastery in the career and technical education subject for which a certificate is sought or a closely related area as approved by the department through a request for qualifications process.

(iv) *Employment and support commitment.* The candidate shall submit evidence of having a commitment for three years of employment as a teacher in grades 7 through 12 in a public or nonpublic school or BOCES, which shall include a mentored experience for the first year that will consist of daily supervision by an experienced teacher during the first 20 days of teaching, except that such mentoring shall not be required if the candidate has two years of satisfactory employment as a teacher of students in grades 7 through 12 in a public or nonpublic school or BOCES.

(7) *Option I:* The requirements of this paragraph are applicable to candidates who seek an initial certificate and who are currently certified as a teacher in grades 7-12 in any subject area acceptable to the department, and who either: hold an industry related credential the career and technical education subject to be taught or in a closely related subject area acceptable to the department or have two years of satisfactory experience in the certificate area sought or a closely related subject area, as determined by the Commissioner. The candidate shall meet the requirements in each of the following subparagraphs:

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

(ii) *Examination.* The candidate shall submit evidence of having achieved a satisfactory level of performance on the New York State Teacher Certification Examination content specialty test(s) in the area of the certificate.

(iii) *Certification as a Career and Technical Education Teacher in grades 7-12.* The candidate shall hold certification as a teacher in grades 7-12 in the career and technical education subject to be taught or in a closely related subject area pursuant to Part 80 of this Title, that is acceptable to the department.

(iv) *Experience or Industry Related Credential.* The candidate shall either:

(a) hold an industry related credential in the certificate area sought or in a related area, as determined by the Department; or

(b) have at least two years of documented and satisfactory work experience in the career and technical education subject for which a certificate is sought, or a related area, as determined by the Commissioner.

(v) *Employment and support commitment.* The candidate shall submit evidence of having a commitment for three years of employment as a teacher in grades 7 through 12 in a public or nonpublic school or BOCES, which shall include a mentored experience for the first year that will consist of daily supervision by an experienced teacher during the first 20 days of teaching, except that such mentoring shall not be required if the candidate has two years of satisfactory employment as a teacher of students in grades 7 through 12 in a public or nonpublic school or BOCES.

This notice is intended to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on June 29, 2016, I.D. No. EDU-26-16-00016-EP. The emergency rule will expire November 11, 2016.

Emergency rule compared with proposed rule: Substantial revisions were made in section 80-3.5(b)(5), (6) and (7).

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: Peg Rivers, New York State Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 408-1189, email: regcomments@nysed.gov

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

Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the *State Register* on June 29, 2016, the following substantial revisions were made to the proposed rule:

Section 80-3.5(b)(5)(v) was amended to clarify that mentoring shall not be required if the candidate has two years of satisfactory employment as a teacher of students in grades 7 through 12 (not grades 5 through 12) in a public or nonpublic school or BOCES.

Section 80-3.5(b)(6)(iv) was amended to clarify that mentoring shall not be required if the candidate has two years of satisfactory employment as a teacher of students in grades 7 through 12 (not grades 5 through 12) in a public or nonpublic school or BOCES.

Section 80-3.5(b)(7) was amended to clarify that mentoring shall not be required if the candidate has two years of satisfactory employment as a teacher of students in grades 7 through 12 (not grades 5 through 12) in a public or nonpublic school or BOCES and a further amendment was made to Option I to clarify that teachers in any subject area may pursue this pathway, not just teachers in any CTE subject area. This more accurately reflects the Department's intention to create a more flexible pathway option for individuals to pursue CTE certification.

The above revisions to the proposed rule require revisions to the Needs and Benefits section of the previously published Regulatory Impact Statement, as follows:

3. **NEEDS AND BENEFITS:** Currently, a Transitional A certificate in a specific career and technical subject is issued to permit the employment of an individual in a specific career and technical education title who does not meet the requirements for an initial certificate, but who possesses the requisite occupational experience. This certificate is valid for three years, and the candidate would complete the additional requirements for an initial certificate during the three years.

The three options available for a Transitional A certificate at this time are:

- Option A. Candidates who possess an associate's degree (or its equivalent) in the career and technical field in which the certificate is sought, and who have at least two years of documented and satisfactory work experience in the career and technical education subject for which a certificate is sought;

- Option B. Candidates who possess a high school diploma or its equivalent (but who do not possess an associate's degree or its equivalent in the certificate area), and who have at least four years of documented and satis-

factory work experience in the career and technical education subject for which a certificate is sought; and

- Option C. Candidates who possess an associate's degree (or its equivalent) in the career and technical field in which the certificate is sought, and who have at least two years of documented and satisfactory teaching experience at the postsecondary level (excluding experience as a teaching assistant) in the career and technical education subject for which a certificate is sought.

All three Transitional A pathways described above also require:

- (1) Coursework training in identification of and reporting of child abuse or maltreatment, school violence prevention and intervention, and harassment, bullying and discrimination prevention and intervention;

- (2) Evidence of having achieved a satisfactory level of performance on the New York State Teacher Certification Exam Content Specialty Test in the area of the certificate, and

- (3) An employment and support commitment—the candidate must submit evidence of having a commitment for three years of employment as a teacher in a public or nonpublic school or BOCES, which includes a mentored experience for the first year consisting of daily supervision by an experienced teacher during the first 20 days. However, the mentoring is not required if the candidate has two years of satisfactory employment as a teacher of students in grades 7-12 in a public or nonpublic school or BOCES.

In addition, at the May 2016 Board of Regents meeting, the Board adopted by Emergency action a new pathway option for those issued a full license to teach in licensed private career schools and who have two years of teaching experience under such license, to qualify for a Transitional A certificate. If adopted at the September 2016 Board of Regents meeting, this will allow those candidates to teach CTE during the 2016-2017 school year.

Proposed Amendment:

To provide additional certification pathways in CTE fields to address the immediate shortages in the field, the Department recommends establishing new pathway options G, H, and I for Transitional A certificates for candidates who meet one of the three requirements listed below:

- Option G. Have a minimum of two years of work experience in the CTE subject area of the certificate sought and hold an industry-related credential, where available, or pass an industry accepted examination as approved by the Department and have an employment and support commitment

- Option H. Are enrolled in an approved CTE teacher preparation program and have either a minimum of one year of related work experience and/or take and pass an industry accepted examination and have an employment and support commitment

- Option I. Are currently certified 7-12 grade teachers in any subject area with two years of documented work experience or who hold industry-recognized credentials, where available, in the related CTE area and have an employment and support commitment

The proposed amendment provides additional opportunities and flexibility for individuals with specific technical and career experience to obtain a Transitional A teaching certificate in their area of expertise, or a related area, thus allowing them to teach CTE subjects at the secondary school level. This will help to increase the supply of qualified, certified teachers in the career and technical education field in order to satisfy the increasing demand for those teachers.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on June 29, 2016, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement herewith.

The above revisions to the proposed rule require that the Effect of Rule and the Compliance sections of the previously published Regulatory Flexibility Analysis be revised as follows:

1. EFFECT OF RULE:

If adopted by the Board of Regents at the September 2016 Board of Regents meeting, commencing with the 2016-2017 school year, the proposed amendment creates three new pathway options to address immediate shortage areas for candidates who meet one of the following three requirements:

To provide additional certification pathways in CTE fields to address the immediate shortages in the field, the Department recommends establishing new pathway options G, H, and I for Transitional A certificates for candidates who meet one of the three options for a Transitional A certificate listed below:

- Option G. Have a minimum of two years of work experience in the CTE subject area of the certificate sought and hold an industry-related credential, where available, or pass an industry accepted examination as approved by the Department and have an employment and support commitment

- Option H. Are enrolled in an approved CTE teacher preparation program and have either a minimum of one year of related work experi-

ence and/or take and pass an industry accepted examination and have an employment and support commitment

- Option I. Are currently certified 7-12 grade teachers in any subject area with two years of documented work experience or who hold industry-recognized credentials, where available, in the related CTE area and have an employment and support commitment

2. COMPLIANCE REQUIREMENTS:

Over the past several years, the Board of Regents has discussed the expansion of career and technical education (CTE) programs in school districts and BOCES generally and of integrated credit allowance which will in turn create a greater demand for teachers certified in CTE titles. At its November 2013 meeting, the Board of Regents was presented with recommendations that would support existing and anticipated demand for teachers certified in CTE titles.

Currently, a Transitional A certificate in a specific CTE subject is issued to permit the employment of an individual in a specific CTE education title who does not meet the requirements for an initial certificate, but who possesses the requisite occupational experience. This certificate is valid for three years, and the candidate would complete the additional requirements for an initial certificate during the three years.

The three options available for a Transitional A certificate prior to the May 2016 Board of Regents meeting were:

- Option A. Candidates who possess an associate's degree (or its equivalent) in the career and technical field in which the certificate is sought, and who have at least two years of documented and satisfactory work experience in the career and technical education subject for which a certificate is sought;

- Option B. Candidates who possess a high school diploma or its equivalent (but who do not possess an associate's degree or its equivalent in the certificate area), and who have at least four years of documented and satisfactory work experience in the career and technical education subject for which a certificate is sought; and

- Option C. Candidates who possess an associate's degree (or its equivalent) in the career and technical field in which the certificate is sought, and who have at least two years of documented and satisfactory teaching experience at the postsecondary level (excluding experience as a teaching assistant) in the career and technical education subject for which a certificate is sought.

All three Transitional A pathways described above also require:

- (1) Coursework training in identification of and reporting of child abuse or maltreatment, school violence prevention and intervention, and harassment, bullying and discrimination prevention and intervention;

- (2) Evidence of having achieved a satisfactory level of performance on the New York State Teacher Certification Examination Content Specialty Test in the area of the certificate; and

- (3) An employment and support commitment. The candidate must submit evidence of having a commitment for three years of employment as a teacher in a public or nonpublic school or BOCES, which includes a mentored experience for the first year consisting of daily supervision by an experienced teacher during the first 20 days. However, the mentoring is not required if the candidate has two years of satisfactory employment as a teacher of students in grades 7-12 in a public or nonpublic school or BOCES.

Establishment of Additional Pathways

At its May 2016 Board of Regents meeting, the Board adopted by emergency action a proposed amendment to provide an additional opportunity for teachers to obtain a Transitional A certificate through a Pathway D Option. It is anticipated that this will be permanently adopted by the Board at its September 2016 meeting. Candidates may be eligible for a Transitional A certificate if they hold a full private career school teacher license issued by the Department's Bureau of Proprietary School Supervision (BPSS) and have taught under that license for two years in a New York State licensed private career school and meet certain other requirements.

Currently, pursuant to Section 126.6 of the Commissioner's Regulations, there are three license levels (permit, provisional and full license) for teachers licensed by BPSS. To apply for a permit, provisional or full license, candidates must complete an application and provide BPSS with all necessary documentation required for the level and license area(s) in which the candidate wishes to be licensed in. Currently, the requirements for a full Private Career School Teacher License by BPSS are (for most CTE subject areas):

- (1) To qualify for a full license, candidates must have completed a total of 90-clock hours in Professional Education, including methods of teaching or a total of 9 semester credits of college course work in Professional Education.

Full licenses are valid for 4 years and are renewable.

During the three years that a candidate has a Transitional A certificate, he/she may apply for and complete all requirements for an Initial Certificate. These requirements include completion of college coursework, receiving a passing score on the NYSTCE exams, and completion of a 40 day student teaching placement in the certificate area sought.

Proposed Amendment

To provide additional certification pathways in CTE fields to address the immediate shortages in the field, the Department recommends establishing new pathway options G, H, and I for Transitional A certificates for candidates who meet one of the three requirements listed below:

- Option G. Have a minimum of two years of work experience in the CTE subject area of the certificate sought and hold an industry-related credential, where available, or pass an industry accepted examination as approved by the Department and have an employment and support commitment
- Option H. Are enrolled in an approved CTE teacher preparation program and have either a minimum of one year of related work experience and/or take and pass an industry accepted examination and have an employment and support commitment
- Option I. Are currently certified 7-12 grade teachers in any subject area with two years of documented work experience or who hold industry-recognized credentials, where available, in the related CTE area and have an employment and support commitment

The proposed amendment provides additional opportunities and flexibility for individuals with specific technical and career experience to obtain a Transitional A teaching certificate in their area of expertise, or a related area, thus allowing them to teach CTE subjects at the secondary school level. This will help to increase the supply of qualified, certified teachers in the career and technical education field in order to satisfy the increasing demand for those teachers.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on June 29, 2016, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement herewith.

The above revisions to the proposed rule require that the Reporting, Recordkeeping, and Other Compliance Requirements and Professional Services published Rural Area Flexibility Analysis be revised as follows:

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

Over the past several years, the Board of Regents has discussed the expansion of career and technical education (CTE) programs in school districts and BOCES generally and of integrated credit allowance which will in turn create a greater demand for teachers certified in CTE titles. At its November 2013 meeting, the Board of Regents was presented with recommendations that would support existing and anticipated demand for teachers certified in CTE titles.

Currently, a Transitional A certificate in a specific CTE subject is issued to permit the employment of an individual in a specific CTE education title who does not meet the requirements for an initial certificate, but who possesses the requisite occupational experience. This certificate is valid for three years, and the candidate would complete the additional requirements for an initial certificate during the three years.

The three options available for a Transitional A certificate prior to the May 2016 Board of Regents meeting were:

- Option A. Candidates who possess an associate's degree (or its equivalent) in the career and technical field in which the certificate is sought, and who have at least two years of documented and satisfactory work experience in the career and technical education subject for which a certificate is sought;
- Option B. Candidates who possess a high school diploma or its equivalent (but who do not possess an associate's degree or its equivalent in the certificate area), and who have at least four years of documented and satisfactory work experience in the career and technical education subject for which a certificate is sought; and
- Option C. Candidates who possess an associate's degree (or its equivalent) in the career and technical field in which the certificate is sought, and who have at least two years of documented and satisfactory teaching experience at the postsecondary level (excluding experience as a teaching assistant) in the career and technical education subject for which a certificate is sought.

All three Transitional A pathways described above also require:

(1) Coursework training in identification of and reporting of child abuse or maltreatment, school violence prevention and intervention, and harassment, bullying and discrimination prevention and intervention;

(2) Evidence of having achieved a satisfactory level of performance on the New York State Teacher Certification Examination Content Specialty Test in the area of the certificate; and

(3) An employment and support commitment. The candidate must submit evidence of having a commitment for three years of employment as a teacher in a public or nonpublic school or BOCES, which includes a mentored experience for the first year consisting of daily supervision by an experienced teacher during the first 20 days. However, the mentoring is not required if the candidate has two years of satisfactory employment as a teacher of students in grades 7-12 in a public or nonpublic school or BOCES.

Establishment of Additional Pathways

At its May 2016 Board of Regents meeting, the Board adopted by emergency action a proposed amendment to provide an additional opportunity for teachers to obtain a Transitional A certificate through a Pathway D Option. It is anticipated that this will be permanently adopted by the Board at its September 2016 meeting. Candidates may be eligible for a Transitional A certificate if they hold a full private career school teacher license issued by the Department's Bureau of Proprietary School Supervision (BPSS) and have taught under that license for two years in a New York State licensed private career school and meet certain other requirements.

Currently, pursuant to Section 126.6 of the Commissioner's Regulations, there are three license levels (permit, provisional and full license) for teachers licensed by BPSS. To apply for a permit, provisional or full license, candidates must complete an application and provide BPSS with all necessary documentation required for the level and license area(s) in which the candidate wishes to be licensed in. Currently, the requirements for a full Private Career School Teacher License by BPSS are (for most CTE subject areas):

(1) To qualify for a full license, candidates must have completed a total of 90-clock hours in Professional Education, including methods of teaching or a total of 9 semester credits of college course work in Professional Education.

Full licenses are valid for 4 years and are renewable.

During the three years that a candidate has a Transitional A certificate, he/she may apply for and complete all requirements for an Initial Certificate. These requirements include completion of college coursework, receiving a passing score on the NYSTCE exams, and completion of a 40 day student teaching placement in the certificate area sought.

Proposed Amendment

To provide additional certification pathways in CTE fields to address the immediate shortages in the field, the Department recommends establishing new pathway options G, H, and I for Transitional A certificates for candidates who meet one of the three requirements listed below:

- Option G. Have a minimum of two years of work experience in the CTE subject area of the certificate sought and hold an industry-related credential, where available, or pass an industry accepted examination as approved by the Department and have an employment and support commitment
- Option H. Are enrolled in an approved CTE teacher preparation program and have either a minimum of one year of related work experience and/or take and pass an industry accepted examination and have an employment and support commitment
- Option I. Are currently certified 7-12 grade teachers in any subject area with two years of documented work experience or who hold industry-recognized credentials, where available, in the related CTE area and have an employment and support commitment

The proposed amendment provides additional opportunities and flexibility for individuals with specific technical and career experience to obtain a Transitional A teaching certificate in their area of expertise, or a related area, thus allowing them to teach CTE subjects at the secondary school level. This will help to increase the supply of qualified, certified teachers in the career and technical education field in order to satisfy the increasing demand for those teachers.

Revised Job Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on June 29, 2016, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement herewith.

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

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on June 29, 2016, the State Education Department (SED) received the following comment:

1. COMMENT:

One commenter raised the concern that the proposed pathways for CTE certification are a "patchwork approach" and that a broader discussion of CTE certification, including a more comprehensive and system-wide approach to CTE teacher certification is required moving forward. The commenter suggested that NYSED convene a work group to look at a more comprehensive approach to CTE certification and to re-convene the CTE Content Advisory Panel to discuss future changes to advance the CTE certification pathways. However, the commenter also expressed appreciation that the Department is recognizing the value of work experience and industry-credentials within the proposed amendment.

The commenter also expressed concern over the requirement that the amendment requires an employment and support commitment on the part of the candidate, and that districts and BOCES do not have the ability to connect with candidates as the need for a CTE teacher arises.

DEPARTMENT RESPONSE:

SED agrees that a more comprehensive approach to the CTE teacher certification pathways is needed, and is currently in the process of working with the field to further revise the regulations relating to CTE teacher certification. However, the proposed amendment seeks to address the immediate concerns raised by the field relating to shortages in CTE teachers by providing an additional pathway to obtain a Transitional A teaching certificate.

In response to the request to convene a work group to look at a more comprehensive approach to CTE certification, the Department will take this under advisement, and will work to address this concern in the most appropriate way given the understaffing of the Department.

With respect to the concerns relating to the need for employment and support commitment, this is required for all candidates seeking a Transitional A certificate and therefore the Department does not believe a revision to the regulations is needed. Moreover, the purpose behind the employment and support commitment is to ensure that the teacher has the needed supports and mentoring when he/she enters the classroom.

NOTICE OF ADOPTION

Procedures for State-Level Review of Impartial Hearing Officer Determinations Regarding Services for Students with Disabilities

I.D. No. EDU-04-16-00004-A

Filing No. 857

Filing Date: 2016-09-13

Effective Date: 2017-01-01

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

Action taken: Amendment of Part 279 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 301(not subdivided), 311(1), 4403(1), (3), 4404(2) and 4410(13)

Subject: Procedures for State-level review of impartial hearing officer determinations regarding services for students with disabilities.

Purpose: To revise the procedures for appealing impartial hearing officer decisions to a State review officer.

Text or summary was published in the January 27, 2016 issue of the Register, I.D. No. EDU-04-16-00004-P.

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

Revised rule making(s) were previously published in the State Register on June 29, 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 Avenue, Albany, NY 12234, (518) 474-6400, email: legal@nysed.gov

Initial Review of Rule

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

Assessment of Public Comment

Since publication of a Notice of Revised Rule Making in the State Register on June 29, 2016, the State Education Department received the following comments.

1. COMMENT:

One commenter objects to the revisions to section 279.(3), to replace the word “must” with the word “may” in the notice included with a request for review and further states that the language, “an answer to the request for review may be served upon the petitioner,” is ambiguous because it could be read to indicate that service of an answer is not mandatory and that service within 5 business days is not mandatory.

DEPARTMENT RESPONSE:

The Department believes that revision of the proposed regulation is not necessary. As noted by the commenter, the purpose of the proposed language is to clarify that a respondent is not required to answer a request for review.

To the extent that a respondent may be confused as to whether service of an answer is mandatory, 8 NYCRR 279.5(a) provides that a party may answer a request for review “either by concurring in a statement of facts with petitioner or by service of an answer” and 8 NYCRR 279.5(e) provides that service of an answer “may be made by personal delivery, United States mail, or overnight delivery service upon the opposing party or such party’s attorney”. Therefore, the Department believes that the existing regulation is clear that an answer is optional, but if an answer is submitted, it must be served in accordance with the procedures set forth in Part 279.

2. COMMENT:

One commenter believes the 5-day time limit for submitting an answer to a request for review or cross-appeal is too short.

DEPARTMENT RESPONSE:

The commenter’s concerns were previously addressed in the Assessment of Public Comment to the Notice of Proposed Rule Making published in the State Register on June 29, 2016, as reflected below.

Because pleadings are filed by mail with the Office of State Review, and often are not filed until several days after they are served, it is not feasible to extend the time to answer as requested by some commenters and still maintain compliance with State and federal timelines. To the extent that a party may be unable to meet the timeline to answer, the regulations provide for the possibility of an extension of time to answer upon good cause shown. Finally, State Review Officers are required to conduct an independent review of the record and render an impartial decision thereon; accordingly, an answer to a request for review is expected to address only the specific issues raised in the request for review. It is expected that parties will have set forth their positions during the impartial hearing, such that it is unnecessary for those positions to be fully reiterated on appeal.

3. COMMENT:

One commenter suggests that, with respect to the record submitted on appeal, the regulations should specify that any briefs or memoranda of law submitted by the parties during the course of the hearing are included as a part of the hearing record.

DEPARTMENT RESPONSE:

The department has considered the commenter’s suggestion and does not believe any changes are necessary. Briefs and memoranda of law are already included as a part of the hearing record pursuant to 8 NYCRR 200.5(j)(5)(vi)(b).

4. COMMENT:

One commenter requests an expansion of the scope of permissible appeals from interim determinations of impartial hearing officers who decline a request to recuse themselves from presiding over an impartial hearing.

DEPARTMENT RESPONSE:

The proposed regulation does not alter the scope of permissible appeals from interim determinations. Therefore, the Department believes that this comment is beyond the scope of the proposed amendment and that no further revisions are necessary.

Moreover, in civil practice and administrative law, interlocutory appeals are generally disfavored; however, the Department has made a limited exception for interlocutory appeals from pendency determinations in order to effectuate the stability that Congress intended the pendency provision to provide to disabled students. At this time, the Department does not find that further regulatory action is necessary to address the commenter’s perception of an inordinate number of improper interim recusal decisions rendered by impartial hearing officers.

5. COMMENT:

One commenter requests clarification as to whether a party has the option of filing an appeal from an interim determination on pendency or waiting for a final determination of the impartial hearing officer before filing an appeal regarding the impartial hearing officer’s determination on pendency.

DEPARTMENT RESPONSE:

The regulation states that appeals from interim determinations are not permitted, “with the exception of a pendency determination.” The regulation goes on to state that in an appeal from a final determination, “a party may seek review of any interim ruling, decision or refusal to decide an issue.” Therefore, the Department does not believe a regulatory revision is necessary.

6. COMMENT:

One commenter requests that State Review Officers be given explicit authority to grant an extension of time to file a request for review to allow parties to attempt to resolve their differences post-hearing decision.

DEPARTMENT RESPONSE:

The Department believes that negotiated resolutions often result in the best outcomes for parties and students with disabilities, and to that end the resolution period and settlement opportunities are potentially available during the impartial hearing process (8 NYCRR 200.5[j][1], [iii]) and again during the second tier administrative appeal process (8 NYCRR 279.10[e]). However, the Department also believes that permitting extensions prior to the filing of an appeal with the Office of State Review and an overreliance on the possibility of settlement can have negative consequences for students and school districts by causing delays in the administrative process, and ordering a remedy becomes more cumbersome when the administrative process is delayed by multiple rounds of settlement discussions that ultimately fail. On balance, the commenter’s concern is not consistent with the overall objective of streamlining the administrative process. Therefore, the Department does not believe that revisions to the regulation are warranted.

7. COMMENT:

One commenter issued comments disagreeing with the Department's reasoning in the Assessment of Public Comment to the Notice of Revised Rule Making published in the State Register on June 29, 2016. Specifically, the commenter disagrees with the Department's response to Comment #11 and reiterates that the district should be required to send the parent a copy of an index to the record that is filed with the Office of State Review.

The commenter also disagrees with the Department's response to Comment #14 and argues that it is at odds with the prohibition against incorporation by reference. The commenter further argues that some impartial hearing officers refuse to accept briefs and/or restrict the length of briefs they will consider and requests that the Department advise impartial hearing officers that submission of and length of briefs should be at the discretion of the parties. In addition, the commenter asserts that the analysis of the issues in a brief to an impartial hearing officer is inherently different than on appeal. On appeal, the focus is on how the impartial hearing officer erred.

DEPARTMENT RESPONSE:

Initially, the comment regarding the Department's response to Comment #11 is beyond the scope of the proposed amendments because the amendments did not modify the requirement that districts file the hearing record with the Office of State Review but only clarified the contents of the record required to be filed. See Department's Response to Comment #11. In addition, while the Department encourages parties to make arrangements between themselves so that parents are made aware of the contents of the record filed with the Office of State Review, because parents should already be aware of the contents of the hearing record, the Department does not believe that any further revisions to the regulation are necessary.

With respect to the commenter's concern regarding the Department's response to Comment #14, the Department reiterates the prior response. See Department Response to Comment #14. In addition, while the commenter identifies the prohibition on incorporation by reference, parties are discouraged from providing a lengthy recitation of relevant facts supporting an assertion and are instead encouraged to move directly to the argument with citation to the underlying facts in the record, as State Review Officers are required to conduct an independent review of the factual record and render an impartial decision thereon. With respect to the commenter's concern that impartial hearing officers do not always permit the submission of memoranda of up to 30 pages in length and request that the Department direct impartial hearing officers that submission of post-hearing memoranda should be at the discretion of the parties, such circumstances may provide a basis for a granting of an extension of time to serve and file an answer and supporting memorandum of law and should be addressed on a case-by-case basis.

With respect to the commenter's concern that the focus of legal analysis on appeal is different from that during the impartial hearing, as previously mentioned the expansion of the requirement for service of a notice of intention to seek review to all parties ensures that parties are aware, no later than 25 days after the date of the impartial hearing officer's determination, that the opposing party is planning to appeal and the subject of that appeal, so that the party may begin preparing a responsive pleading and memoranda.

NOTICE OF ADOPTION

Authorize NY Higher Education Institutions to Participate in SARA and Approve Out-of-State Institutions for Distance Learning

I.D. No. EDU-18-16-00004-A

Filing No. 863

Filing Date: 2016-09-13

Effective Date: 2016-09-28

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

Action taken: Addition of Part 49 to Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 210(not subdivided), 210-c and 212(3); Finance Law, section 97-III; L. 2015, ch. 220

Subject: Authorize NY higher education institutions to participate in SARA and approve out-of-state institutions for distance learning.

Purpose: Authorize NY higher education institutions to participate in SARA and approve out-of-state institutions for distance learning.

Text of final rule: 1. A new Part 49 is added to the Regulations of the

Commissioner of Education, effective September 28, 2016, to read as follows:

Part 49

Post-Secondary Distance Education

Subpart 49-1

Approval of New York State Degree-Granting Institutions to Operate Under a State Authorization Reciprocity Agreement (SARA).

§ 49-1.1. Definitions.

For purposes of this Subpart:

(a) *Accredited* shall mean holding institutional accreditation from an accreditor recognized by the U.S. Department of Education.

(b) *Approved or Approval* means the department has granted approval for an institution to operate distance education programs under the terms of the state authorization reciprocity agreement (SARA), pursuant to section 210-c of the Education Law.

(c) *Complaint* means a formal complaint received by the department in writing that asserts that an institution has violated the terms and policies of SARA and/or the provisions of this Subpart, are being violated by a person, institution, state, agency or other organization or entity operating under SARA.

(d) *Distance education* means instruction offered by any means where the student and faculty member are in separate physical locations. It includes, but is not limited to, online, interactive video or correspondence courses or programs. It does not include intrastate distance education activity.

(e) *Institution* means a post-secondary higher education institution that is authorized by the Regents to confer degrees in New York State.

(f) *Legal domicile* means the state in which the institution's principal campus holds its institutional accreditation and, if applicable, its federal Office of Postsecondary Education Identifier (OPEID) number.

(g) *State authorization reciprocity agreement or SARA* means an agreement among member states, districts and U.S. territories that establishes comparable national standards for interstate offering of post-secondary distance-education courses and programs.

(h) *SARA policies and standards* means the SARA Policies and Standards February 17, 2016 as adopted by National Council of State Authorization Reciprocity Agreements, 3005 Center Green Drive, Suite 130 Boulder, Colorado 80301 - Available at the Office of Counsel, New York State Education Department, State Education Building, Room 148, 89 Washington Avenue, Albany, New York, 12234.

§ 49-1.2. *Institutional Eligibility Requirements.* To be eligible for approval to operate under SARA an institution shall:

(a) be legally domiciled in New York State and be authorized by the Board of Regents to confer post-secondary degrees in New York State and offer registered degree programs in New York State;

(b) possess and maintain institutional accreditation, by an accrediting body recognized by the U.S. Secretary of Education, including distance education within the scope of its recognition;

(c) for non-public institutions only, possess a financial responsibility index score from the U.S. Department of Education that is 1.5 or above;

(d) agree to be bound by the SARA policies and standards and to be responsible for the actions of any third-party providers used by the institution to engage in operations under SARA;

(e) agree to remain responsible for compliance with the requirements of SARA and applicable laws and regulations, regardless of whether the institution engages in operations under the agreement itself, or through a third-party provider;

(f) agree to notify the department of any adverse actions by its accreditor or any negative changes to its accreditation status;

(g) agree to notify in writing all students in a course or program that customarily leads to professional licensure or certification, or which a student could reasonably believe leads to such licensure or certification, whether or not the course or program meets requirements for licensure or certification in the state where the student resides. If an institution does not know whether the course or program meets licensure requirements in the student's state of residence, the institution may meet this requirement by informing the student in writing and providing the student the contact information for the appropriate state licensing board(s);

(h) agree, in cases where the institution cannot fully deliver the instruction for which a student has contracted, to provide a reasonable alternative for delivering the instruction or reasonable financial compensation for the education they did not receive;

(i) agree to provide any data requested by the department, to the extent permitted by applicable law, to assist the department in resolving any complaints arising from its students and to abide by decisions of the

department, in order for the department to effectively monitor any activities under the agreement;

(j) upon application submission, pay to the department any state fees for application review and SARA participation as prescribed in section 49-1.7 of this Subpart;

(l) pay an annual SARA participation fee to the National Council for SARA (NC-SARA), as required by the SARA policies and standards; and

(m) report any other information required by SARA and/or this section. § 49-1.3. Initial Application for Approval to Operate Under SARA.

(a) An institution may apply to the department for approval to operate under SARA on a form and in a timeframe prescribed by the Commissioner, with the required fees as prescribed in section 49-1.7 of this Subpart.

(b) All complete applications will be reviewed by the department to determine whether the institution meets the eligibility requirements set forth in this section. Following the department's review of an institution's application for approval, the department shall take one of the following actions:

(1) Approval. The department shall approve all institutions that meet the requirements set forth in this section. The term of approval shall be one year from the date of notification of approval, and may be renewed annually thereafter based on a renewal application. An extension of such term may be granted at the discretion of the Commissioner.

(2) Disapproval. The department shall disapprove all institutions that do not meet the requirements set forth in this section. If an institution's application for participation in SARA is disapproved, the department will provide the institution with a written reason for such disapproval. The institution may appeal any disapproval to the Commissioner or his/her designee in a timeframe and manner prescribed by the Commissioner, and submit additional information in support of its position. An institution that has been disapproved, may reapply to the Department no earlier than 180 days from the date of disapproval.

(3) Provisional approval. The department may, at its discretion, provisionally approve institutions for participation in SARA, subject to the specific terms for provisional approval identified in the SARA policies and standards.

§ 49-1.4. Application for Renewal of Approval to Operate Under SARA.

(a) An institution may apply to the department for renewal of its approval to operate under SARA on a form and in a timeframe prescribed by the Commissioner, with the required fees as prescribed in section 49-1.7 of this section no later than 60 days prior to the expiration of its existing term of approval. An extension of the submission period for renewal of approval may be granted at the discretion of the Commissioner.

(b) The department shall review all properly submitted renewal applications, and any other relevant data in the department's possession related to the institution's compliance with the SARA policies and standards. Following such review, the department will make a determination consistent with the options and procedures identified in section 49-1.3(b) of this Subpart. The institution may appeal such disapproval to the Commissioner or his/her designee in a timeframe and manner prescribed by the Department, and submit additional information in support of its position.

(c) Institutions that do not apply for renewal before expiration of its approval are no longer approved to operate under SARA.

(d) Institutions no longer approved to operate under SARA may reapply to the Department no earlier than 180 days from the date of disapproval or non-renewal.

§ 49-1.5. Loss of Eligibility and Removal.

The department may remove an institution from approval to operate under SARA, based on a finding that the institution is no longer eligible or is out of compliance with SARA policies and standards. The institution may appeal a disapproval to the Commissioner or his/her designee in a timeframe and manner prescribed by the Commissioner, and submit additional information in support of its position. An institution that is removed from eligibility during an approval period shall receive no fee refund, except as otherwise provided in section 49-1.7 of this Subpart.

§ 49-1.6. Complaints. Complaints against New York State institutions operating under SARA shall follow the following procedures:

(a) Complaints against a New York State institution shall first be subject to an institution's own procedures for resolving complaints.

(b) If a person bringing a complaint to an institution is not satisfied with the outcome of the institutional process for handling complaints, a complaint (except for complaints about grades or student conduct violations) may be made to the department, on a form prescribed by the Commissioner.

(c) The department shall review and resolve complaints in accordance with the SARA policies and standards.

(d) The department may impose as a penalty, refunds or other corrective action, to resolve complaints.

(e) Nothing in this section precludes the state from simultaneously using its laws of general application, including laws of consumer protection and fraud prevention, to pursue action against an institution that violates those laws.

§ 49-1.7. Fee Schedule.

(a) New York State institutions seeking approval to operate under SARA shall be subject to the following annual fees to obtain and/or maintain state participation in SARA:

Institution's total full-time equivalent (FTE) enrollment as shown in the Federal Integrated Postsecondary Education Data System (IPEDS)	Total Annual Fee
Under 2,500 FTE enrollment	\$5,000
2,500 – 9,999 FTE enrollment	\$7,000
10,000 or more FTE enrollment	\$9,000

(b) The annual fees for approval to operate under SARA shall be due upon the submission of an application for initial approval or renewal as prescribed in sections 49-1.3 and 49-1.4 of this Subpart.

(c) If the department determines that an institution's application is disapproved; the institution will be refunded its annual fee, less \$2,000, which represents the costs to the Department for application review.

(d) In addition to the fees prescribed in (a) of this section, institutions that have been approved by the Department to participate in SARA shall be subject to the annual fees required by the SARA policies and standards, which shall be made payable to the National Council for SARA.

(e) The department shall periodically review, and if necessary revise this fee schedule to ensure that it is sufficient to meet the state administrative costs of State participation in SARA.

Subpart 49-2

Approval of Out-of-State Post-Secondary Institutions to Offer Distance Education to New York State Residents

§ 49-2.1 Approval of the Department.

(a) Any institution legally domiciled in a State other than New York State that seeks to offer any educational credit-bearing post-secondary instruction, courses, or degree programs through distance education to New York State residents shall obtain approval to operate in this State from the Department. This includes institutions that are operating in New York State under section 3.56 of the Rules of the Board of Regents (permission to operate) that seek to offer distance education programs in this State.

(1) Post-secondary institutions that enrolled New York State residents in its distance education programs on or before of the effective date of this Subpart, shall have six months from the effective date of this Subpart to seek and obtain department approval to continue to operate such programs to New York State residents. An extension of the six-month time period may be granted in limited circumstances, at the discretion of the Commissioner.

(2) All institutions with New York State residents enrolled in its distance education programs on or before the effective date of this Subpart, that have not received department approval by the expiration of the time period in paragraph (1) of this subdivision, must cease enrolling new students, and shall phase-out instruction for students who are currently enrolled in such programs until such students have completed the distance education program they are enrolled on the effective date of this section.

(b) Exemption. Any institution that is identified by a member state as participating in SARA is exempt from the application procedures and fees identified in this Part, and are instead subject to the SARA policies and standards.

§ 49-2.2. Definitions.

For purposes of this Subpart only:

(a) Accredited shall mean holding institutional accreditation from an accreditor recognized by the U.S. Department of Education.

(b) Approved or Approval means approval of an institution to offer its distance education programs to New York State residents.

(c) Complaint means a formal assertion in writing that the terms of approval are being violated by a person, institution, state, agency or other organization or entity operating under the terms of this agreement.

(d) Distance education means credit-bearing post-secondary instruction offered by any means where the student and faculty member are in separate physical locations. It includes, but is not limited to, online,

interactive video or correspondence courses or programs. It does not include intrastate distance education activity.

(e) Institution means a degree-granting postsecondary entity legally domiciled in a state other than New York State.

(f) Interregional Guidelines for the Evaluation of Distance Education means the guidelines developed by the Council of Regional Accrediting Commissions (C-RAC) in February 2011, published by the Middle States Commission on Higher Education, 3624 Market Street, Philadelphia, PA 19104 - Available at the Office of Counsel, New York State Education Department, State Education Building, Room 148, 89 Washington Avenue, Albany, New York 12234.

(g) Legal domicile or legally domiciled means the state in which the institution's principal campus holds its institutional accreditation and, if applicable, its federal Office of Postsecondary Education Identifier (OPEID) number.

§ 49-2.3. Institutional Eligibility. An institution applying to the Department for approval to offer credit-bearing post-secondary courses or degree programs to New York State residents through distance education pursuant to this Subpart must:

(a) be legally domiciled in a state other than New York or a United States territory and hold proper authorization from such state/territory to offer degree-granting programs and confer degrees in such state/territory;

(b) be a U.S. degree-granting institution that holds institutional accreditation from an accrediting association recognized by the U.S. Secretary of Education with distance education within its scope of recognition;

(c) possess a financial responsibility index score from the U.S. Department of Education that is 1.5 or above;

(d) agree to abide by the Interregional Guidelines for the Evaluation of Distance Education as defined in section 49-2.2(f) of this Subpart;

(e) agree to be responsible for the actions of any third-party providers used by the institution to offer distance education to New York State residents;

(f) agree to notify the department of any adverse actions by its accreditor or any negative changes to its accreditation status;

(g) agree to provide any data requested by the department, to the extent permitted by applicable law for the purposes of monitoring activities or responding to or resolving complaints;

(h) agree to work with the Department, other state agencies, and accreditors to resolve any complaints, and to abide by decisions of the Department or other state agencies regarding complaint resolution, including by not limited to paying any fines or other corrective actions imposed;

(i) agree to notify in writing all students in a course or program that customarily leads to professional licensure or certification, or which a student could reasonably believe leads to such licensure or certification, that the institution outside of New York State is not able to recommend graduates for licensure or certification in New York State, does not know whether the course or program meets licensure requirements in New York State, and provide the student the contact information for the appropriate state licensing or certification board(s);

(j) agree, in cases where the institution cannot fully deliver the instruction for which a student has contracted, to provide a reasonable alternative for delivering the instruction or reasonable financial compensation for the education they did not receive;

(k) agree to pay a non-refundable fee as prescribed by the department, for the review and processing of an institution's application;

(l) If deemed approved by the Commissioner, agree to pay a non-refundable fee as prescribed by the department, for the maintenance of ongoing administrative costs; and

(m) agree to cease and desist all operations, including offering any distance education programs to New York State residents, upon notification from the department that the institution has lost its eligibility to offer such programs under this Subpart.

(n) Waiver. The Commissioner, at her/his sole discretion, may waive one or more eligibility requirements identified in this section, provided that the institution can establish, in the determination of the Commissioner, that it has met the substantial equivalent of a requirement under this Subpart.

§ 49-2.4. Initial Application for Approval to Offer Distance Education.

(a) An institution shall apply to the department for approval to offer distance education on a form and in a timeframe prescribed by the Commissioner, with the required fees as prescribed in section 49-2.8 of this Subpart.

(b) All properly submitted applications will be reviewed by the department to determine whether an institution meets the eligibility requirements set forth in this section. Following the department's review of an

institution's application for approval, the department shall take one of the following actions:

(1) Approval. The department shall approve all institutions that meet the requirements set forth in this section. The term of approval shall be one year from the date of notification of approval, and may be renewed annually thereafter based on a renewal application. An extension of such term may be granted at the discretion of the Commissioner.

(2) Disapproval. The department shall disapprove all institutions that do not meet all of the requirements set forth in this section. If an institution's application to offer distance education in this State is disapproved, the department will provide the institution with a written reason for disapproval. Within 10 days of the date of the written notification of disapproval, the institution may appeal a disapproval to the Commissioner or his/her designee in a timeframe and manner prescribed by the Commissioner, and submit additional information in support of its position.

An institution that has been disapproved, may reapply to the Department no earlier than 180 days from the date of disapproval.

§ 49-2.5. Renewal Application.

(a) An approved institution that seeks to renew its approval authority shall apply to the department on a form and in a timeframe prescribed by the Commissioner, with the required fees as prescribed in section 49-2.8, no later than 60 days prior to the expiration of its existing term of approval. An extension of the submission period for renewal may be granted at the discretion of the Commissioner.

(b) The department shall review all properly submitted renewal applications, and any other relevant data in the department's possession related to the institution's compliance with eligibility requirements and other indicators of good standing. Following such review, the department will make a determination on the renewal application consistent with the options in section 49-2.3(b) of this Subpart. The institution may appeal a disapproval to the Commissioner or his/her designee in a timeframe and manner prescribed by the Commissioner, and submit additional information in support of its position.

(c) Institutions that do not apply for renewal before the expiration of its approval period are no longer approved to operate distance education programs in this State.

§ 49-2.6. Loss of Eligibility and Revocation.

(a) The department may revoke an institution's approval authority under this Subpart, based on a finding that the institution no longer meets the requirements of this Subpart and/or based on any one or number of complaints received, that raise a substantial question as to the institution's ability to offer distance education programs to New York State residents. The institution may appeal a disapproval to the Commissioner or his/her designee in a timeframe and manner prescribed by the Commissioner, and submit additional information in support of its position.

An institution that has had its approval revoked during an approval period receives no fee refund, except as otherwise provided for in section 49-2.7 of this Subpart.

§ 49-2.7. Complaints. Complaints relating to an institution that has been approved by the Department to offer distance education to New York State residents shall follow the following procedures:

(a) Complaints against an approved institution shall first be subject to institution's own procedures for resolving complaints.

(b) If a person bringing a complaint against an institution is not satisfied with the outcome of the institutional process for handling complaints, a complaint (except for complaints about grades or student conduct violations) may be made to the department, in a form prescribed by the Commissioner.

(c) The Department shall review such complaints and may impose as a penalty, refunds or other corrective action, to resolve complaints.

(d) Nothing in this section precludes the state from simultaneously using its laws of general application, including laws of consumer protection and fraud, to pursue action against an institution that violates those laws.

§ 49-2.8. Fee Schedule.

(a) Institutions seeking approval from the Department to offer distance education to New York State residents under this Subpart shall be subject to the following state fees:

Application Review Fees	Annual Approval Fee	Total Annual Fee
\$7,000	\$10,000	\$17,000

(b) The total annual fee of \$17,000 shall be due upon the submission of an application for approval or renewal as required by this Subpart. The

annual application review fee is non-refundable. Upon a department determination to disapprove an application, the department will refund the annual approval fee.

(c) The department shall periodically review, and if necessary revise this fee schedule to ensure that it is sufficient to meet the state administrative costs of approval and oversight of out-of-state distance education programs offered pursuant to this Subpart.

Final rule as compared with last published rule: Nonsubstantial changes were made in Part 49.

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

Revised Regulatory Impact Statement

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on May 4, 2016, the proposed rule was revised as follows:

Section 49-1.1 was amended to fix a few typos-- lowercase the word "department", put a hyphen in the word post-secondary, change agreements to "agreement", change "it's" to "its" and fix a typo in a zip code.

Section 49-1.4-1.3 was amended to change "on" to "of" and to delete an extra period.

Section 49-1.5 was amended to insert an (a).

Section 49-1.7 was amended to put a comma in \$2,000.

Section 49-2.2 was amended to hyphenate "post-secondary".

Section 49-2.3 was amended to insert the word section and delete the section symbol to be consistent with the rest of the regulation and to change "providing" to "provide" in one place and to insert the word "it" in one place to make this section grammatically correct.

Section 49-2.4 is amended to change the word "on" to "of" and to combine two sentences and lowercase the word "the" and combine two sentences.

Section 49-2.6 was amended to insert the words "of this Subpart" for clarity purposes.

Section 49-2.8 was amended to delete a ";" and instead insert a comma for grammatical reasons.

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

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on May 4, 2016, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above revisions to the proposed rule do not require any revisions to the previously published Regulatory Flexibility Analysis.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on May 4, 2016, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above revisions to the proposed rule do not require any revisions to the previously published Rural Area Flexibility Analysis.

Revised Job Impact Statement

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on May 4, 2016, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

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

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 Proposed Rule Making in the State Register on May 4, 2016, the State Education Department (SED) received the following comments:

1. COMMENT:

Commenter supports the amendment because SARA would protect the quality of online courses and ensure students seeking to take courses online will be able to proceed with confidence, and because SARA will remove barriers to providing quality online education.

DEPARTMENT RESPONSE:

Comment supportive, no response necessary.

2. COMMENT:

Commenter strongly supports the amendment because it will increase regulatory oversight over online programs, preserve New York State's right to legally prosecute predatory institutions, expand education options for resident students, and enable legitimate colleges with strong online programs to more easily offer distance education beyond New York State's borders.

DEPARTMENT RESPONSE:

Comment supportive, no response necessary.

3. COMMENT:

Commenter supports the amendment on behalf of its 24 New York State colleges and schools and regards SARA's oversight of academic programs of education institutions in other member states a valuable service to New York State's own students, and hopes that the fee structure that makes membership for the entire university attractive can be developed. Without SARA, we would miss the opportunity to participate in a more transparent and collaborative consumer protection effort. At the same time, each of our New York institutions would need to continue the tasks of registering with each individual state, or choosing not to provide New York based learning opportunities to citizens in particular states because the processes are too time consuming or expensive.

DEPARTMENT RESPONSE:

Comment supportive. To the extent that the commenter requests that the fee structure be attractive for its entire university, the Department has established a fee structure in section 49-1.7 of the proposed amendment, which it believes will reduce the costs of individual institutions securing multiple state approvals, while maintaining state capacity to ensure quality and consumer protection.

4. COMMENT:

Commenter strongly supports the amendment because students in New York and across the country will benefit from high quality online providers such as New York's independent colleges and universities while providing a layered approach to consumer protection and states' rights. SARA creates a shared responsibility for ensuring the quality of online education and provides new tools for states to protect students. Joining SARA will ensure quality, transparency and protection on all fronts. Not all institutions in a state are automatically eligible for participation in SARA. Each state must assure that participating institutions are in compliance with state rules, regulations and standards of good practice in online education, and each state must have a transparent system regarding student complaints.

DEPARTMENT RESPONSE:

Comment supportive, no response necessary.

5. COMMENT:

Commenter strongly supports the amendment on behalf of its 64 campuses. Participation in SARA will avoid current expenditures of more than \$250,000 in fees and countless administrative resources for the commenter's institutions each year. In addition, commenter believes that SARA provides a more robust regulatory environment for online education than currently exists to protect students. SARA provides an effective, multi-layered approach to consumer protections and state rights. SARA creates shared responsibility for ensuring the quality of online education, without interfering with New York's ability to enforce laws related to consumer protection and fraudulent activities.

DEPARTMENT RESPONSE:

Comment supportive, no response necessary.

6. COMMENT:

Commenter supports reciprocity changes that will allow out-of-state teachers up to two years to complete their requirements and to accept the SARA higher education institutions as comparable to a New York State administrator or teacher preparation NYS approved program.

DEPARTMENT RESPONSE:

The proposed amendment and SARA have no effect on reciprocity for professional certification and/or licensure or the establishment of comparable administrator or teacher preparation programs. Therefore, this comment does not appear to relate to the proposed amendment.

7. COMMENT:

Commenter supports the amendment because it would ease the administrative burden associated with launching online degrees without diminishing the protections offered to students. The commenter has allocated significant administrative resources to navigating the bureaucratic processes established in 50 states acting somewhat autonomously. It is already the case that thirty-six states participate in SARA, and at least nine others are pursuing it. With more than 300 colleges and universities, New York is one of the most important states in higher education. Participation in SARA would help New York institutions continue to thrive in a competitive environment.

DEPARTMENT RESPONSE:

Comment supportive, no response necessary.

8. COMMENT:

Commenter supports the amendment, yet suggests that § 49-1.2(c) be revised to permit an institution that possesses a financial responsibility index score from the U.S. Department of Education of between 1.0 and 1.5, to participate in SARA if it is able to successfully demonstrate to the New York State Education Department that it is nevertheless sufficiently financially stable to justify participation in SARA.

DEPARTMENT RESPONSE:

A financial responsibility index score of 1.5 or higher is the basic standard set by SARA policies and standards for approval to operate under SARA (although SARA does not preclude a state from setting its minimum standard higher than 1.5). However, SARA does allow a state to consider for “provisional approval,” institutions that possess a financial responsibility index score of 1.0 to 1.5, with justification. No revision to the proposed regulation is necessary to address the suggestion of the commenter since § 49-1.3(3) permits the department to consider institutions with a financial responsibility index score of 1.0 to 1.5 for provisional approval.

9. COMMENT:

Commenter supports the amendment.

DEPARTMENT RESPONSE:

Comment supportive, no response necessary.

10. COMMENT:

Commenter supports the amendment because SARA will enable institutions to provide opportunities for students all across the country who are interested in attaining their educational goals by creating clear processes, accountability, and accessibility for our organization to serve students in the national marketplace.

DEPARTMENT RESPONSE:

Comment supportive, no response necessary.

11. COMMENT:

Several commenters strongly support the amendment because it would level the playing field for institutions who wish to recruit both in-state and out-of-state students by eliminating burdensome and costly barriers to New York State colleges and universities to provide high quality online education and provide oversight of out-of-state IHEs that currently have no regulatory screen to offering programs to New York State residents.

DEPARTMENT RESPONSE:

Comment supportive, no response necessary.

12. COMMENT:

Several commenters strongly support the amendment. SARA will provide benefits both to New York institutions of higher education, and to New York students who choose to enroll in distance education programs from institutions located in other states.

DEPARTMENT RESPONSE:

Comment supportive, no response necessary.

13. COMMENT:

One commenter seeks to expand their reach beyond New York and Vermont. The commenter notes that as they build online programs, without SARA they would have to engage in the daunting and expensive task of registering with each state. Commenter would likely face the undesirable situation of choosing not to provide New York-based online learning opportunities to citizens in particular states because their processes are too time consuming or expensive.

Commenter strongly supports the amendment because SARA will increase student access to New York State’s high-quality online education providers and without SARA, the commenter would miss the opportunity to participate in a more transparent and collaborative consumer protection effort across higher education. Participation in SARA will provide an efficient and effective mechanism for the regulation of online higher education across the United States while leveling the playing field for New York’s colleges and universities to deliver education in a reasonable and responsible manner.

DEPARTMENT RESPONSE:

Comment supportive, no response necessary.

14. COMMENT:

Commenter supports the amendment because the current costs of obtaining and managing compliance and accreditation requirements across individual states could have a direct impact on the affordability of higher education programs in New York State, and by entering SARA New York State will be providing an option for qualifying institutions within New York State to maintain needed regulatory approvals. The commenter further notes that if NYS does not join SARA, there could be a direct impact on a student’s ability to be successful upon graduation, in an era where graduates of a higher education institution struggle to find robust internship programs, since currently internships in other states trigger the need for additional State approval.

DEPARTMENT RESPONSE:

Comment supportive, no response necessary.

15. COMMENT:

Several commenters support the amendment. With 36 states currently

in SARA, New York State and its colleges and universities will be at a great disadvantage if New York State does not join. The option to join SARA would provide significant relief to universities and other institutions in New York wishing to provide courses in an online format, and would allow us to extend our high quality, unique, and innovative programs to more students, including those for whom a traditional college experience is unfeasible. Further, joining SARA will strengthen regulatory oversight, improve consumer protections for New York residents, and provide a more effective system for ensuring quality online education programs. By participating in SARA, the unique, innovative programs here at this University and other institutions across NYS can reach more students in more states around the country, while ensuring an efficient, effective and transparent mechanism for regulation that our current system lacks.

DEPARTMENT RESPONSE:

Comment supportive, no response necessary.

16. COMMENT:

Commenter supports the amendment. This is a long overdue development that will allow colleges and universities such as the commenter to compete more equally for online students from across the country. Presently, the commenter must still secure permissions from all states and territories to operate its online programs outside of New York State. SARA offers an efficient means to secure those permissions, while maintaining high educational standards and protections for students. The commenter noted that their online programs have more than doubled the enrollment of out-of-students over the past three years, but they cannot even begin to market their programs in states where they are not authorized, putting them at a competitive disadvantage. The current process by which the commenter secures individual states’ authorization is lengthy, inefficient, and very expensive. SARA offers an efficient means to secure those permissions, while maintaining educational standards and protections for students.

DEPARTMENT RESPONSE:

Comment supportive, no response necessary.

17. COMMENT:

Commenter strongly supports the amendment because SARA creates a shared responsibility for ensuring that high quality online education is achieved across the state and provides tools in which to protect students enrolled in these programs. As a SARA member, New York will monitor institutions based in the state offering distance education programs and will receive assistance from other SARA states, as they will monitor providers in their own states. This will ensure transparency and provide protections. Any state will be able to take action against in or out-of-state institutions and if fraud, misrepresentation or abuse occurs that violates consumer protections laws of their state.

The current compliance landscape for many colleges and universities is cumbersome, time consuming and costly. Joining SARA will assist such institutions in remaining competitive in developing human capital and preparing graduates for the global workforce through online education.

DEPARTMENT RESPONSE:

Comment supportive, no response necessary.

18. COMMENT:

As the largest developer and provider of online learning opportunities for New Yorkers, commenter urges the Board to support and adopt SARA/Part 49 regulations, because it will improve and tighten oversight of online learning providers and will serve to remove barriers for New York schools to offer online learning to students in other states without having to incur tremendous expense and difficult bureaucratic rules. Commenter also expresses an understanding about the expressed concerns about unscrupulous and predatory practices sometimes associated with for-profit online providers, yet believes that SARA/Part 49 as published, will enhance New York’s regulatory power to fight against such practices.

DEPARTMENT RESPONSE:

Comment supportive, no response necessary.

19. COMMENT:

Commenter notes that the current lack of regulations regarding the enrollment of New York residents in out-of-state online schools is unsustainable and dangerous, however, the commenter expresses concerns about SARA. These concerns include, the notion that under SARA, New York State is ceding its authority to approve institutions to a third party entity that may rely on the good will of other states and NC-SARA; that SARA enshrines a two-tiered system in which New Yorkers attending in-state online schools are subject to one set of marketing and operating standards, while students attending out-of-state online schools are subject to another, likely lower set of standards; and that the agreement additionally requires New York and every other state to ignore the financial incentives that have caused so much predatory behavior at for-profit schools, by requiring that for-profit, nonprofit and public institutions be assessed as if they are the same.

However, if New York does join SARA, commenter made the following recommendations:

1. Clarify application of New York law to SARA institutions.

a. Institutions based in New York that participate in SARA must be held accountable to both the standards outlined in the national compact sponsored by NCSARA, as well to New York's regulations. As such, the recommendation is to add language explicitly stating that participating schools must abide by New York regulations and SARA.

b. The SARA agreement itself states that "general purpose laws enforced by state, tribal or federal law enforcement agencies shall not be affected or superseded by any provisions of SARA." However, the parallel provision in the proposed regulations is in subpart 49-1, which applies only to institutions based in New York. It is critical to ensure that New York's general purpose laws apply to institutions participating in SARA whether they are based in-state or out-of-state. The recommendation would be to make clear that the state's protections against fraud and abuse apply regardless of the home state of the offending institution.

2. Ensure that colleges provide data necessary for the integrity of SARA.

a. By joining SARA, NYSED will be taking responsibility for nationwide oversight of online programs offered by New York-based institutions participating in SARA. It will be the Department's stamp of approval that other states will rely on to allow the institutions to operate in their states without licensure or registration. Therefore, it is incumbent on the Department to be able to verify the information that New York institutions are submitting in their applications for SARA membership, and to monitor the institutions on an ongoing basis.

b. While New York would not have a general right to seek data from out-of-state

SARA institutions, we recommend a provision that ensures that, at minimum, information is made available regarding the number of New York residents enrolled by the out-of-state institutions. Our expectation is that these data would be submitted to NC-SARA and made available to participating states.

c. These provisions would require non-SARA institutions enrolling New York students-from out of state to provide data requested the department, including New York enrollment figures.

3. Retain right to hear complaints from students. Student complaint procedures are among the most important tools government officials have to monitor postsecondary institutions, ensuring that these schools live up to the reasonable expectations of consumers and abide by established legal standards. While it is appropriate, as a general procedure, for complaints to be referred to institutions, it is dangerous for the department to legally require itself to do so. The severity, volume, or nature of some complaints may justify a direct inquiry or investigation without first referring the complaints and awaiting an institution's reply to the complainant. It is for this reason that we strongly recommend that § 49-1.6(a), § 49-1.6(b), § 49-2.7(a) and § 49-2.7(b) be stricken from the proposed regulation. We recommend, instead, a general agreement to follow the SARA procedures with the department retaining the right to follow up on complaints as it deems appropriate given the circumstances.

4. Making sure students get what they pay for. Under SARA, participating states are required to have "clear and well-documented policies for addressing catastrophic events," including "processes to ensure that students receive the services for which they pay," in the event of an institutional closure. States have some flexibility to determine how to comply, through methods such as "tuition assurance funds, surety bonds, teach-out provisions or other practices deemed sufficient to protect consumers." The recommendation is to add explicit language requiring that New York State establish such fees and requirements for institutions approved by the Department to participate in SARA.

DEPARTMENT RESPONSE:

SED agrees with the commenter that the present lack of regulations regarding the enrollment of New York State residents in out-of-state online schools is problematic; however, SED believes that implementing Part 49 is a potential solution to that problem. SED disagrees that by joining SARA New York State would be ceding any of its current authority, since all existing New York State laws for consumer protection and fraud, and education regulations for program registration remain unaffected by SARA or by Part 49. Rather SED agrees with comment numbers 1-18, that SARA adds a multi-layered approach to quality assurance and consumer protection that provides SED with a system of external supports for consumer protection in other SARA member states and affords greater student access to New York State's high quality institutions of higher education. SED does not believe that SARA enshrines a two-tiered system where New Yorkers are subject to two sets of standards, but rather, that SARA provides for initial quality screens for out-of-state institutions, where there are presently none. Finally, SED disagrees with the premise that applying the same standards to all higher education sectors (for-profit, not-for-profit, public) incentivizes predatory behavior by for-profit institutions. The existing regulatory framework in New York State already requires that all degree-granting institutions in New York State meet the

same standards in order to be approved to operate in New York, regardless of sector and Education Law § 210-c does not make a distinction between for-profit and non-profit institutions. It allows the state to enter into an interstate reciprocity agreement for all postsecondary distance education courses. Moreover, section 3 of the SARA agreement provides that all degree-granting institutions located in the United States holding proper authorization from Congress, a U.S. State or a federally recognized tribe and holding accreditation as a single entity from an accrediting association recognized by the U.S. Secretary of Education is eligible to apply to its home state to participate in SARA if that state is a SARA member. SED further notes that presently for-profit and non-profit colleges and universities in New York State are held to the same standards of program quality and program registration standards, which is consistent with Part 49 and SARA.

In response to each of the specific recommendations presented by the commenter SED responds as follows:

1a. SED agrees that New York State institutions must be held accountable to both the standards outlined in the national compact, as well as to New York's regulations. However, SED believes no regulatory revision is necessary to achieve this effect. New York State institutions that are approved to participate in SARA, must meet the requirements for institutional participation in SARA and all of New York State's requirements. New York State has confirmed this with NC-SARA. There is no provision in Education Law § 210-c, Subpart 49-1, or in the SARA policies and standards that waive, or supersede New York State's requirements that New York State institutions meet all other Part 50 regulations for program and site approval, including any distance education programs offered through SARA, or any other applicable New York State laws and regulations.

1.b. SED agrees that it is critical to ensure that New York's general purpose laws apply to institutions participating in SARA whether they are based in-state or out-of-state, however, SED believes no regulatory revision is necessary as all general purpose laws continue to be applicable per section 4 of the SARA agreement which provides that "Nothing in the SARA Policies and Procedures precludes a state from using its laws of general application to pursue action against an institution that violates those laws." The Department has confirmed this with NC-SARA.

2.a. SED agrees that it will be incumbent on the Department to verify the information that New York State institutions submit in their applications for SARA membership and to monitor the institutions on an ongoing basis. SED believes that no regulatory revisions are needed, since §§ 49-1.2(i) and 49-2.3(g) require institutions to provide any data requested by the Department to assist the Department in resolving any complaints arising from its students and to abide by decisions of the Department, in order for the Department to effectively monitor any activities under the agreement.

2.b. SED agrees with this recommendation. These data are required to be reported annually to NC-SARA and made available to the Department.

2.c. SED agrees with this recommendation, however no regulatory revision is necessary since the reporting of these data will be covered under § 49-2.3(g).

3. See response to 1b. The complaint procedures as currently written comport to existing SED practice with regard to student complaints and to SARA policies and standards. The student complaint procedures to be adopted in Part 49 are specific to SARA. Nothing prohibits SED from simultaneously referring complaints to other state agencies to enforce general state laws for consumer protection and fraud or to take immediate action upon receipt of the complaint. SED does not believe a revision is needed to maintain consumer protection.

4. SED acknowledges that the establishment of fees for catastrophic events such as institutional closure are worthy of Department and Regents consideration, however, this is a broader consideration not specific to SARA, and it would require a statutory change.

20. COMMENT:

Commenter asserts it investigated state oversight over online education providers in a report entitled "Wake Up Call to State Governments: Protect Online Education Students from For-Profit School Fraud," which suggests the need for state regulation of online education providers and the insufficiency of the then existing SARA to address consumer protection issues. Commenter does not support the amendment and requests the Department consider alternative measures to regulate online schools. Commenter states that if New York joins SARA any current or future laws and regulations the state develops specifically to protect students from unfair or predatory conduct by for-profit schools will be inapplicable to protect New York State residents who attend online SARA schools based in another state. Commenter suggests that the result would be a two-tiered system in which New Yorkers attending in-state online schools would be subject to one set of protections, while New Yorkers attending online schools based in another state would be deprived of those same protections. Commenter further suggests that SARA would bar New York from applying state student-protection regulations against New York-based schools that violate the regulations with respect to students in other states.

DEPARTMENT RESPONSE:

SED does not agree with the commenter's analysis. See response to Comment #19. Also, section 4.2(g) of the SARA policies and standards explicitly states that "nothing in SARA Policies and Standards precludes a state from using its laws of general application to pursue action against an institution that violates those laws." Therefore, the Attorney General's authority to apply its consumer protection and fraud laws should not be impacted by SARA. The Department has confirmed this with NC-SARA.

21. COMMENT:

Commenter supports the comments submitted by commenter # 20. Commenter does not support the amendment because of the requirement that students submit complaints to institutions of higher education before New York State regulators would consider a complaint (citing the proposed § 49-1.6.9(a), § 49-1.6.9(b), and § 49-2.7(a) and § 49-2.7(b)), in the event that certain student complaints may well warrant immediate and direct inquiry or investigation by NYSED. Commenter also cites recently proposed federal regulations that would prohibit a school participating in the Direct Loan Program from requiring students to engage in internal institutional complaint or grievance procedures before contacting accrediting or government agencies with authority over the school regarding such claims, and suggest that the Department consider a reciprocity agreement that would balance the interests of schools, students, and the state.

DEPARTMENT RESPONSE:

See SED response to Comments #19 and #20.

22. COMMENT:

Commenter does not support the amendment out of concern about for-profit schools and because under SARA there is no distinction between for-profit and non-profit or public institutions. The commenter indicates that there are widespread deceptive practices in the for-profit sectors. Commenter requests that the Department carefully consider where changes in SARA are necessary before signing, and recommends consideration of each of the recommendations identified in Comment #19.

DEPARTMENT RESPONSE:

Education Law § 210-c does not make a distinction between for-profit and non-profit institutions. It allows the State to enter into an interstate reciprocity agreement for all postsecondary distance education courses. In addition, section 3 of the SARA agreement provides that all degree-granting institutions located in the United States holding proper authorization from Congress, a U.S. State or a federally recognized tribe and holding accreditation as a single entity from an accrediting association recognized by the U.S. Secretary of Education are eligible to apply to its home state to participate in SARA if that state is a SARA member. SED further notes that presently for-profit and non-profit colleges and universities in New York State are held to the same standards of program quality and program registration standards, which is consistent with Part 49 and SARA. Moreover, under SARA, if any entity, whether for-profit or non-profit engaged in deceptive practices, SED would have the authority to refer such conduct to the Attorney General's Office for an investigation under general consumer protection laws at any time.

23. COMMENT:

Commenter expresses support for the recommendations identified in Comment #19.

DEPARTMENT RESPONSE:

See SED response to Comment #19.

24. COMMENT:

Commenter agrees with comment #20, however states that if New York State intends to join SARA anyway, the commenter supports adopting the recommendations identified in comment #19.

DEPARTMENT RESPONSE:

See response to comment #20.

25. COMMENT:

Commenter expresses support for the recommendations identified in comment #19.

DEPARTMENT RESPONSE:

See response to comment #19.

26. COMMENT:

Commenter expresses support for comment #20 and requests the Department consider alternatives that will address common abuses of the industry.

DEPARTMENT RESPONSE:

See Response to Comment #20.

27. COMMENT:

Commenter recommends that the Department consider changes presented by both comment #19 and comment #20.

DEPARTMENT RESPONSE:

See responses to comments #19 and #20.

28. COMMENT:

Commenter suggests that SARA ties schools across the country together in one agreement, with no way for a state to apply its requirements to a problem school without causing a breach in the entire agreement, citing

that SARA requires states waive their consumer protections and minimum standards applicable to for-profit schools. Additionally, commenter asserts that SARA treats for-profit colleges as though they were the same quality investment as a non-profit or public institution, which ignores significant differences between non-profit and public colleges and for-profit education businesses. Commenter suggests that New York State should demand that SARA be revised to address consumer and state interests and suggests NYSED carefully consider the proposals put forth in comment #19.

DEPARTMENT RESPONSE:

SED does not agree with the commenter's analysis. SARA policies do not require New York State to waive its laws for consumer protections or minimum standards applicable to for-profit schools. As stated in responses to similar comments, Section 4.2(g) of the SARA policies and standards explicitly states that "nothing in SARA Policies and Standards precludes a state from using its laws of general application to pursue action against an institution that violates those laws." SED notes that presently for-profit and non-profit colleges and universities in New York State are held to the same standards of program quality and program registration standards, which is consistent with Part 49 and SARA. Institutions that do not meet the standards, whether for-profit or non-profit, will not be approved to participate. Moreover, under SARA, if any entity, whether for-profit or non-profit engaged in deceptive practices, SED would have the authority to refer such conduct to the Attorney General's Office for an investigation under general consumer protection laws. Therefore, the Attorney General's authority to apply its consumer protection and fraud laws should not be impacted by SARA. The Department has confirmed this with NC-SARA.

29. COMMENT:

Commenter does not support the amendment, shares the general concerns for SARA noted in comment #19 and recommends the Department consider alternative regulatory measures to regulate online schools. Commenter asserts that SARA cedes New York State's authority to approve institutions of higher education to a third-party private entity controlled by institutional representatives and enshrines a two-tiered system in which New Yorkers attending in-state online schools are subject to a different set of marketing and operational standards and requires New York State ignore the financial incentives that have caused predatory behavior at for-profit schools.

DEPARTMENT RESPONSE:

See SED responses to comment #19, #20, #21, and #22.

30. COMMENT:

Commenter asserts that although the state has been assured, even under SARA, New York's general consumer protection laws remain applicable; SARA would generally require schools to comply only with the laws of their home state, laws which could be comparatively much weaker than New York laws. Because SARA enables schools to earn regulatory approval in one state, and then enroll students in any other SARA state, the compact creates an incentive for schools to find the state with the lowest bar to initial entry, thereby encouraging a race to the bottom. Joining SARA would also create a two-tiered by in which New Yorkers attending in-state online schools are subject to one set of standards, while students attending out-of-state online schools are subject to another, likely weaker set of standards.

DEPARTMENT RESPONSE:

Since the SARA policies and standards require that all SARA states apply the same initial minimum standards for institutional participation in SARA, SARA will provide for initial quality screens in New York State, where there are currently none. This will improve the quality of out-of-state online offerings accessible to New York State residents. In addition, under SARA, other State agencies will provide an additional network of support to SED for online oversight of institutions offering within the context of the agreement. Finally, as stated in previous responses, Section 4.2 (g) of the SARA policies and standards explicitly states that "nothing in SARA Policies and Standards precludes a state from using its laws of general application to pursue action against an institution that violates those laws." Therefore, the New York State Attorney General's authority to apply its consumer protection and fraud laws to out-of-state institutions enrolling New York State residents should not be impacted by SARA. The Department has confirmed this with NC-SARA.

NOTICE OF ADOPTION

Teacher Certification in Career and Technical Education

I.D. No. EDU-22-16-00006-A

Filing No. 854

Filing Date: 2016-09-13

Effective Date: 2016-09-28

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

Action taken: Amendment of section 80-3.5 of Title 8 NYCRR.

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

Subject: Teacher certification in career and technical education.

Purpose: Establishes a new pathway for Transitional A certificate.

Text or summary was published in the June 1, 2016 issue of the Register, I.D. No. EDU-22-16-00006-EP.

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

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

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 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 Proposed Rule Making in the State Register on June 1, 2016, the State Education Department (SED) received the following comment:

1. COMMENT:

One commenter raised the concern that the proposed pathways for CTE certification are a "patchwork approach" and that a broader discussion of CTE certification, including a more comprehensive and system-wide approach to CTE teacher certification is required moving forward. The commenter suggested that NYSED convene a work group to look at a more comprehensive approach to CTE certification and to re-convene the CTE Content Advisory Panel to discuss future changes to advance the CTE certification pathways. However, the commenter also expressed appreciation to the Department for recognizing the value of work experience and industry-credentials within the proposed amendment.

The commenter also expressed concern over the requirement for employment and support commitment on the part of the candidate, and that districts and BOCES do not have the ability to connect with candidates as the need for a CTE teacher arises.

DEPARTMENT RESPONSE:

SED agrees that a more comprehensive approach to the CTE teacher certification pathways is needed, and is currently in the process of working with the field to further revise the regulations relating to CTE teacher certification. However, the proposed amendment seeks to address the immediate concerns raised by the field relating to shortages in CTE teachers by providing an additional pathway to obtain a Transitional A teaching certificate.

In response to the request to convene a work group to look at a more comprehensive approach to CTE certification, the Department will take this under advisement, and will work to address this concern in the most appropriate way given the understaffing of the Department.

With respect to the concerns relating to the need for employment and support commitment, this is required for all candidates seeking a Transitional A certificate and therefore the Department does not believe a revision to the regulations is needed. Moreover, the purpose behind the employment and support commitment is to ensure that the teacher has the needed supports and mentoring when he/she enters the classroom.

NOTICE OF ADOPTION

Licensure of Occupational Therapy Assistants (OTAs)

I.D. No. EDU-22-16-00008-A

Filing No. 850

Filing Date: 2016-09-13

Effective Date: 2016-09-28

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

Action taken: Amendment of sections 76.6, 76.7, 76.8, 76.9 and 76.10 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2)(a), 7902-a, 7903, 7904-a, 7905(2), 7906(4) and 7907; L. 2015, ch. 470

Subject: Licensure of Occupational Therapy Assistants (OTAs).

Purpose: To define the practice of OTAs, establish requirements for licensure, and alter the composition of the State Board.

Text or summary was published in the June 1, 2016 issue of the Register, I.D. No. EDU-22-16-00008-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, 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 2021, which is the 4th or 5th year after the year in which this rule is being adopted. This review period, justification for proposing same, and invitation for public comment thereon, were contained in a RFA, RAFA or JIS.

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Annual Professional Performance Reviews (APPR) of Classroom Teachers and Building Principals

I.D. No. EDU-26-16-00015-A

Filing No. 858

Filing Date: 2016-09-13

Effective Date: 2016-09-28

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

Action taken: Amendment of section 30-2.3 and Subpart 30-3 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 215(not subdivided), 305(1), (2), 3009(1), 3012-c and 3012-d; L. 2015, ch. 20, subpart C, section 3; L. 2015, ch. 56, part EE, subpart E, sections 1 and 2

Subject: Annual Professional Performance Reviews (APPR) of classroom teachers and building principals.

Purpose: Technical Amendments.

Text or summary was published in the June 29, 2016 issue of the Register, I.D. No. EDU-26-16-00015-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, 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

The agency received no public comment.

NOTICE OF ADOPTION

Licensure of Perfusionists

I.D. No. EDU-26-16-00017-A

Filing No. 851

Filing Date: 2016-09-13

Effective Date: 2016-10-21

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

Action taken: Amendment of sections 29.2, 52.47; and addition of Subpart 79-19 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 212, 6504(not subdivided), 6507(2)(a), 6509(9), 6630, 6631, 6632, 6633, 6634, 6635 and 6636; L. 2013, ch. 409

Subject: Licensure of Perfusionists.

Purpose: To establish licensure requirements for perfusionists, including education, experience and examination.

Text of final rule: 1. Subdivision (a) of section 29.2 of the Rules of the Board of Regents is amended, effective October 21, 2016, as follows:

(a) Unprofessional conduct shall also include, in the professions of: acupuncture, athletic training, audiology, certified behavior analyst assis-

tant, certified dental assisting, chiropractic, creative arts therapy, dental hygiene, dentistry, dietetics/nutrition, licensed behavior analyst, *licensed perfusionist*, licensed practical nursing, marriage and family therapy, massage therapy, medicine, mental health counseling, midwifery, occupational therapy, occupational therapy assistant, ophthalmic dispensing, optometry, pharmacy, physical therapist assistant, physical therapy, physician assistant, podiatry, psychoanalysis, psychology, registered professional nursing, respiratory therapy, respiratory therapy technician, social work, specialist assistant, speech-language pathology (except for cases involving those professions licensed, certified or registered pursuant to the provisions of article 131 or 131-B of the Education Law in which a statement of charges of professional misconduct was not served on or before July 26, 1991, the effective date of chapter 606 of the Laws of 1991):

- (1) ...
- (2) ...
- (3) ...
- (4) ...
- (5) ...
- (6) ...
- (7) ...
- (8) ...
- (9) ...
- (10) ...
- (11) ...
- (12) ...
- (13) ...
- (14) ...

2. Section 52.47 of the Regulations of the Commissioner of Education is added, effective October 21, 2016, as follows:

§ 52.47 Licensed Perfusionist.

In addition to meeting all the applicable provisions of this Part, to be registered as a program recognized as leading to licensure as a licensed perfusionist, which meets the requirements of section 79-19.1 of this Title, the program shall:

(a) either:

(1) *be a program in perfusion or a substantially equivalent program as determined by the department, which leads to a baccalaureate or higher degree; or*

(2) *be a credit bearing certificate program in perfusion acceptable to the department which ensures that each student holds a baccalaureate or higher degree;*

(b) *include course content in each of the following subjects or their equivalent as determined by the department:*

- (1) *heart-lung bypass for patients undergoing heart surgery;*
- (2) *long-term supportive extracorporeal circulation;*
- (3) *monitoring of the patient undergoing extracorporeal circulation;*
- (4) *autotransfusion; and*
- (5) *special applications of the technology related to the practice of perfusion; and*

(c) *include a supervised clinical experience, which is appropriate to the practice of perfusion, as such practice is defined in subdivision (3) of section 6630 of the Education Law, and incorporates and requires performance of an adequate number and variety of circulation procedures.*

3. Subpart 79-19 of the Regulations of the Commissioner of Education is added, effective October 21, 2016, to read as follows:

SUBPART 79-19

LICENSED PERFUSIONISTS

§ 79-19.1 Professional study for licensed perfusionists.

(a) *As used in this section, an acceptable accrediting body for perfusion education programs shall mean an organization acceptable to the department as a reliable authority for the purpose of accreditation of perfusion education programs at the postsecondary level, which applies its criteria for granting accreditation of programs in a fair, consistent, and nondiscriminatory manner.*

(b) *To meet the professional educational requirement for licensure as a perfusionist, the applicant shall present satisfactory evidence of:*

(1) *holding a baccalaureate or higher degree in perfusion awarded upon the successful completion of a baccalaureate or higher degree program in perfusion registered as leading to licensure pursuant to section 52.47 of this Title or accredited by an acceptable accrediting body for perfusion education programs, or a baccalaureate or higher degree program that is substantially equivalent to such a registered program as determined by the department; or*

(2) *both:*

(i) *holding a baccalaureate or higher degree awarded upon the successful completion of a baccalaureate or higher degree program; and*

(ii) *completing a credit bearing certificate program in perfusion acceptable to the department which is accredited by an acceptable ac-*

crediting body for perfusion education programs or its equivalent as determined by the department; or

(3) *completing, on or before October 20, 2018, a baccalaureate or higher degree and an accredited training program in perfusion acceptable to the department. Such training program must be accredited by an acceptable accrediting body for perfusion education programs but need not be a credit bearing program.*

§ 79-19.2 Licensing examinations for licensed perfusionists.

(a) *Content. The licensing examination shall consist of an examination designed to test knowledge, skills and judgment relating to all areas of perfusion, including, but not limited to, the basic science of perfusion, clinical applications of perfusion, and the practice of perfusion as defined in subdivision (3) of section 6630 of the Education Law.*

(b) *The department may accept a passing score on an examination determined by the department to be acceptable for licensure as a licensed perfusionist.*

§ 79-19.3 Fees.

(a) *Applicants shall pay a fee of \$50 for an initial license and a fee of \$150 for the first registration period.*

(b) *Licenseses shall pay a fee of \$150 for each triennial registration period.*

§ 79-19.4 Limited permits.

As authorized by section 6635 of the Education Law, the department may issue a limited permit to practice perfusion in accordance with the requirements of this section.

(a) *An applicant for a limited permit to practice as a licensed perfusionist shall:*

(1) *file an application with the department on a form prescribed by the department together with a fee of \$105 for the limited permit;*

(2) *meet all the requirements for licensure as a licensed perfusionist, except the examination requirement; and*

(3) *practice as a perfusionist only under the supervision of a licensed perfusionist and pursuant to the order and direction of a physician.*

(b) *The limited permit in perfusion shall be valid for a period of not more than 12 months, provided that a limited permit may be extended for an additional 12 months at the discretion of the department for good cause as determined by the department. The time authorized by such limited permit and subsequent extension shall not exceed 24 months in total.*

§ 79-19.5 Special provisions.

(a) *An individual who meets the requirements for a license as a licensed perfusionist except for examination, experience and education and who meets the requirements enumerated under paragraphs (1) or (2) of this subdivision may be licensed without meeting additional requirements provided that such individual submits an application to the department on or before October 20, 2018:*

(1) *applicants may be licensed if they have been practicing as a perfusionist, as defined in subdivision (3) of section 6630 of the Education Law, for five years in the past ten years in an inpatient unit that provides cardiac surgery services in a hospital approved by the department of health or a substantially equivalent accrediting body acceptable to the State Committee for Perfusion and the department. At least three of such years of experience shall have occurred during the past five years; or*

(2) *applicants who possess certification from a national certification organization acceptable to the State Committee for Perfusion and the department may be licensed if they have been employed as a perfusionist, as defined in subdivision (3) of section 6630 of the Education Law, for three of the past five years.*

Final rule as compared with last published rule: Nonsubstantive changes were made in section 79-19.1(b)(3).

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

Revised Regulatory Impact Statement

Since the publication of a Notice Proposed Rule Making in the State Register on June 29, 2016, a nonsubstantial revision was made in order to correct an inadvertent typographical error in the text of the proposed regulation as follows:

In paragraph (3) of subdivision (b) of section 79-19.1 of subpart 79-19, the word “to” was added so that the revised language states that “completing, on or before October 20, 2018, a baccalaureate or higher degree and an accredited training program in perfusion acceptable to the department....”

The above nonsubstantial revision does not require any changes to the previously published Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis

Since the publication of a Notice of Proposed Rule Making in the State Register on June 29, 2016, a nonsubstantial revision was made to the

proposed regulation as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above nonsubstantial revision does not require any changes to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments.

Revised Rural Area Flexibility Analysis

Since the publication of a Notice Proposed Rule Making in the State Register on June 29, 2016, a nonsubstantial revision was made to the proposed regulation as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above nonsubstantial revision does not require any changes to the previously published Rural Area Flexibility Analysis.

Revised Job Impact Statement

Since the publication of a Notice of Proposed Rule Making in the State Register on June 29, 2016, a nonsubstantial revision was made to the proposed regulation as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The revised proposed amendment is necessary to implement Chapter 409 of the Laws of 2013, relating to the licensure of licensed perfusionists.

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

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2021, which is the 4th or 5th year after the year in which this rule is being adopted. This review period, justification for proposing same, and invitation for public comment thereon, were contained in a RFA, RAFA or JIS.

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Regulation of Consent Orders in Disciplinary Proceedings in the Professions

I.D. No. EDU-26-16-00018-A

Filing No. 852

Filing Date: 2016-09-13

Effective Date: 2016-09-28

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

Action taken: Amendment of section 17.5(b) of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2)(a), 6509(9), 6510 and 6511(not subdivided)

Subject: Regulation of consent orders in disciplinary proceedings in the professions.

Purpose: To remove requirement that the State Board of Pharmacy Executive Secretary agree to consent orders for pharmacists/pharmacies.

Text or summary was published in the June 29, 2016 issue of the Register, I.D. No. EDU-26-16-00018-P.

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

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

Initial Review of Rule

As a rule that 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

The agency received no public comment.

NOTICE OF ADOPTION

Annual Professional Performance Reviews (APPR) of Classroom Teachers and Building Principals

I.D. No. EDU-27-16-00003-A

Filing No. 860

Filing Date: 2016-09-13

Effective Date: 2016-09-28

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

Action taken: Amendment of sections 30-3.4 and 30-3.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 215(not subdivided), 305(1), (2), 3009(1), 3012-c and 3012-d; L. 2015, ch. 20, subpart C, section 3; L. 2015, ch. 56, part EE, subpart E, sections 1 and 2

Subject: Annual Professional Performance Reviews (APPR) of classroom teachers and building principals.

Purpose: Provide districts and BOCES with a hardship waiver commencing with the 2016-2017 school year from independent evaluator.

Text or summary was published in the July 6, 2016 issue of the Register, I.D. No. EDU-27-16-00003-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, 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

The agency received no public comment.

NOTICE OF ADOPTION

District-Wide School Safety Plans and Building-Level Emergency Response Plans

I.D. No. EDU-27-16-00005-A

Filing No. 865

Filing Date: 2016-09-13

Effective Date: 2016-09-28

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

Action taken: Amendment of section 155.17 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 305(1), (2), 807 and 2801-a as amended by L. 2016, ch. 54

Subject: District-wide school safety plans and building-level emergency response plans.

Purpose: The purpose of the proposed rule is to implement the provisions of part B of chapter 54 of the Laws of 2016.

Text of final rule: 1. Section 155.17 of the Regulations of the Commissioner of Education is amended, effective September 28, 2016, as follows:

§ 155.17

[(a) ...]

(a) Development of school safety plans. Every board of education of a school district, every board of cooperative educational services and county vocational education and extension board and the chancellor of the City School District of the City of New York shall adopt by July 1, 2001, and shall update by [July 1st of each succeeding year] *July 1 for the 2002-2003 through the 2015-2016 school years and by September 1 for the 2016-2017 school year and each subsequent September 1 thereafter*, a *comprehensive* district-wide school safety plan and building-level [school safety] *emergency response* plans regarding crisis intervention and emergency response and management, provided that in the City School District of the City of New York, such plans shall be adopted by the chancellor of the city school district. Such plans shall be developed by a district-wide school safety team and a building-level [school safety] *emergency re-*

sponse team, as such terms are defined in subdivision [(c)] (b) of this section, and shall be in a form developed by the commissioner in consultation with the Division of Criminal Justice Services, the superintendent of the State Police and any other appropriate State agencies. [A school district having only one school building shall develop a single building-level school safety plan, which shall also fulfill all requirements for development of a district-wide plan to insure the safety and health of children and staff and to insure integration and coordination with similar emergency planning at the municipal, county and State levels.] Each *district-wide school safety plan and building-level emergency response plan* shall be reviewed by the appropriate school safety team on at least an annual basis, and updated as needed.

[(c)] (b) Definitions. As used in this section:

(1)...

(2)...

(3)...

(4) Emergency means a situation, including but not limited to a disaster[,], that requires immediate action, occurs unpredictably, and poses a threat of injury or loss of life to students or school personnel or of severe damage to school property.

(5)...

(6)...

(7)...

(8)...

(9)...

(10) *Lock-down means to immediately clear the hallways, lock and/or barricade doors, hide from view, and remain silent while readying a plan of evacuation as a last resort. Lock-down will only end upon physical release from the room or secured area by law enforcement.*

[(10)] (11) Building-level [school safety] *emergency response plan* means a building-specific school emergency response plan that addresses crisis intervention, emergency response and management at the building level and has the contents prescribed in paragraph [(e)](c)(2) of this section.

[(11)] (12) Building-level [school safety] *emergency response team* means a building-specific team appointed by the building principal, in accordance with regulations or guidelines prescribed by the board of education, the chancellor in the case of New York City, or other governing body. The building-level *emergency response team is responsible for the designation of the emergency response team and the development of the building-level emergency response plan and its required components. The building-level emergency response team* shall include, but not be limited to, representatives of teacher, administrator, and parent organizations, school safety personnel, other school personnel, community members, local law enforcement officials, local ambulance, *fire officials* or other emergency response agencies, and any other representatives the school board, chancellor or other governing body deems appropriate.

[(12)] (13) District-wide school safety plan means a comprehensive, multi-hazard school safety plan that covers all school buildings of the school district, BOCES or county vocational education and extension board, that addresses crisis intervention, emergency response and management at the district level and has the contents prescribed in paragraph [(e)](c)(1) of this section.

[(13)] (14) District-wide school safety team means a district-wide team appointed by the board of education, the chancellor in the case of New York City, or other governing board. The district-wide team shall include, but not be limited to, representatives of the school board, [student,] teacher, administrator, and parent organizations, school safety personnel and other school personnel. *At the discretion of the board of education, or the chancellor in the case of the City of New York, a student may be allowed to participate on the safety team, provided however, that no portion of a confidential building-level emergency response plan shall be shared with such student nor shall such student be present where details of a confidential building-level emergency response plan or confidential portions of a district-wide emergency response strategy are discussed.*

[(14)] (15) Emergency response team means a building-specific team designated by the building-level [school safety] *emergency response team* that [includes appropriate] *is comprised of* school personnel, [local] law enforcement officials, *fire officials*, and representatives from local, regional and/or State emergency response agencies and assists the school community in responding to a [serious] violent incident or emergency. In a school district in a city having a population of more than one million inhabitants, such emergency response team may be created on the district-level with building-level participation, and such district shall not be required to establish a unique team for each of its schools.

[(15)] (16) Post-incident response team means a building-specific team designated by the building-level [school safety] *emergency response team* that includes appropriate school personnel, medical personnel, mental health counselors and others who can assist the school community in coping with the aftermath of a [serious] violent incident or emergency.

In a school district in a city having a population of more than one million inhabitants, such post-incident response team may be created on the district-level with building-level participation, and such district shall not be required to establish a unique team for each of its schools.

[16] (17) . . .

[17] (18) . . .

[(d)] . . .

[(e)] (c) *District-wide [School] school safety plans and building-level emergency response plans.* District-wide school safety plans and building-level [school safety] *emergency response plans* shall be designed to prevent or minimize the effects of [serious] violent incidents and emergencies and to facilitate the coordination of schools and school districts with local and county resources in the event of such incidents or emergencies.

(1) District-wide school safety plans. A district-wide school safety plan shall be developed by the district-wide school safety team and shall include, but not be limited to:

[(i)] . . .

[(ii)] . . .

(iii) (i) policies and procedures for responding to implied or direct threats of violence by students, teachers, other school personnel and visitors to the school, *including threats by students against themselves, which for the purposes of this subdivision shall include suicide;*

[(iv)] (ii) . . .

[(v)] (iii) . . .

[(vi)] (iv) . . .

[(vii)] (v) . . .

[(viii)] (vi) . . .

[(ix)] (vii) . . .

[(x)] (viii) . . .

[(xi)] (ix) . . .

(x) *policies and procedures for contacting parents, guardians or persons in parental relation to an individual student of the district in the event of an implied or direct threat of violence by such student against themselves, which for the purposes of this subdivision shall include suicide;*

[(xii)] (xi) . . .

[(xiii)] (xii) . . .

[(xiv)] (xiii) policies and procedures for annual multi-hazard school safety training for staff and students, *provided that the district must certify to the commissioner that all staff have undergone annual training by September 15, 2016 and each subsequent September 15 thereafter on the building-level emergency response plan which must include components on violence prevention and mental health, provided further that new employees hired after the start of the school year shall receive such training within 30 days of hire or as part of the district's existing new hire training program, whichever is sooner.*

[(xv)] (xiv) . . .

[(xvi)] (xv) . . .

[(xvii)] (xvi) . . .

[(xviii)] (xvii) . . .

[(xix)] (xviii) in the case of a school district, except in a school district in a city having more than one million inhabitants, a system for informing all educational agencies within such school district of a disaster[.]; and

(xix) *the designation of the superintendent, or superintendent's designee, as the district chief emergency officer whose duties shall include, but not be limited to:*

(a) *coordination of the communication between school staff, law enforcement, and other first responders;*

(b) *lead the efforts of the district-wide school safety team in the completion and yearly update of the district-wide school safety plan and the coordination of the district-wide plan with the building-level emergency response plans;*

(c) *ensure staff understanding of the district-wide school safety plan;*

(d) *ensure the completion and yearly update of building-level emergency response plans for each school building;*

(e) *assist in the selection of security related technology and development of procedures for the use of such technology;*

(f) *coordinate appropriate safety, security, and emergency training for district and school staff, including required training in the emergency response plan;*

(g) *ensure the conduct of required evacuation and lock-down drills in all district buildings as required by Education Law section 807; and*

(h) *ensure the completion and yearly update of building-level emergency response plans by the dates designated by the commissioner.*

(2) [School] *Building-level emergency response plan.* A [school] *building-level emergency response plan* shall be developed by the

building-level [school safety] *emergency response* team, shall be kept confidential, including but not limited to the floor plans, blueprints, schematics or other maps of the immediate surrounding area, and shall not be disclosed except to authorized department or school staff, and law enforcement officers, and shall include the following elements:

(i) policies and procedures for the [safe evacuation of students, teachers, other school personnel and visitors to the school in the event of a serious violent incident or other emergency which may occur before, during or after school hours] *response to emergency situations, such as those requiring evacuation, sheltering, and lock-down*, which shall include, at a minimum, the description of plans of action for evacuation [and], sheltering, lock-down, evacuation routes and shelter sites, and procedures for addressing medical needs, transportation and emergency notification to persons in parental relation to a student;

(ii) ...

(iii) [procedures for assuring that crisis response, fire and law enforcement officials have access to] floor plans, blueprints, schematics or other maps of the school interior, school grounds and road maps of the immediate surrounding area;

(iv) ...

(v) ..

(vi) coordination of the [school safety] *building-level emergency response* plan with the statewide plan for disaster mental health services to assure that the school has access to Federal, State and local mental health resources in the event of a violent incident;

(vii) procedures for an annual review of the *building-level emergency response plan* and the conduct of drills and other exercises to test components of the *building-level* emergency response plan, including the use of tabletop exercises, in coordination with local, [and] county, and state emergency responders and preparedness officials;

(viii) ...

(ix) ...

(3) Each board of education, chancellor or other governing body shall make each district-wide [and building-level school] safety plan available for public comment at least 30 days prior to its adoption[, provided that only a summary of each building-level emergency response plan shall be made available for public comment]. Such district-wide [and building-level] plans may be adopted by the school board only after at least one public hearing that provides for the participation of school personnel, parents, students and any other interested parties. Each district shall file a copy of its district-wide [comprehensive] safety plan with the commissioner and all amendments to such plan shall be filed with the commissioner no later than 30 days after their adoption. *Each board of education, chancellor or other governing body or officer shall ensure that a copy of each building-level [safety] emergency response plan and any amendments thereto, [shall be] is filed with the appropriate local law enforcement agency and with the State Police within 30 days of its adoption, but no later than October 15, 2016 and each subsequent October 15 thereafter.* Building-level emergency response plans shall be confidential and shall not be subject to disclosure under article six of the Public Officers Law or any other provision of law.

[(4) ...]

(f) ...

(g) ...

(h) ...

(i) ...

(j) *Fire and Emergency Drills.* Each school district and board of cooperative educational services shall, at least once every school year, and where possible in cooperation with local county emergency preparedness plan officials, conduct one test of its [emergency plan or its] emergency response procedures under each of its building-level *emergency response* [school safety] plans, including sheltering, *lock-down*, or early dismissal, at a time not to occur more than 15 minutes earlier than the normal dismissal time.

(1)...

(2)...

(3)...

(k) ...

(l) ...

(m) ..

Final rule as compared with last published rule: Nonsubstantive changes were made in section 155.17(c)(1)(xix)(e).

Text of rule and any required statements and analyses may be obtained from: Kirti Goswami, New York State Education Department, 89 Washington Avenue, Room 138, Albany, NY 12234, (518) 474-6400, email: legal@nysed.gov

Revised Regulatory Impact Statement

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on June 29, 2016, the following non-substantial revision was made to the proposed rule:

Section 155.17(c)(1)(xix)(e) is revised to replace the word “policy” with “procedure” to ensure that the development of technology related procedures are properly within the purview of the superintendent consistent with the intent of the proposed rule.

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

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on June 29, 2016, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above revisions to the proposed rule do not require any revisions to the previously published Regulatory Flexibility Analysis.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on June 29, 2016, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above revisions to the proposed rule do not require any revisions to the previously published Rural Area Flexibility Analysis.

Revised Job Impact Statement

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on June 29, 2016, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

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

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2021, which is the 4th or 5th year after the year in which this rule is being adopted. This review period, justification for proposing same, and invitation for public comment thereon, were contained in a RFA, RAFA or JIS.

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

Assessment of Public Comment

COMMENT:

Commenters were concerned that school districts couldn’t update Comprehensive District-Wide School Safety Plans and Building-Level Emergency Response Plans by September 1st of the 2016-17 schoolyear and sought a delay until 2017-2018.

RESPONSE:

Prior to the amendments of Part B of Ch.54 of the Laws of 2016, Commissioner’s regulation § 155.17 required districts to adopt and amend plans by July 1st of each year. Recognizing the changes made by the new law, NYSED delayed the requirement to September 1, 2016 to provide districts with time to meet the requirements, while also ensuring compliance with the new law. The proposed amendment was adopted by the Board of Regents as an emergency measure at its June 2016 meeting, effective July 1, 2016, to timely implement Part B of Ch.54 of the Laws of 2016.

COMMENT:

Commenters were confused about the definition of “lockdown.”

RESPONSE:

The “lockdown” definition was adopted by the New York State School Safety Improvement Team, as recommended by the Federal Emergency Management Agency’s Guide for Developing High-Quality School Emergency Operations Plans (2013) and is further defined in the NYS Guide to School Emergency Response Planning Template available and in use since the 2014-2015 schoolyear. See, <http://www.p12.nysed.gov/sss/documents/QuickReferenceCardv102-13-15.pdf>. Because the definition has been used by law enforcement in the past, NYSED does not believe a regulatory change is needed.

COMMENT:

Commenters were confused by the definition and responsibilities of the, “Building-Level Emergency Response Team” in contrast with the “Emergency Response Team” and suggested clarifying language.

RESPONSE:

NYSED understands the confusion that exists as a result of the updated terminology in the statute. Education Law § 2801-a always required the school safety team to develop an emergency response plan, and to designate an emergency response team. The amendments to Education Law § 2801-a renamed the school safety team the building-level emergency response team. Now, the responsibility for designating the emergency response team lies with the building-level emergency response team (previ-

ously referred to as the school safety team). The changes to Commissioner's regulation § 155.17 were made to comply with the statutory amendments made by Part B of Ch.54 of the Laws of 2016 and the Department believes no revisions are necessary.

The Emergency Response Team is designed to respond in the event of an actual emergency and is required by statute to include school personnel, law enforcement officials, fire officials, and representatives from local, regional and/or State emergency response agencies and assists the school community in responding to a violent incident or emergency.

COMMENT:

Commenter didn't think it made sense to have a student on the safety team if all information cannot be discussed. The student perspective is extremely valuable; this will lead to students being totally eliminated from the team.

RESPONSE:

The changes to Commissioner's regulation § 155.17 were made to comply with the statutory amendments to Education Law § 2801-a(3), which eliminated the student's access to confidential building level plans.

COMMENT:

Why is the Post-Incident Response Team selected by the Building-Level Emergency Response Team?

RESPONSE:

Education Law § 2801-a(3)(b) always required the school safety team to designate the post-incident response team. Other than to reflect the new title of the Building-Level Emergency Response Team, such obligation was not changed by the statutory amendments or the proposed regulation. Therefore, no revisions are necessary.

COMMENT:

Commenters thought it was unrealistic to require districts to conduct annual training by September 15, 2016, and requested a delay to 2017.

RESPONSE:

Part B of Ch.54 of the Laws of 2016 was effective July 1, 2016. NYSED believes staff should be trained on the new requirements as soon as possible after the start of the school year since the statute is already in effect and that delaying such training would appear to be contrary to the intent of the statute, which is to ensure the safety of students and staff. However, the statute does permit districts to conduct such training as part of existing professional development.

COMMENT:

The duties of the District Chief Emergency Officer will remove responsibility from the school building principal and are burdensome for one person.

RESPONSE:

The amendments to Education Law § 2801-a by Ch.54 of the Laws of 2016 require the designation and outline the duties of a District Chief Emergency Officer. The statute and implementing regulation allow the individual to be either the superintendent, or the superintendent's designee. Neither the statute nor the implementing regulation prohibits a principal or other building leader from being designated to this role.

COMMENT:

Commenters asked questions about the changes to fire and emergency drills? Does the regulation limit these drills to no more than 15 minutes before normal dismissal time?

RESPONSE:

In addition to Education Law § 2801-a, Part B of Ch.54 of the Laws of 2016 amended Education Law § 807, relating to fire and emergency drills. Commissioner's regulation § 155.17 solely relates to emergency response plan. Commissioner's regulation § 155.17(j) has always required school districts to conduct at least one test of the emergency response plan each year. The timing of these drills remains limited to not more than 15 minutes prior to dismissal time to minimizing the impact on instructional time. This regulation does not address the requirements of Education Law § 807. See <http://www.p12.nysed.gov/sss/documents/EmergencyResponseLegRegChangesQAFinal.pdf>.

COMMENT:

What must be included in the required training on violence prevention and mental health and suicide crisis handling?

RESPONSE:

NYSED compiled a list of mental health resources available at, <http://www.p12.nysed.gov/sss/documents/MentalHealthResourcesforEducators.pdf>; and <http://www.p12.nysed.gov/sss/documents/SVPIRequiredComponents.pdf>.

COMMENT:

How can schools certify that all staff have undergone the annual training.

RESPONSE:

NYSED issued guidance explaining the statutory requirement. <http://www.p12.nysed.gov/sss/documents/EmergencyResponseLegRegChangesQAFinal.pdf>

COMMENT:

Can school districts provide online training? Does SED have a sample curriculum?

RESPONSE:

The manner and method of providing the training is a local decision. NYSED compiled resources for district use. <http://www.p12.nysed.gov/sss/documents/SVPIRequiredComponents.pdf>; <http://www.p12.nysed.gov/sss/documents/MentalHealthResourcesforEducators.pdf>.

COMMENT:

Is the "Chief Emergency Officer" in addition to the District Safety Officer?

RESPONSE:

The Chief Emergency Officer, required by § 2801-a, is either the superintendent or the superintendent's designee. Neither the prior regulations nor the proposed amendments required a district safety officer.

COMMENT:

How was Commissioner's authority to provide a waiver from the requirements of this section impacted?

RESPONSE:

Education Law § 2801-a, and Commissioner's regulation § 155.17(e)(4) previously permitted the Commissioner to waive the school safety plan requirements for schools that had a plan in place prior to the original enactment in 2000, for a period of up to two years from July 24, 2000. This provision was removed because it was an expired provision of SAVE (Ch.181 of the Laws of 2000).

COMMENT:

Must school districts switch Building-Level Emergency Response Plans to the Building-Level Emergency Response Plan Template this year?

RESPONSE:

Education Law § 2801-a and the implementing regulations continue to provide the Commissioner with the authority to prescribe the form and manner of the plans, in consultation with the Division of Criminal Justice Services. Beginning with the 2016-17 schoolyear, schools must use the Building-Level Emergency Response Plan Template, developed and distributed by the New York State School Safety Improvement Team (which included representatives from the Division of Criminal Justice Services). The template was shared with districts during statewide regional meetings during the 2014-15 schoolyear and has been publicly available at <https://safeschools.ny.gov/>. The use of a standardized format for collecting this information is the best way to ensure that first responders have immediate access in case of an emergency. Since the statute became effective on July 1, 2016, NYSED does not believe that an extension is warranted.

COMMENT:

Commenters asked if districts may modify the terms used by the template.

RESPONSE:

The Template was developed by the New York State School Safety Improvement Team and adopted standardized Federal Emergency Management Agency (FEMA) language, which includes specific definitions of vital emergency terms. Using the standardized terms and definitions will improve and streamline how emergencies are communicated to staff, students, and parents. Since the terminology used in the template is outside the scope of the proposed amendment, the Department does not believe regulatory revisions are needed. <http://www.p12.nysed.gov/sss/documents/QuickReferenceCardv102-13-15.pdf>.

COMMENT:

How will districts submit plan updates for the 2016-2017 schoolyear?

RESPONSE:

Beginning in the fall of 2016, schools may electronically submit Building-Level Emergency Response Plans to the New York State Police via NYSED's Business Portal. Electronic submission of Building-Level Emergency Response Plans will be optional for the 2016-17 schoolyear, but schools are encouraged to use the application. All schools must continue to share their emergency response plans with local law enforcement for the 2016-17 schoolyear.

COMMENT:

Must the Building-Level Emergency Response Team, Emergency Response Team, and Post-Incident Response Team include a representative from a fire department, even in districts with only volunteer fire departments?

RESPONSE:

Part B of Ch.54 of the Laws of 2016 amended Education Law § 2801-a to explicitly include fire officials as members of the Building-Level Emergency Response Team and the Emergency Response Team. Commissioner's regulation § 155.17 was amended accordingly. It is a local decision as to which fire officials to include.

COMMENT:

Who is must receive annual training on the Emergency Response Plan, violence prevention, and mental health?

RESPONSE:

Education Law § 2801-a always required schools to provide school safety training to students and staff. Part B of Ch.54 of the Laws of 2016 amended Education Law § 2801-a to require districts to certify that all staff receive such training. Commissioner’s regulation § 155.17 was amended accordingly to comply with the statute.

COMMENT:

Commenters sought the inclusion of language from Education Law § 2801-a authorizing the Commissioner, in conjunction with the State Police, to develop an appeals process from duplicative requirements of District-Wide School Safety Plans for single-building districts.

RESPONSE:

Part B of Ch.54 of the Laws of 2016 which amended Education Law § 2801-a, authorized the Commissioner, in consultation with the Superintendent of the State Police to develop an appeals process. The statute did not require the development of the appeals process. After consulting with the New York State Police, it was determined that no appeals process would be developed at this time.

COMMENT:

Commenter opposed the September 15th staff training deadline indicating that the date is contrary to the intent of Part B of Ch.54 of the Laws of 2016 which did not establish a set training date. Commenter indicated that legislative negotiations resulted in the intentional omission of a date.

RESPONSE:

NYSED cannot opine on the legislative intent or internal discussions that may have occurred surrounding the date by which school districts must certify the completion of training. Consistent with statutory authority, the proposed regulation imposes a date certain by which all school districts must comply. NYSED believes this is a reasonable date to ensure the safety of the school community.

COMMENT:

Commenter suggested that training for employees hired after the start of the school year be required 30 days after the employee officially begins reporting for duty.

RESPONSE:

In accordance with the statute, the proposed regulation requires the training to be provided to employees who are hired after the start of the school year within 30 days of such hire, or as part of the district’s existing new hire training program, whichever is sooner. Since this is a statutory requirement, no revisions are necessary.

COMMENT:

Commenter suggested an amendment to the Chief Emergency Officer’s duties surrounding technology, recommending that the word “procedure” replace “policy” to avoid a statewide policy mandate and to ensure that the duties are properly within the purview of the superintendent, and do not require board approval.

RESPONSE:

NYSED revised the regulation to clarify such point.

COMMENT:

Must a board of education formally approve the building level emergency response plans? How can a board of education adopt the about Building-Level Emergency Response Plan while also maintaining confidentiality?

RESPONSE:

Education Law § 2801-a(1) requires the board to adopt both District-Wide School Safety Plans and Building-Level Emergency Response Plans. Education Law § 2801-a(3) requires all Building-Level Plans to be confidential. Education Law § 2801-a(7) further indicates building-level plans are confidential and not subject to disclosure under Public Officers Law Article 6 or any other law. The proposed amendment implements these statutory requirements and therefore no revisions are needed. Districts should consult with their attorneys as to how to comply. Please note that Public Officers Law § 105(a)(Open Meetings Law) provides that matters which will imperil public safety if disclosed may be approved through Executive Session.

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

Substitute Teachers

I.D. No. EDU-39-16-00009-P

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

Proposed Action: Amendment of section 80-5.4 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 210(not subdivided), 305(1), (2), 3001(2), 3004(1), 3006(1), 3007(1), (2) and 3009(1)

Subject: Substitute Teachers.

Purpose: To provide a sunset date for the amendments made to section 80-5.4 at the July Regents meeting.

Text of proposed rule: Paragraph (3) of subdivision (c) and subdivision (d) of section 80-5.4 of the Regulations of the Commissioner of Education are amended, effective December 28, 2016 to read as follows:

(3) Substitutes without a valid certificate and who are not working towards certification.

(i) [Service] *Except as otherwise provided in subparagraph (ii) of this paragraph, service may be rendered for no more than 40 days by a school district or board of cooperative educational services in a school year. [Provided, however, that in]*

(ii) *In extreme circumstances where there is an urgent need for a substitute teacher and the district has undertaken a good faith recruitment search for a properly certified candidate, and determined that there are no available certified teachers to perform the duties of such position, a substitute teacher, without a valid teaching certificate and who is not working towards certification, may be employed by the school district or board of cooperative educational services beyond the 40-day limit, for up to an additional 50 days (90 days total in a school year), if the district superintendent (for districts that are a component district of a board of cooperative educational services and boards of cooperative educational services) or the superintendent (for school districts that are not a component district of a board of cooperative educational services) certifies that the district or board of cooperative educational services, as applicable, has conducted a good faith recruitment search and there are no available certified teachers that can perform the duties of such position. In rare circumstances, a district or BOCES may hire a substitute teacher beyond the 90 days, if a district superintendent or superintendent attests that a good faith recruitment search has been conducted and that there are still no available certified teachers who can perform the duties of such position and that a particular substitute teacher is needed to work with a specific class or group of students until the end of the school year. *The provisions of this subparagraph shall be applicable until June 30, 2018.**

(d) Reporting. The chief school officer of each school district and the district superintendent of each board of cooperative educational services shall submit an annual report concerning the employment of all uncertified substitute teachers to the commissioner on forms prescribed by the commissioner, which shall include the number of substitute teachers authorized to be employed beyond the 40 day limit *until June 30, 2018* for the limited circumstances described in paragraph [(c)(3)] (c)(3)(ii) of this section, with the required certification(s) from the district superintendent or superintendent, as applicable, for each substitute teacher employed beyond the 40 day limit, certifying that a good faith recruitment search was conducted and that there were no available certified teachers that could perform the duties of such position. The annual report shall also include the number of substitute teachers authorized to be employed beyond the 90 days limit *until June 30, 2018* for the limited circumstances described in paragraph [(c)(3)] (c)(3)(ii) of this section, with the required certification(s) from the district superintendent or superintendents, as applicable, for each substitute teacher employed beyond the 90 day limit, certifying that a good faith recruitment search was conducted and that there were no available certified teachers that could perform the duties of such position and that a particular substitute teacher is needed to work with a specific class or group of students until the end of the school year.

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

Data, views or arguments may be submitted to: Peg Rivers, New York State Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 408-1189, email: regcomments@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

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

Education Law 3001 establishes the qualifications of teachers in the classroom.

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

Education Law 3006(1) authorizes the Commissioner to issue certificates to teachers.

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

2. LEGISLATIVE OBJECTIVES:

The proposed rule relates to the employment of substitute teachers without a valid teaching certificate beyond the 40 day limit in specific circumstances.

3. NEEDS AND BENEFITS:

In July 2016, the Board of Regents adopted an amendment allowing school districts and BOCES to employ an individual without a valid teaching certificate as a substitute teacher beyond the 40 day limit, for up to an additional 50 days (90 days total) in limited circumstances where the district superintendent (for districts that are a component district of a board of cooperative educational services or a BOCES) or the superintendent (for districts that are not a component district of a board of cooperative educational services) certifies that the district or BOCES, as applicable, has conducted a good faith recruitment search and there are no available certified teachers that can perform the duties of such position. In rare circumstances, a district or BOCES may hire a substitute teacher beyond the 90 days if a district superintendent or superintendent attests that a good faith recruitment search has been conducted and that there are still no available certified teachers who can perform the duties of such position and that a particular substitute teacher is needed to work with a specific class or group of students until the end of the school year.

Proposed Amendment:

Based on feedback from the Board of Regents, the Department is including an amendment to the rule that sunsets this provision after two years—June 30, 2018. The sunset provision allows the amendment to address short term teacher shortage concerns while allowing the Department to continuously work towards a long term solution.

4. COSTS:

a. Costs to State government: The amendment does not impose any costs on State government, including the State Education Department.

b. Costs to local government: The amendment does not impose any costs on local government, including school districts and BOCES.

c. Costs to private regulated parties: The amendment does not impose any costs on private regulated parties.

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, school districts or BOCES.

6. PAPERWORK:

The amendment does not require any additional paperwork requirements upon state or local government, the State Education Department, school districts, or BOCES.

7. DUPLICATION:

The rule does not duplicate existing State or Federal requirements.

8. ALTERNATIVES:

The proposed amendment was added in response to concerns raised by the Board of Regents. No alternatives were considered.

9. FEDERAL STANDARDS:

There are no applicable Federal standards related to the amendment.

10. COMPLIANCE SCHEDULE:

It is anticipated that the proposed amendment will be adopted by the Board of Regents at its December 2016 meeting. If adopted by the Board of Regents at the December 2016 meeting, the proposed amendment will become effective on December 28, 2016 and the proposed amendment will sunset on June 30, 2018.

Regulatory Flexibility Analysis

(a) Small businesses:

The Board of Regents adopted an amendment at its July 2016 meeting, commencing with the 2016-2017 school year, to allow school districts and BOCES to employ an individual without a valid teaching certificate (and who is not pursuing certification) as a substitute teacher beyond the current 40 day limit, for up to an additional 50 days (90 days total) in limited circumstances where the district superintendent or superintendent certifies that the district or BOCES has conducted a good faith recruitment search and there are no available certified teachers that can perform the duties of such position. In rare circumstances, a district or BOCES may hire a substitute teacher beyond the 90 days, if a district superintendent or superintendent attests that a good faith recruitment search has been conducted and that there are still no available certified teachers who can perform the

duties of such position and that a particular substitute teacher is needed to work with a specific class or group of students until the end of the school year. The proposed amendment sunsets this provision on June 30, 2018 in order to address concerns raised by the Board of Regents in response to the rule adopted at its July 2016 meeting.

The amendment does not impose any new 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:

If adopted at the September 2016 Board of Regents meeting, the proposed amendment will simply cause the new rule adopted by the Board in July to sunset on June 30, 2018.

2. COMPLIANCE REQUIREMENTS:

The Board of Regents adopted an amendment to section 80-5.4 of the Commissioner's regulations at its July 2016 meeting, commencing with the 2016-2017 school year, to allow district and BOCES to employ an individual without a valid teaching certificate (and who is not pursuing certification) as a substitute teacher beyond the current 40 day limit, for up to an additional 50 days (90 days total) in limited circumstances where the district superintendent or superintendent certifies that the district or BOCES has conducted a good faith recruitment search and there are no available certified teachers that can perform the duties of such position. In rare circumstances, a district or BOCES may hire a substitute teacher beyond the 90 days, if a district superintendent or superintendent attests that a good faith recruitment search has been conducted and that there are still no available certified teachers who can perform the duties of such position and that a particular substitute teacher is needed to work with a specific class or group of students until the end of the school year.

Proposed Amendment:

Based on feedback from the Board of Regents, the Department is including an amendment to the substitute teacher rule discussed above that sunsets this provision after two years—on June 30, 2018. This address the Boards concern with allowing uncertified individuals to be employed as substitute teachers beyond the 40 day limit—they view the provision as a short term solution as opposed to a long term solution. The sunset provision allows the amendment to address short term teacher shortage concerns while allowing the Department to continuously work towards a long term solution.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

There are no additional costs on local governments.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The rule does not impose any additional technological requirements on districts or BOCES.

6. MINIMIZING ADVERSE IMPACT:

The rule adopted in July seeks to address the issue of school districts having difficulty finding certified teachers to serve as substitute teachers, as this concern was raised by the field; the proposed amendment simply sunsets this provision on June 30, 2018. This rule applies equally to all school districts and BOCES throughout the State.

7. LOCAL GOVERNMENT PARTICIPATION:

Copies of the rule have been provided to Superintendents and District Superintendents with the request that they distribute them to school districts within their supervisory districts for review and comment.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

This proposed amendment applies to all districts and BOCES in New York employing substitute teachers, including those in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

The Board of Regents adopted an amendment to section 80-5.4 of the Commissioner's regulations at its July 2016 meeting, commencing with the 2016-2017 school year, to allow district and BOCES to employ an individual without a valid teaching certificate (and who is not pursuing certification) as a substitute teacher beyond the current 40 day limit, for up to an additional 50 days (90 days total) in limited circumstances where the district superintendent or superintendent certifies that the district or BOCES has conducted a good faith recruitment search and there are no available certified teachers that can perform the duties of such position. In rare circumstances, a district or BOCES may hire a substitute teacher beyond the 90 days, if a district superintendent or superintendent attests that a good faith recruitment search has been conducted and that there are still

no available certified teachers who can perform the duties of such position and that a particular substitute teacher is needed to work with a specific class or group of students until the end of the school year.

Proposed Amendment:

Based on feedback from the Board of Regents, the Department is including an amendment to the substitute teacher rule discussed above that sunsets this provision after two years—on June 30, 2018. This address the Boards concern with allowing uncertified individuals to be employed as substitute teachers beyond the 40 day limit—they view the provision as a short term solution as opposed to a long term solution. The sunset provision allows the amendment to address short term teacher shortage concerns while allowing the Department to continuously work towards a long term solution.

3. COSTS:

The proposed amendment does not impose any costs on school districts or BOCES across the State, including those located in rural areas of the State.

4. MINIMIZING ADVERSE IMPACT:

Because the qualifications of substitute teachers apply across the State, the proposed amendment applies equally to all school districts and BOCES throughout the State.

5. RURAL AREA PARTICIPATION:

Copies of the rule have been provided to Rural Advisory Committee for review and comment.

Job Impact Statement

At its July 2016 meeting, the Board of Regents adopted amendments to section 80-5.4 of the Commissioner’s regulations to allow school districts and BOCES to employ a substitute teacher without a valid teaching certificate beyond the current 40 day limit in specific limited circumstances. At the request of the Board of Regents, the proposed amendment sunsets this provision after two years—June 30, 2018 in order to address the concern that the employment of uncertified substitutes for periods longer than 40 days is not a long-term solution to the shortage of substitute teachers.

Because the proposed amendment simply adds a sunset provision to a rule that was initially approved by the Board in order to address an issue raised by the field in employing substitute teachers, 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, and no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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

Uniform Violent or Disruptive Incident Reporting System (VADIR)

I.D. No. EDU-39-16-00034-P

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

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

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 305(1), (2), 308 and 2802

Subject: Uniform Violent or Disruptive Incident Reporting System (VADIR).

Purpose: To revise the categories of violent and disruptive incidents for VADIR reporting.

Text of proposed rule: 1. Subdivision (gg) of section 100.2 of the Regulations of the Commissioner of Education shall be amended, effective July 1, 2017 to read as follows:

(g) Uniform violent or disruptive incident reporting system. School districts, boards of cooperative educational services, charter schools and county vocational education and extension boards shall submit to the commissioner annual reports of violent or disruptive incidents that occurred in the prior school year, commencing with the 2001-2002 school year, in accordance with Education Law, section 2802 and this subdivision.

(1) Definitions. For the purposes of this subdivision:

(i) ...

(ii) ...

(iii) Physical injury means impairment of physical condition or substantial pain and includes, but is not limited to, black eyes, welts, abrasions, bruises, cuts not requiring stitches, swelling and headaches not related to a concussion.

(iv) Serious physical injury means physical injury which creates a substantial risk of death or which causes death or serious and protracted disfigurement or protracted impairment of health or protracted loss or impairment of the function of any bodily organ and requires hospitaliza-

tion or treatment in an emergency medical care facility outside of school, including but not limited to, a bullet wound, fractured or broken bones or teeth, concussions, cuts requiring stitches and any other injury involving risk of death or disfigurement.

(v)...

(vi) Violent or disruptive incident shall mean one of the following categories of incidents that occurs on school property of the school district, board of cooperative educational services, charter school or county vocational education and extension board, committed with or without a weapon (except in the case of weapons possession):

(a) Homicide. Any intentional violent conduct which results in the death of another person.

(b) Sex offenses.

(1) Forcible sex offenses. [Forcible sex offenses involving forcible compulsion. Incidents involving forcible compulsion and completed or attempted sexual intercourse, oral sexual conduct, anal sexual conduct or aggravated sexual contact with or without a weapon, including, but not limited to, rape and sodomy.] Sex offenses involving forcible compulsion and completed or attempted sexual intercourse, oral sexual conduct, anal sexual conduct or aggravated sexual contact, with or without a weapon including but not limited to, rape and sodomy; or resulting from forcibly touching or grabbing another student on a part of the body that is generally regarded as private, which includes, but it not limited to the buttocks, breasts, or genitalia.

(2) Other sex offenses. Other non-consensual sex offenses involving inappropriate sexual contact [but no forcible compulsion], including, but not limited to, touching another student on a part of the body that is generally regarded as private, which includes, but is not limited to, the buttocks, breasts, and genitalia, removing another student’s clothing to reveal underwear or private body parts, or brushing or rubbing against another person in a sexual manner. Other sex offenses shall also include, but not be limited to conduct that may be consensual or involve a child who is incapable of consent by reason of disability or because he or she is under 17 years of age, provided that such term shall not include consensual sexual conduct involving only students, and/or non-students 18 years of age or under, unless at least one of the individuals participating in the conduct is at least four years older than the youngest individual participating in the conduct.

(c) [Robbery. Forcible stealing of property from a person by using or threatening the immediate use of physical force upon that person, with or without the use of a weapon.

(d) Assault [involving serious physical injury]. Intentionally or recklessly causing [serious] physical injury to another person, with or without a weapon, in violation of the school district code of conduct [.] which shall include either;

(1) engaging in behavior which causes serious physical injury; or,

(2) engaging in behavior which causes physical injury.

[(e)...

(f) ...

(g) ...

(h) ...

(i) ...

(j) ...]

(d) Material incident of harassment, bullying, and/or discrimination. A single verified incident or a series of related verified incidents where a student is subjected to harassment, bullying and/or discrimination by a student and/or employee on school property or at a school function. In addition, such term shall include a verified incident or series of related incidents of harassment or bullying that occur off school property, as defined in subclause (viii) of paragraph (1) of subdivision (kk) of this section, Such conduct shall include, but is not limited to, threats, intimidation or abuse based on a person’s actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex; provided that nothing in this subdivision shall be construed to prohibit a denial of admission into, or exclusion from, a course of instruction based on a person’s gender that would be permissible under Education Law sections 3201-a or 2854(2)(a) and Title IX of the Education Amendments of 1972 (20 U.S.C. section 1681, et seq.), or to prohibit, as discrimination based on disability, actions that would be permissible under section 504 of the Rehabilitation Act of 1973.

[(k)...

(l) ...

(m)...

(n) (e) Bomb threat. A telephoned, written or electronic message that a bomb, explosive, chemical or biological weapon has been or will be placed on school property.

[(o)] (f) False alarm. [Falsely activating] Causing a fire alarm or other disaster alarm to be activated knowing there is no danger, or through false reporting of a fire or disaster.

[(p) Riot. Simultaneously with four or more persons engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of physical injury or substantial property damage or causes public alarm.

[(q) (g) Weapons possession. Possession of [a weapon] *one or more weapons as defined by subparagraph (v) of this paragraph*, except possession in a classroom or laboratory as part of an instructional program or in a school-related activity under the supervision of a teacher or other school personnel as authorized by school officials[,] *which are discovered either through:*

(1) *routine security checks; or*
 (2) *weapons possessed at a school function or on school property which are not discovered through a routine security check, including but not limited to, weapons found in the possession of a student or within a locker.*

[(r) (h) [Drug use] Use, possession or sale of drugs. Illegally using [or], possessing, or being under the influence of a controlled substance or marijuana, on school property or at a school function, including having such substance on a person in a locker, vehicle, or other personal space; selling or distributing a controlled substance or marijuana, on school property; finding a controlled substance or marijuana, on school property that is not in the possession of any person; provided that nothing herein shall be construed to apply to the lawful administration of a prescription drug on school property.

[(s) (i) [Alcohol use] Use, possession or sale of alcohol. Illegally using [or], [Possessing] possessing, or being under the influence of alcohol on school property or at a school function, including having such substance on a person or in a locker, vehicle, or other personal space; illegally selling or distributing alcohol on school property or at a school function; finding alcohol on school property that is not in the possession of any person.

[(t) Other disruptive incidents. Other incidents involving disruption of the educational process.]

(2) Recording of offenses

(i) For purposes of reporting pursuant to this subdivision, each incident shall be reported once in the highest ranking category of offense that applies, except that incidents involving a weapon and one of the offenses listed in clauses (1)(vi)(a) through [(p) (f)] of this subdivision shall be reported in the highest ranking category of offense that applies as an offense committed with a weapon, and not in weapons possession; and incidents involving drug use, possession or sale and/or alcohol use, possession or sale and another offense shall be reported in the highest ranking category in clauses (1)(vi)(a) through [(q) (g)] of this subdivision that applies. If the offense involves only the use, possession or sale of drugs or alcohol, it shall be recorded in the applicable category of drug or alcohol use, possession or sale as an incident involving drug or alcohol use, possession or sale only. For purposes of determining the highest ranking offense pursuant to this subparagraph, offenses shall be ranked in the order that they appear in clauses (1)(vi)(a) through [(p) (f)] of this subdivision, followed by weapons possession, drug use, possession or sale and alcohol use, possession or sale[, and other disruptive incidents].

(ii) [The offenses described in clauses (1)(vi)(i), (k), (l), (m), (p) and (t) of this subdivision shall only be reported where such behavior, under the district's code of conduct, is of sufficient seriousness to warrant the suspension or removal of a student or the referral of a student to a counseling or treatment program or transfer of a student to an alternative education program, or the referral of a student to the juvenile justice system, or disciplinary action against or dismissal of a school employee, or notification of law enforcement of the commission of a crime, whether or not the perpetrators are identified.] All incidents involving bomb threats or false alarms as defined in clauses (1)(vi)[(n)](e) and [(o) (f)] of this subdivision shall be reported. All incidents involving [intimidation, harassment, menacing or bullying behavior] *material incidents of harassment, bullying, and/or discrimination* as defined in clause (1)(vi)[(j)](d) of this subdivision [that are the subject of a written or oral complaint to the school principal or other school administrator responsible for school discipline, or are otherwise directly observed by such principal or administrator,] shall be reported.

(3)...

(4) Content of report. Each individual violent or disruptive incident report shall be in a form prescribed by the commissioner and shall contain the following information concerning each violent or disruptive incident that occurred in the prior school year:

(i) ...

(ii)...

(iii)...

(iv) the types of incident, identified by category listed in clauses (1)(vi)(a) through [(t)(i)] of this subdivision;

(v) ...

(vii)...

(viii)...

(ix)...

(x)...

(5)...

(6)...

(7)...

(8) School violence index. Each school year, commencing with the 2005-2006 school year, the department shall establish a school violence index as a comparative measure of the level of school violence in a school. The school violence index will be computed in accordance with a formula established by the commissioner that takes into account the enrollment of the school and is weighted to reflect the most serious violent incidents, which shall include but need not be limited to the following categories of incidents: homicide, forcible sexual offense, [robbery,] assault resulting in serious physical injury, *assault resulting in physical injury*, [arson, kidnapping,] and incidents involving the possession, use or threatened use of a weapon.

Text of proposed rule and any required statements and analyses may be obtained from: Kirti Goswami, New York State Education Department, 89 Washington Avenue, Room 138, Albany, NY 12234, (518) 474-6400, email: legal@nysed.gov

Data, views or arguments may be submitted to: Renee Rider, Assistant Commissioner for Student Supports, New York State Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 474-4817, 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 section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Regents to appoint the Commissioner as chief administrative officer of the Department, which is charged 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 of Education to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the State Education Department by law.

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

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 2802, as added by section 5 of Chapter 181 of the Laws of 2000, required the Commissioner of Education to promulgate regulations establishing a statewide uniform violent incident reporting system that public school districts, boards of cooperative educational services (BOCES) and county vocational education and extension boards shall follow to annually report to the Commissioner information concerning violent and disruptive incidents that occurred in the prior school year.

Chapter 482 of the Laws of 2010 added a new Article 2 to the Education Law, relating to Dignity for All Students, which among other things required the Commissioner to create a reporting system under which material incidents of harassment, bullying and discrimination are reported to the Department.

2. LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above statutory authority and is necessary to update the definitions of violent and disruptive incidents for purposes of the uniform violent incident reporting system (VADIR) consistent with the requirements of Education Law section 2802, as added by section 5 of Chapter 181 of the Laws of 2000.

3. NEEDS AND BENEFITS:

Both federal and State law require the Department to implement a statewide policy that identifies persistently dangerous public elementary and secondary schools, for the purpose of unsafe school choice.¹ Enacted as part of the Safe Schools Against Violence in Education Act (SAVE) in 2001, Education Law § 2802 required the Commissioner, in conjunction with the Division of Criminal Justice Services, to establish a statewide uniform violent incident reporting system (VADIR) and to promulgate regulations defining "violent or disruptive incidents." In order to implement this section, Commissioner's regulation § 100.2(gg) was developed in consultation with the Division of Criminal Justice Services as well as legislative and executive staff, and required schools to record information about violent and disruptive incidents beginning in the 2001-02 school year.

To fulfill the requirements of federal law relating to unsafe school choice, Education Law § 2802 requires the Commissioner to annually determine which public elementary and secondary schools are persistently dangerous, in accordance with the Commissioner's regulations. Each school is required to maintain a record of all violent and disruptive incidents that occur within each school year, from July 1st through June 30th, and to provide an annual report of such incidents to the superintendent. Currently, schools must submit to the Department the number of incidents in each of the twenty categories outlined in 100.2(gg). Using this VADIR data, the Department calculates the School Violence Index (SVI) which is the benchmark for determining which schools are persistently dangerous.

Presently, Commissioner's regulation § 100.2(gg) requires schools to collect and submit data related to violent incidents in twenty categories:

- 1) Homicide
- 2) Forcible Sex Offenses and Other Sex Offenses
- 3) Robbery
- 4) Assault with Serious Physical Injury
- 5) Arson
- 6) Kidnapping
- 7) Assault with Physical Injury
- 8) Reckless Endangerment
- 9) Minor Altercations
- 10) Intimidation, Harassment, Menacing or Bullying
- 11) Burglary
- 12) Criminal Mischief
- 13) Larceny and Other Theft Offenses
- 14) Bomb Threat
- 15) False Alarm
- 16) Riot
- 17) Weapons Possession
- 18) Drug Use, Possession, or Sale
- 19) Alcohol Use, Possession, or Sale
- 20) Other Disruptive Incidents

Stakeholders have expressed concern that the categories do not accurately capture the types of incidents that occur in schools, and do not serve as a tool to identify strategies to reduce incidents of violence and improve school climate for the purpose of improving student outcomes.

In 1999, the New York State Task Force on School Violence was created and issued its first report, *Safer Schools for the 21st Century: A Common Sense Approach to Keep New York's Students and Schools Safe*. It was the work of this Task Force that led to the Safe Schools Against Violence in Education Act (SAVE).² In January of 2013, the Board of Regents directed the Department to reestablish the Safe Schools Task Force. In 2013 and 2014, the Safe Schools Task Force held meetings and forums with various groups of stakeholders, including students. As a result of this work, the Schools Task Force issued thirty-six recommendations for improving school safety statewide. One of these recommendations specifically recommended that the Department: "[d]evelop a new process and criteria for the Persistently Dangerous designation and a new set of definitions of incident categories for reporting using a School Climate Index. The reporting process for Dignity for All Students Act (DASA) and Violent and Disruptive Incident Reporting (VADIR) should be combined and renamed into one system that is not punitive and is reflective of the school climate and can be used for prevention and intervention purposes; also, that it includes positive measures and incorporates most improved schools."

Together with Department staff, members of the Safe Schools Task Force developed a revised method for collecting incident data that incorporates both VADIR and DASA into one reporting structure. The revised definitions developed by the Task Force provide a greater degree of clarity and are better aligned with the intent of VADIR, which is not to be punitive but rather to inform policies for reducing school violence.

As a result, the Task Force recommended, and the proposed amendment reduces the current 20 reporting categories to the following nine categories, commencing with the 2017-2018 school year:

- 1) Homicide
- 2) Sexual Offenses
- 3) Physical Injury
- 4) Weapons Possession
- 5) Material Incidents of Discrimination, Harassment, and Bullying
- 6) Bomb Threat
- 7) False Alarm
- 8) Use, Possession or Sale of Drugs
- 9) Use, Possession or Sale of Alcohol

4. COSTS:

(a) Costs to State: none.

(b) Costs to local governments: in general, the proposed rule does not impose any costs beyond those imposed by Education Law section 2802, as added by section 5 of Chapter 181 of the Laws of 2000. School districts,

BOCES and county vocational education and extension boards continue to be required to collect information on violent and disruptive incidents as part of existing record-keeping procedures. An updated and streamlined form has been developed by the Department and will be provided to districts for the required annual reporting. However, the Department will continue to provide professional development and technical assistance to assist school districts, BOCES and county vocational education and extension boards to understand the updated reporting categories. There may be additional costs associated with changing software programming, etc. to report the new nine categories. Actual costs may vary significantly due to the software programs and applications used by the reporting entity.

(c) Costs to private regulated parties: none.

(d) Costs to regulating agency for implementation and continued administration of this rule: The proposed amendment will not impose any additional costs on the Department, beyond those currently incurred for VADIR reporting purposes.

5. LOCAL GOVERNMENT MANDATES:

As required by Education Law section 2802, as added by section 5 of Chapter 181 of the Laws of 2000, the proposed amendment continues to require school districts, boards of cooperative educational services and county vocational education and extension boards to submit to the Commissioner annual reports of violent or disruptive incidents that occurred in the prior school year. However, the categories of violent or disruptive incidences subject to such reporting have been reduced from 20 to 9 categories, making the reporting process more streamlined.

6. PAPERWORK:

A school district, BOCES or county vocational education and extension board must continue to collect and maintain information on each violent or disruptive incident as defined by this amendment. School districts, BOCES and county vocational education and extension boards continue to be required to electronically submit a report to the Commissioner containing the information on all of the violent or disruptive incidents that occurred in the prior school year.

7. DUPLICATION:

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

8. ALTERNATIVES:

The proposed rule is necessary to implement Education Law § 2802 and consistent with the recommendations of the Safe Schools Task Force. There were no significant alternatives considered.

9. FEDERAL STANDARDS:

There are no applicable Federal standards.

10. COMPLIANCE SCHEDULE:

It is anticipated that regulated parties can achieve compliance with the proposed rule by its effective date of July 1, 2017. The proposed rule provides school districts with additional time to make and implement any changes to their internal violent and disruptive incident reporting systems.

¹ 20 U.S.C.A. § 7912; N.Y. Education Law § 2801.

² Chapter 181 of the Laws of New York 2000.

Regulatory Flexibility Analysis

(a) Small businesses:

As required by Education Law section 2802, as added by section 5 of Chapter 181 of the Laws of 2000, the proposed amendment continues to require school districts, boards of cooperative educational services and county vocational education and extension boards to submit to the Commissioner annual reports of violent or disruptive incidents that occurred in the prior school year. However, the categories of violent or disruptive incidences subject to such reporting have been reduced from 20 to 9 categories, making the reporting process more streamlined.

Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local governments:

1. EFFECT OF RULE:

The rule applies to all school districts, BOCES, county vocational education and extension boards required to submit to the Commissioner annual reports of violent or disruptive incidents that occurred in the prior school year. The proposed rule reduces the categories of violent or disruptive incidences subject to such reporting from 20 to 9 categories, making the reporting process more streamlined.

2. COMPLIANCE REQUIREMENTS:

Both federal and State law require the Department to implement a statewide policy that identifies persistently dangerous public elementary and secondary schools, for the purpose of unsafe school choice.¹ Enacted as part of the Safe Schools Against Violence in Education Act (SAVE) in 2001, Education Law § 2802 required the Commissioner, in conjunction with the Division of Criminal Justice Services, to establish a statewide

uniform violent incident reporting system (VADIR) and to promulgate regulations defining “violent or disruptive incidents.” In order to implement this section, Commissioner’s regulation § 100.2(gg) was developed in consultation with the Division of Criminal Justice Services as well as legislative and executive staff, and required schools to record information about violent and disruptive incidents beginning in the 2001-02 school year.

To fulfill the requirements of federal law relating to unsafe school choice, Education Law § 2802 requires the Commissioner to annually determine which public elementary and secondary schools are persistently dangerous, in accordance with the Commissioner’s regulations. Each school is required to maintain a record of all violent and disruptive incidents that occur within each school year, from July 1st through June 30th, and to provide an annual report of such incidents to the superintendent. Currently, schools must submit to the Department the number of incidents in each of the twenty categories outlined in 100.2(gg). Using this VADIR data, the Department calculates the School Violence Index (SVI) which is the benchmark for determining which schools are persistently dangerous.

Presently, Commissioner’s regulation § 100.2(gg) requires schools to collect and submit data related to violent incidents in twenty categories:

- 1) Homicide
- 2) Forcible Sex Offenses and Other Sex Offenses
- 3) Robbery
- 4) Assault with Serious Physical Injury
- 5) Arson
- 6) Kidnapping
- 7) Assault with Physical Injury
- 8) Reckless Endangerment
- 9) Minor Altercations
- 10) Intimidation, Harassment, Menacing or Bullying
- 11) Burglary
- 12) Criminal Mischief
- 13) Larceny and Other Theft Offenses
- 14) Bomb Threat
- 15) False Alarm
- 16) Riot
- 17) Weapons Possession
- 18) Drug Use, Possession, or Sale
- 19) Alcohol Use, Possession, or Sale
- 20) Other Disruptive Incidents

Stakeholders have expressed concern that the categories do not accurately capture the types of incidents that occur in schools, and do not serve as a tool to identify strategies to reduce incidents of violence and improve school climate for the purpose of improving student outcomes.

In 1999, the New York State Task Force on School Violence was created and issued its first report, *Safer Schools for the 21st Century: A Common Sense Approach to Keep New York’s Students and Schools Safe*. It was the work of this Task Force that led to the Safe Schools Against Violence in Education Act (SAVE).² In January of 2013, the Board of Regents directed the Department to reestablish the Safe Schools Task Force. In 2013 and 2014, the Safe Schools Task Force held meetings and forums with various groups of stakeholders, including students. As a result of this work, the Schools Task Force issued thirty-six recommendations for improving school safety statewide. One of these recommendations specifically recommended that the Department: “[d]evelop a new process and criteria for the Persistently Dangerous designation and a new set of definitions of incident categories for reporting using a School Climate Index. The reporting process for Dignity for All Students Act (DASA) and Violent and Disruptive Incident Reporting (VADIR) should be combined and renamed into one system that is not punitive and is reflective of the school climate and can be used for prevention and intervention purposes; also, that it includes positive measures and incorporates most improved schools.”

Together with Department staff, members of the Safe Schools Task Force developed a revised method for collecting incident data that incorporates both VADIR and DASA into one reporting structure. The revised definitions developed by the Task Force provide a greater degree of clarity and are better aligned with the intent of VADIR, which is not to be punitive but rather to inform policies for reducing school violence.

As a result, the Task Force recommended, and the proposed amendment reduces the current 20 reporting categories to the following nine categories, commencing with the 2017-2018 school year:

- 1) Homicide
- 2) Sexual Offenses
- 3) Physical Injury
- 4) Weapons Possession
- 5) Material Incidents of Discrimination, Harassment, and Bullying
- 6) Bomb Threat
- 7) False Alarm

- 8) Use, Possession or Sale of Drugs
- 9) Use, Possession or Sale of Alcohol

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

In general, the proposed rule does not impose any costs beyond those imposed by Education Law section 2802, as added by section 5 of Chapter 181 of the Laws of 2000. School districts, BOCES and county vocational education and extension boards continue to be required to collect information on violent and disruptive incidents as part of existing record-keeping procedures. An updated and streamlined form has been developed by the Department and will be provided to districts for the required annual reporting. However, the Department will continue to provide professional development and technical assistance to assist school districts, BOCES and county vocational education and extension boards to understand the updated reporting categories. There may be additional costs associated with changing software programming, etc. to report the new nine categories. Actual costs may vary significantly due to the software programs and applications used by the reporting entity. The proposed amendment will not impose any additional costs on the Department, beyond those currently incurred for VADIR reporting purposes.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Education Law § 2802 and is consistent with the recommendations of the Safe Schools Task Force. There were no significant alternatives considered.

7. LOCAL GOVERNMENT PARTICIPATION:

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

¹ 20 U.S.C.A. § 7912; N.Y. Education Law § 2801.

² Chapter 181 of the Laws of New York 2000.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed rule applies to school districts, boards of cooperative educational services (BOCES), and county vocational education and extension boards, including those located in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

Both federal and State law require the Department to implement a statewide policy that identifies persistently dangerous public elementary and secondary schools, for the purpose of unsafe school choice.¹ Enacted as part of the Safe Schools Against Violence in Education Act (SAVE) in 2001, Education Law § 2802 required the Commissioner, in conjunction with the Division of Criminal Justice Services, to establish a statewide uniform violent incident reporting system (VADIR) and to promulgate regulations defining “violent or disruptive incidents.” In order to implement this section, Commissioner’s regulation § 100.2(gg) was developed in consultation with the Division of Criminal Justice Services as well as legislative and executive staff, and required schools to record information about violent and disruptive incidents beginning in the 2001-02 school year.

To fulfill the requirements of federal law relating to unsafe school choice, Education Law § 2802 requires the Commissioner to annually determine which public elementary and secondary schools are persistently dangerous, in accordance with the Commissioner’s regulations. Each school is required to maintain a record of all violent and disruptive incidents that occur within each school year, from July 1st through June 30th, and to provide an annual report of such incidents to the superintendent. Currently, schools must submit to the Department the number of incidents in each of the twenty categories outlined in 100.2(gg). Using this VADIR data, the Department calculates the School Violence Index (SVI) which is the benchmark for determining which schools are persistently dangerous.

Presently, Commissioner’s regulation § 100.2(gg) requires schools to collect and submit data related to violent incidents in twenty categories:

- 1) Homicide
- 2) Forcible Sex Offenses and Other Sex Offenses
- 3) Robbery
- 4) Assault with Serious Physical Injury
- 5) Arson
- 6) Kidnapping

- 7) Assault with Physical Injury
- 8) Reckless Endangerment
- 9) Minor Altercations
- 10) Intimidation, Harassment, Menacing or Bullying
- 11) Burglary
- 12) Criminal Mischief
- 13) Larceny and Other Theft Offenses
- 14) Bomb Threat
- 15) False Alarm
- 16) Riot
- 17) Weapons Possession
- 18) Drug Use, Possession, or Sale
- 19) Alcohol Use, Possession, or Sale
- 20) Other Disruptive Incidents

Stakeholders have expressed concern that the categories do not accurately capture the types of incidents that occur in schools, and do not serve as a tool to identify strategies to reduce incidents of violence and improve school climate for the purpose of improving student outcomes.

In 1999, the New York State Task Force on School Violence was created and issued its first report, *Safer Schools for the 21st Century: A Common Sense Approach to Keep New York's Students and Schools Safe*. It was the work of this Task Force that led to the *Safe Schools Against Violence in Education Act (SAVE)*.² In January of 2013, the Board of Regents directed the Department to reestablish the *Safe Schools Task Force*. In 2013 and 2014, the *Safe Schools Task Force* held meetings and forums with various groups of stakeholders, including students. As a result of this work, the *Schools Task Force* issued thirty-six recommendations for improving school safety statewide. One of these recommendations specifically recommended that the Department: “[d]evelop a new process and criteria for the Persistently Dangerous designation and a new set of definitions of incident categories for reporting using a *School Climate Index*. The reporting process for *Dignity for All Students Act (DASA)* and *Violent and Disruptive Incident Reporting (VADIR)* should be combined and renamed into one system that is not punitive and is reflective of the school climate and can be used for prevention and intervention purposes; also, that it includes positive measures and incorporates most improved schools.”

Together with Department staff, members of the *Safe Schools Task Force* developed a revised method for collecting incident data that incorporates both *VADIR* and *DASA* into one reporting structure. The revised definitions developed by the *Task Force* provide a greater degree of clarity and are better aligned with the intent of *VADIR*, which is not to be punitive but rather to inform policies for reducing school violence.

As a result, the *Task Force* recommended, and the proposed amendment reduces the current 20 reporting categories to the following nine categories, commencing with the 2017-2018 school year:

- 1) Homicide
- 2) Sexual Offenses
- 3) Physical Injury
- 4) Weapons Possession
- 5) Material Incidents of Discrimination, Harassment, and Bullying
- 6) Bomb Threat
- 7) False Alarm
- 8) Use, Possession or Sale of Drugs
- 9) Use, Possession or Sale of Alcohol

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

3. COMPLIANCE COSTS:

In general, the proposed rule does not impose any costs beyond those imposed by Education Law section 2802, as added by section 5 of Chapter 181 of the Laws of 2000. School districts, BOCES and county vocational education and extension boards continue to be required to collect information on violent and disruptive incidents as part of existing record-keeping procedures. An updated and streamlined form has been developed by the Department and will be provided to districts for the required annual reporting. However, the Department will continue to provide professional development and technical assistance to assist school districts, BOCES and county vocational education and extension boards to understand the updated reporting categories. There may be additional costs associated with changing software programming, etc. to report the new nine categories. Actual costs may vary significantly due to the software programs and applications used by the reporting entity. The proposed amendment will not impose any additional costs on the Department, beyond those currently incurred for *VADIR* reporting purposes.

4. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement Education Law § 2802 and is consistent with the recommendations of the *Safe Schools Task Force*. There were no significant alternatives considered.

5. RURAL AREA PARTICIPATION:

The proposed rule was submitted for review and comment to the

Department's Rural Education Advisory Committee, which includes representatives of school districts in rural areas.

¹ 20 U.S.C.A. § 7912; N.Y. Education Law § 2801.

² Chapter 181 of the Laws of New York 2000.

Job Impact Statement

The purpose of the proposed rule is to update the definitions of violent and disruptive incidents for purposes of the uniform violent incident reporting system (*VADIR*) consistent with the requirements of Education Law section 2802, as added by section 5 of Chapter 181 of the Laws of 2000. Because it is evident from the nature of the proposed rule that it will have no impact on the number of jobs or employment opportunities in New York State, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Dental Anesthesia Certification Requirements for Licensed Dentists

I.D. No. EDU-10-16-00018-RP

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

Proposed Action: Amendment of section 61.10 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6504(not subdivided), 6506(1), 6507(2)(a), 6601(not subdivided) and 6605-a(2)

Subject: Dental Anesthesia Certification Requirements for Licensed Dentists.

Purpose: To conform regulations to the current practice of dental anesthesia administration.

Substance of revised rule: The Commissioner of Education proposes to amend section 61.10 of the Regulations of the Commissioner of Education relating to the dental anesthesia certification requirements for licensed dentists under Article 133 of the Education Law. The following is a summary of the proposed rule:

Subdivision (a) of section 61.10 of the Regulations of the Commissioner of Education is amended to update New York's definitions to reflect those currently used in the profession and re-define the types of anesthesia used by dentists that are subject to certification.

Subdivision (b) of section 61.10 of the Regulations of the Commissioner of Education is amended to reflect the definitional changes made to certain methods of sedation and to add new certifications for administering parenteral conscious (moderate) sedation and for administering enteral conscious (moderate) sedation to pediatric patients aged 12 years old and younger. The certificates created under this section are: (1) general anesthesia; (2) dental parenteral conscious (moderate) sedation for patients 13 years old and older; (3) dental parenteral conscious (moderate) sedation for patients 12 years old and younger; (4) dental enteral conscious (moderate) sedation for patients 13 years old and older; and (5) dental enteral conscious (moderate) sedation for patients 12 years old and younger.

Subdivision (b) of section of 61.10 is also amended to delete outdated references to certificates issued prior to January 2001 as being valid until the end of their term and to provide a transition pathway for current holders of parenteral conscious sedation certificates and enteral conscious sedation certificates, who wish to continue to provide sedation to pediatric patients, until the end of their certificate term.

Subdivision (c) of section 61.10 of the Regulations of the Commissioner of Education is amended to eliminate redundant anesthesia certificate descriptions already set forth in subdivision (b) of section 61.10; incorporate the definitional changes set forth in subdivision (a) of section 61.10(a); amend the education requirements to at least 60 hours of coursework provided through didactic instruction and/or an anesthesia rotation for all certificates, with the exception of a general anesthesia certificate; amend the experience requirements for the parenteral conscious (moderate) sedation certificate and the enteral conscious (moderate) sedation certificate to include live clinical experiences with dental patients; include a requirement that post-doctoral education necessary for acquiring a certificate in dental parenteral conscious (moderate) sedation or dental enteral conscious (moderate) sedation be previously approved by the Department; include the requirements required to obtain a certificate to administer general anesthesia or conscious (moderate) sedation through endorsement from another jurisdiction; include the education and training

requirements as well as the renewal requirements for the new certificates for parenteral conscious (moderate) sedation pediatric and for enteral conscious (moderate) sedation pediatric; add Advanced Cardiac Life Support (ACLS) to the parenteral and enteral conscious (moderate) sedation certificates for patients ages 13 years and older; add Pediatric Advanced Life Support (PALS) to the parenteral and enteral conscious (moderate) sedation certificates for patients ages 12 years old and younger and for those Oral Surgeons and Dental Anesthesiologists administering general anesthesia to children 12 years old and younger; and delete the provisions for licensed dentists who applied for certificates prior to January 1, 2002.

Subdivision (d) of section 61.10 is amended to reflect the definitional changes referenced in section 61.10(a); provide that a licensed dentist can administer conscious (moderate) sedation, deep sedation and general anesthesia to more than one patient at a time when supervising dental students or residents; provide that licensed dentists administering conscious (moderate) sedation, deep sedation and general anesthesia are responsible for pre-operative preparation for the patient; set forth specific pre-operative requirements for administering deep sedation and general anesthesia and separate pre-operative requirements for administering conscious (moderate) sedation; eliminate the existing requirements for monitoring during the administration of general anesthesia, deep sedation and moderate sedation, and set forth new monitoring requirements for the administration of those types of sedation; delete existing reference to dietary instructions and oral or written instructions since they would now be included in the pre-operative instructions; include an exception for a requirement for the recording of blood pressure records on patients who are being administered conscious (moderate) sedation using an enteral route; include a provision that dentists maintain proof of completing the twelve hours of education in sedation/anesthesia as required for the new provision for renewal of their certificate to administer conscious (moderate) parenteral sedation or deep sedation or general anesthesia; include a provision setting forth the overall responsibility of the dentist administering general anesthesia, deep sedation and conscious (moderate) sedation; and include guidelines for reporting mortality or irreversible morbidity to the Department.

Full text is posted at the following State website: <http://www.regents.nysed.gov/meetings/2016/2016-09/professional-practice>

Revised rule compared with proposed rule: Substantial revisions were made in section 61.10(b)(5), (c)(1), (2), (3), (d)(4) and (8).

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

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

Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on March 9, 2016, the proposed rule has been revised as follows:

Section 61.10(b)(5) has been revised to remove the following language: "Patient names are not required to be redacted from the copied material. If the licensed dentist decides to redact patient names, no other information should be redacted from the copied material submitted to the department." This revision is being made because the Department has no need to collect such patient information in order to fulfill its obligations under this regulation.

Section 61.10(c)(1)(iii)(c) has been revised to require applicants for the certificate in dental parenteral conscious (moderate) sedation for patients 12 years old or younger to complete a clinical experience, acceptable to and previously approved by the Department, demonstrating the successful use of dental parenteral conscious (moderate) sedation by the intravenous route on no fewer than 15 live dental patients who shall be 12 years old or younger and five live dental patients who shall be 13 years old or older in a 1 doctor/student to 1 patient ratio, instead of 20 live dental patients who shall be 12 years old or younger in a 1 doctor/student to 1 patient ratio. This change was made because some licensed dentists with this certificate may regularly treat patients who are 13 years old or older, who may typically have some kind of developmental disability, which makes it more appropriate for them to be treated by licensed dentists that specialize in pediatric dentistry. Thus, in order to ensure such patients' safety, the rule has been revised to require licensed dentists, seeking this particular dental anesthesia certificate, to have clinical experience in treating, at least, five live dental patients who are 13 years old or older with dental parenteral conscious (moderate) sedation.

Section 61.10(c)(1)(v)(c) has been revised to require applicants for the certificate in dental enteral conscious (moderate) sedation for patients 12

years old or younger to complete a clinical experience demonstrating the successful use of dental enteral conscious (moderate) sedation on no fewer than 15 live clinical dental patients 12 years old or younger and five live clinical dental patients 13 years old or older in a 2:1 doctor/student to patient ratio, instead of 20 live clinical dental patients 12 years old or younger in a 2:1 doctor/student to patient ratio. This change was made because some licensed dentists with this certificate may regularly treat patients who are 13 years old or older, who may typically have some kind of developmental disability, which makes it more appropriate for them to be treated by licensed dentists that specialize in pediatric dentistry. Thus, in order to ensure such patients' safety, the rule has been revised to require licensed dentists seeking this particular dental anesthesia certificate, to have clinical experience in treating, at least, five live dental patients who are 13 years old or older with dental enteral conscious (moderate) sedation.

Section 61.10(c)(2)(iii)(c) has been revised to require applicants for certification through endorsement for the certificate in dental parenteral conscious (moderate) sedation for patients 12 years old and younger to provide 15 anesthesia records of patients 12 years old and younger and five anesthesia records of patients 13 years old and older, that the applicant has administered parenteral conscious (moderate) sedation (via the intravenous route) in the licensed jurisdiction, within the three years immediately preceding the applicant's submission of his or her application to the Department for review with no patients having had irreversible morbidity or mortality due to the sedation provided by the applicant, instead of 20 anesthesia records of patients 12 years old and younger. This change was made because some applicants for certification through endorsement for this certificate may regularly treat patients who are 13 years old and older, who may typically have some kind of developmental disability, which makes it more appropriate for them to be treated by licensed dentists that specialize in pediatric dentistry. Thus, in order to ensure such patients' safety, the rule has been revised to require applicants for certification through endorsement for this particular dental anesthesia certificate, to have experience in administering dental parenteral conscious (moderate) sedation to, at least, five live dental patients who are 13 years old and older with no such patients having had irreversible morbidity or mortality due to the sedation provided by the applicant.

Section 61.10(c)(2)(v)(c) has been revised to require applications for certification through endorsement for the certificate in dental enteral conscious (moderate) sedation for patients 12 years old and younger to provide 15 anesthesia records of patients 12 years old and younger and five anesthesia records of patients 13 years old and older, that the applicant has administered enteral conscious (moderate) sedation in the licensed jurisdiction, within the three years immediately preceding the applicant's submission of his or her application to the Department for review. This change was made because some applicants for certification through endorsement for this certificate may regularly treat patients who are 13 years old and older, who may typically have some kind of developmental disability, which makes it more appropriate for them to be treated by licensed dentists that specialize in pediatric dentistry. Thus, in order to ensure such patients' safety, the rule has been revised to require applicants for certification through endorsement for this particular dental anesthesia certificate, to have experience in administering dental enteral conscious (moderate) sedation to, at least, five live dental patients who are 13 years old and older.

Section 61.10(c)(3)(i)(c) has been revised to clarify that for the renewal of certificates in dental general anesthesia, a licensed dentist must complete an additional 12 clock hours of education (exclusive of the ACLS and PALS requirements) in anesthesia/sedation techniques approved by an acceptable accrediting body and the Department, including, but not limited to, coursework in medications and recognition and management of complications and emergencies including rescue from deeper levels of sedation as may occur in both pediatric and adult patient populations.

Section 61.10(c)(3)(ii)(c) has been revised to clarify that for the renewal of certificates in dental parenteral conscious (moderate) sedation for patients 12 years old and younger, and dental enteral conscious (moderate) sedations for patients 12 years old and younger, the licensed dentists must successfully complete an additional 12 clock hours of education (exclusive of the ACLS and PALS requirements) in anesthesia/sedation techniques, approved by an acceptable accrediting body and the Department, including, but not limited to, coursework in medications and recognition and management of complications and emergencies including rescue from deeper levels of sedation as may occur in both the pediatric and adult patient populations.

Section 61.10(c)(3)(iii)(b) has been revised to clarify that for the renewal of certificates in dental parenteral and enteral conscious (moderate) sedation for patients 13 years old and older the licensed dentist must successfully complete an additional 12 clock hours of education (exclusive of the ACLS requirement) in anesthesia/sedation techniques, approved by an acceptable accrediting body and acceptable to and previously approved by the Department, including, but not limited to, coursework in medications

and recognition and management of complications and emergencies, including rescue from deeper levels of sedation as may occur in both the pediatric and adult patient populations.

Section 61.10(d)(4)(i)(a)(2) has been revised to clarify that one of the practice requirements for deep sedation or general anesthesia pre-operative preparation is consultation with the patient's physician, as appropriate, for patients ASA III (a patient with severe systemic disease, according to the American Association of Anesthesiologists patient physical status classification system) or greater, instead of requiring such consultation in all instances.

Section 61.10(d)(4)(i)(a)(7) has been revised to add the requirement that, in deep sedation or general anesthesia pre-operative preparation, when a patient's baseline vital signs cannot be obtained because the patient's behavior prohibits it, this fact must be noted in the time-oriented anesthesia record. This change was made because the Department determined that public protection would be furthered by requiring this information to be noted in the time-oriented anesthesia record.

Section 61.10(d)(4)(ii)(a)(2) has been revised to clarify that one of the practice requirements for conscious (moderate) sedation pre-operative preparation is consultation with the patient's physician, as appropriate, instead of requiring such consultation in all instances, for patients ASA III (a patient with severe systemic disease, according to the American Association of Anesthesiologists patient physical status classification system) or greater.

Section 61.10(d)(4)(ii)(a)(7) has been revised to add the requirement that, in conscious (moderate) sedation pre-operative preparation, when a patient's baseline vital signs cannot be obtained because the patient's behavior prohibits it, this fact must be noted in the time-oriented anesthesia record. This change was made because the Department determined that public protection would be furthered by requiring this information to be noted in the time-oriented anesthesia record.

Section 61.10(d)(8)(ii) has been revised to correct inadvertent typographical errors. The words "or" and "agents" were removed so that the revised language states: "In addition, a licensed dentist who completes twelve clock hours of education in anesthesia/sedation techniques for the renewal of a certification to administer conscious (moderate) enteral sedation, conscious (moderate) parenteral sedation, deep sedation or general anesthesia shall be required to maintain records documenting completion of such course work for six years from the completion of the coursework."

The effective dates of subdivisions (b) and (c) of section 61.10 have been revised from January 1, 2017 to January 1, 2018 in order to provide residency programs and post-graduate programs sufficient time to update their curriculum to comply with the regulation's requirements.

The effective dates of subdivisions (a) and (d) of section 61.10 have been revised from January 1, 2017 to July 1, 2017 in order to provide licensed dentists with dental anesthesia certification(s) sufficient time to comply with the regulation's practice requirements.

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

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on March 9, 2016, the proposed rule has been revised as set forth in the Statement Concerning the Regulatory Impact Statement.

The aforementioned revisions do not require any changes to the previously published Statement in Lieu of Regulatory Flexibility Analysis for Small Businesses and Local Governments.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on March 9, 2016, the proposed rule has been revised as set forth in the Statement Concerning the Regulatory Impact Statement.

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

Revised Job Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on March 9, 2016, the proposed rule has been revised as set forth in the Statement Concerning the Regulatory Impact Statement.

The proposed amendment to section 61.10 of the Regulations of the Commissioner of Education conforms the regulation to the current practice of dental anesthesia administration and improves the protection of the public by updating definitions, adding new certifications, deleting outdated references, and revising educational, training and practice requirements. The proposed revised rule relates to: (1) clinical experience requirements for applicants for the certificates for dental parenteral conscious (moderate) sedation for patients 12 years old and younger and dental enteral conscious (moderate) sedation for patients 12 years old and younger; (2) clinical experience requirements for applicants for certification through endorsement for the certificates in dental parenteral conscious (moderate) sedation for patients 12 years old and younger and dental enteral conscious (moderate) sedation for patients 12 years old and

younger; (3) the continuing education requirements for the renewal of certificates in dental general anesthesia, dental parenteral conscious (moderate) sedation for patients 12 years old and younger, dental enteral conscious (moderate) sedation for patients 12 years old and younger, dental parenteral conscious (moderate) sedation for patients 13 years old and older, and dental enteral conscious (moderate) sedation for patients 13 years old and older; (4) pre-operative consultation with the patient's physician practice requirements for deep sedation or general anesthesia and conscious (moderate) sedation; (5) time-oriented anesthesia record keeping requirements in deep or general anesthesia and conscious (moderate) sedation pre-operative preparation practice; (6) correction of typographical errors by removing the words "or" and "agents" from the educational record keeping requirements for the renewal of a certification to administer conscious (moderate) enteral sedation, conscious (moderate) parenteral sedation, and deep or general anesthesia; (7) copies of patient charts and time-oriented anesthesia records; and (8) the effective dates of the subdivisions of the proposed amendment.

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

Assessment of Public Comment

Since the publication of a Notice of Proposed Rule Making in the March 9, 2016 State Register, the State Education Department received the following comments:

1. COMMENT:

An association of dental surgeons submitted several comments in support of clarifying the term conscious sedation to mean moderate sedation, requiring certificate holders to have prerequisite educational coursework of at least 60 hours, requiring 12 hours of anesthesia related continuing education for permit renewal, requiring ACLS at every certificate level and PALS for pediatric sedation, reporting mortality or irreversible morbidity to SED within two days, and strengthening dentists' responsibility for patient discharge.

The association of dental surgeons feels strongly that end-tidal CO₂ monitoring should be required for all anesthetized patients, not just intubated ones as required by the proposal. The association does not agree that training in pediatric sedation should automatically qualify a certificate holder to perform adult sedation. The certificate should additionally require the necessary live adult cases (10 or 20) as a prerequisite. The association would like to see route of administration removed from certificate categories and they be solely based upon a level of sedation. The proposal should require a consult with the patient's physician for all ASA III class sedated patients. Any consult with the patient's physician should be left to the discretion of the dentist as stated in the ADA Anesthesia Guidelines. The association would like to see hours for ACLS/PALS courses count toward the 12 hours of continuing education necessary for renewal.

DEPARTMENT RESPONSE:

Due to the inconsistent efficacy of end-tidal CO₂ monitoring with an open airway, the Department determined that the anesthesia provider should have the discretion of using auscultation or end-tidal CO₂ monitoring for the purpose of monitoring ventilation during the administration of deep sedation or general anesthesia. During the administration of conscious (moderate) sedation, it was determined that the dentist must monitor ventilation by auscultation of breath sounds, monitoring end-tidal CO₂ or by verbal communication with the patient.

Most pediatric residencies involve the treatment of developmentally delayed patients, including adult patients. Many pediatric dentists continue to treat such patients into adulthood. The Department agrees with the commenter that adults and children present with different medical circumstances. Therefore, the Department has revised proposed section 61.10(c)(1) to require applicants for the certificates in parenteral and enteral conscious (moderate) sedation for patients 12 years old or younger to successfully complete a clinical experience involving the use of parental/enteral conscious (moderate) sedation by the respective routes on no fewer than 15 live dental patients who must be 12 years or younger and five live dental patients who must be 13 years old or older. Section 61.10(c)(2)(iii)(c) has also been revised to require applicants for certification through endorsement for the certificate in dental parenteral conscious (moderate) sedation for patients 12 years old and younger to provide 15 anesthesia records of patients 12 years old and younger and five anesthesia records of patients 13 years old and older, that the applicant has administered parenteral conscious (moderate) sedation (via the intravenous route) in the licensed jurisdiction. It is required that the anesthesia cases in these records be within the three years immediately preceding the applicant's submission of his or her application to the Department for review with no patients having had irreversible morbidity or mortality due to the sedation provided by the applicant. This replaces the current 20 anesthesia

records of patients 12 years old and younger. Additionally, section 61.10(c)(2)(v)(c) has been revised to require applications for certification through endorsement for the certificate in dental enteral conscious (moderate) sedation for patients 12 years old and younger to provide 15 anesthesia records of patients 12 years old and younger and five anesthesia records of patients 13 years old and older, that the applicant has administered enteral conscious (moderate) sedation in the licensed jurisdiction. It is required that the anesthesia cases in these records be within the three years immediately preceding the applicant's submission of his or her application to the Department for review. These revisions will help ensure the safety of patients 13 years and older, who are treated by licensed dentists seeking one or both of these certificates because it will require such dentists to submit clinical experience in successfully treating patients in this age group with the type of anesthesia they are seeking a certification in.

The Department does not feel that level of administration adequately protects the public. If the anesthesia certificates were issued via level, everyone with a certificate would have to be trained in both enteral and parenteral techniques. It is the opinion of the Department that the education process of teaching parenteral techniques, which includes the intravenous (IV) route of administration, is more extensive than the oral technique. This is due to the time it takes the student/resident to learn how to place an IV, titrate medications (this is not done with oral sedation) and so on. Many dentists want the option of providing sedation for their patients but do not want the additional training and liability which comes with administering parenteral sedation. This is evidenced by the 837 enteral certificates the Department has issued as of April 2016 compared to the 291 parenteral certificates which have been issued.

The Department has revised section 61.10(d)(4)(i)(a)(2) and 61.10(d)(4)(ii)(a)(2) to clarify that one of the practice requirements for deep sedation or general anesthesia and conscious (moderate) sedation pre-operative preparation is consultation with the patient's physician, as appropriate, instead of requiring such consultation in all instances, for patients ASA III (a patient with severe systemic disease, according to the American Association of Anesthesiologists patient physical status classification system) or greater.

With respect to the commenter's request that ACLS/PALS courses count toward the 12 hours of continuing education necessary for certificate renewal, it is the Department's position that requiring an additional 12 clock hours of education, exclusive of the ACLS/PALS requirements, furthers public protection because of the additional coursework licensed dentists will be required to take in order to renew their anesthesia certification(s). Sections 61.10(c)(3)(i)(c), 61.10(c)(3)(ii)(c), and 61.10(c)(3)(iii)(b) have also been revised to clarify that ACLS/PALS courses cannot be used to satisfy the 12 hours of continuing education necessary for certificate renewal. However, ACLS/PALS may be used toward the 60 continuing education hours required for triennial registration.

Section 61.10(d)(4)(i)(a)(7) and 61.10(d)(4)(ii)(a)(7) have been revised to add the requirement that, in deep sedation or general anesthesia and conscious (moderate) sedation pre-operative preparation, when a patient's baseline vital signs cannot be obtained because the patient's behavior prohibits it, this fact must be noted in the time-oriented anesthesia record.

2. COMMENT:

One commenter stated that any effort to make sedation dentistry unreasonably difficult to provide to patients will in the long run cause a lot more harm to patients who are too fearful to come to the dentist.

DEPARTMENT RESPONSE:

It is the Department's position that the proposed amendment to section 61.10 does not make the requirements for dental anesthesia certification and dental anesthesia administration "unreasonably difficult." The proposed amendment conforms the regulations to the current practice of dental anesthesia administration and improves the protection of the public, which should assist in alleviating some of the anxiety of dental patients.

3. COMMENT:

One commenter submitted several comments raising concerns about requiring ACLS or PALS for all levels of anesthesia. To improve patient safety, two things need to change: (1) increase airway management training at all levels; and (2) require a separate operator, with a general anesthesia permit to administer medications and monitor the unconscious dental patient. Most patients only require anxiolysis or conscious sedation for oral surgery, root canals and other dental procedures, which is "perfectly safe." Some patients want to be "out cold" and others are "unmanageable unless unconscious." This small percent of patients creates the most risk and there needs to be a cost effective way to have them treated in the hospital setting under general anesthesia or in an office with a dedicated anesthesia team and recovery process.

The commenter supports improving patient safety by prioritizing airway management.

DEPARTMENT RESPONSE:

The Department notes ACLS and PALS are specific courses which train healthcare providers how to react in specific situations. The course content

includes, but is not limited to, CPR and use of the automated external defibrillators (AEDs), physiology, ventilation, pharmacology and airway management. The initial coursework in each of these courses ranges from 10-14 hours. Dentists who treat patients 12 and younger must take both ACLS and PALS in order to qualify for a certificate. The airway management course is 5 hours. It is the opinion of the Department, based on research, that most of the information in the 5 hour airway course will be covered in the 10-14 hours of ACLS and PALS courses.

Additionally, the Department's Office of Professional Discipline's records do not contain evidence that would support the argument that any of the reported morbidity or mortality cases would have had different outcomes if a separate provider was administering the anesthesia at the time of the incident.

4. COMMENT:

An association of anesthesiologists submitted a comment recommending that the administration of general anesthesia for children two years old and younger be permitted only in an accredited hospital or an accredited ambulatory care setting.

DEPARTMENT RESPONSE:

The Department has not received any morbidity or mortality reports in children less than 2 years old, who have been administered general anesthesia in the course of dental treatment. The patients in this age group account for a very small portion of dental anesthesia which is administered each year. The lack of reports may, at least in part, be due to the fact that such patients are already being treated in an accredited hospital or an accredited ambulatory care center.

5. COMMENT:

One commenter suggested that the regulation should be summarized for each type of certificate holder separately, so Dentists can understand and comply with the regulations. Moderate sedation should be compared with light sedation (anxiolysis). Any patient provided a sedative drug along with Nitrous Oxide should be monitored with a pulse oximeter. It is unclear whether the regulation defines this as anxiolysis or moderate sedation, however this level of sedation should require training and a certificate. Capnography or monitoring breath sounds via auscultation results in better control and monitoring of the patient. Capnography is well documented as the standard for monitoring an intubated patient undergoing general anesthesia. There are some who feel that monitoring breath sounds in a moderately sedated patient is more accurate and provides a faster reaction time. Types of monitoring required should be clearly explained for each type of certificate and level of sedation.

The commenter further suggests requiring the American Heart Association's course on airway management (or equivalent) instead of ACLS.

DEPARTMENT RESPONSE:

The Department intends to provide a summary of the certificate requirements for each dental anesthesia certificate in guidance. The Department does not regulate minimal sedation or anxiolysis. Thus, the suggested comparison is unwarranted. The proposed regulation explains the type of ventilation monitoring that is required for each level/type of sedation. If the Department determines that there is a need for additional information regarding the type of ventilation monitoring that is required for each level/type of sedation, it may consider providing such additional information through guidance.

ACLS and PALS are specific courses which train healthcare providers how to react in specific situations. The course content includes, but is not limited to, CPR and use of the AEDs, physiology, ventilation, pharmacology and airway management. The initial coursework in each of these courses ranges from 10-14 hours. Dentists who treat patients 12 and younger must take both ACLS and PALS in order to qualify for a certificate. The airway management course is 5 hours. It is the opinion of the Department that most of the information in the 5 hour airway course will be covered in the 10-14 hours of ACLS and PALS courses.

Department of Environmental Conservation

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Sportfishing (Freshwater) and Associated Activities

I.D. No. ENV-39-16-00011-P

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

Proposed Action: Amendment of sections 10.2, 10.3, 10.7 and 10.9 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301, 11-0303, 11-0305, 11-0317, 11-1301, 11-1303, 11-1316 and 11-1319

Subject: Sportfishing (freshwater) and associated activities.

Purpose: To revise sportfishing regulations and associated activities.

Substance of proposed rule (Full text is posted at the following State website: www.dec.ny.gov): The purpose of this rule making is to amend the Department of Environmental Conservation's (department) general regulations governing sportfishing (6 NYCRR Part 10). Following biennial review of the department's fishing regulations, department staff have determined that the proposed amendments are necessary to maintain or improve the quality of the State's fisheries resources. Changes to sportfishing regulations are intended to promote optimum opportunity for public use consistent with resource conservation. The following is a summary of the amendments that the department is proposing. Proposed changes include:

Great Lakes related proposals:

Clarify that St. Lawrence River tributaries in Franklin and Clinton counties are exempt from Great Lakes regulations.

Define the portion of Cattaraugus Creek subject to Lake Erie and tributary fishing regulations from Lake Erie upstream to the Springville Dam.

Expand the Lake Erie and tributaries 20 inch minimum size limit 1 fish daily limit black bass regulation to December 1 through the Friday before the third Saturday in June.

Improved language for interpreting combined trout and salmon creel limit in Lake Ontario.

Reduce the daily limit from 5 to 3 northern pike for St. Lawrence River and define boundary between Lake Ontario and the St. Lawrence River.

Clarification of boundary between Lake Ontario and the Salmon River. Provide an exception allowing access for fishing to the closed section of the Salmon River on Salmon River Hatchery property by permit.

Walleye, black bass and northern pike related proposals:

Establish an 18 inch minimum size limit and daily creel limit of 3 walleye for Titicus Reservoir (Westchester County); Sacandaga Lake and tributaries and outlet and Lake Pleasant and tributaries (Hamilton County); Kiwassa Lake, St. Regis Falls Impoundment, and Little Wolf Pond (Franklin County); Putnam Pond (Essex County); Cazenovia and De-Ruyter lakes (Madison County); Waterport Reservoir (Orleans County); Rio Reservoir (Orange and Sullivan counties); East Sidney Reservoir (Delaware County); Taghkanic Lake (Columbia County); Canadarago Lake (Otsego County); and additional portions of the Seneca River (Cayuga, Onondaga, Seneca and Wayne counties).

Eliminate 18 inch minimum size limit and daily creel limit of 3 walleye in Chautauqua Lake (Chautauqua County) and Franklin Falls Flow (Essex County).

Clarify that the 22 inch minimum size 5 fish daily limit for northern pike regulation applies to the Wayne County portion of the Seneca River.

Clarify that statewide black bass regulations apply to the Hamilton County portion of Fourth Lake.

Eliminate the special regulation for black bass in the Hamilton County portion of the Hudson River.

Trout and salmon related proposals:

Decrease the minimum size limit for trout at Colgate Lake (Greene County) from 12 to 9 inches.

Eliminate special trout regulation on Whey Pond (Franklin County).

Eliminate the special regulation for landlocked salmon for Piseco Lake (Hamilton County).

Decrease the minimum size length for lake trout in Woodhull Lake (Herkimer County) from 21 to 18 inches.

Change the end time anglers are allowed to fish Spring Creek on the Caledonia State Fish Hatchery property from 4:00 PM to 3:30 PM.

Eliminate the 9 inch minimum size limit for trout in the Carmans River (Suffolk County) in Southaven County Park as well as the catch and release section of the Carmans River for brown and rainbow trout.

Reduce the number of brown trout and rainbow trout that can be kept as part of a 5 fish daily limit in Skaneateles Lake to no more than 3 of either species.

Reduce the allowable daily harvest of brown trout and rainbow trout from 5 of each to 3 of each and increase the allowable daily harvest of lake trout from 3 to 5 as part of the 5 in any combination daily limit regulation for trout, lake trout, and landlocked salmon at Cayuga and Owasco lakes.

Increase the minimum size limit for rainbow trout from 9 to 15 inches at Owasco, Skaneateles and Otisco Lake tributaries.

Gear and use of gear related proposals:

Eliminate the allowance for spearing bullheads and suckers in all Cayuga, Oswego and Wayne county tributaries to Lake Ontario.

Allow for the taking of suckers by snatching (but not blind snatching) from January 1 through March 15 in specific portions of the Otselic and Tiohgnioa rivers in Cortland County.

Eliminate the allowance for lake whitefish snatching and blind snatching at Piseco Lake in Hamilton County.

Continue to restrict the number of devices allowed for ice fishing on Bigsby and Copperas ponds (Essex County), Upper Saranac Lake (Franklin County), and Fawn Lake (Hamilton County).

Allow for ice fishing in Rushford Lake in Allegany County.

Re-open Crane Pond (Essex County) to ice fishing.

Baitfish and non-game fish related proposals:

Remove the prohibition on the use or possession of smelt in Lake George and allow for harvest of smelt by angling.

Clarify that taking and possessing sauger and mooneye is prohibited in Lake Champlain.

Fishing prohibited related proposals:

Prohibit fishing at any time on Buttermilk Creek from mouth to Fox Valley Road Bridge.

Close two short sections of Fish Creek and Indian River in St. Lawrence County to fishing from March 16th until the opening of walleye season.

Close a section of the Grasse River in St. Lawrence County to all fishing from March 16th until the opening of walleye season.

Clarify the portion of the Bouquet River that is closed to fishing at any time.

Eliminate the angling and dipnetting prohibited regulation on Dutch Hollow Brook in Cayuga County.

Several additional amendments are included, not as substantive regulation modifications, but as removal of duplicate regulations or making structural changes to make the regulations easier to modify in the future:

The redundant statewide black bass regulation was removed from Otisco Lake.

The duplicate listing of landlocked salmon was removed from the Lake George and tributaries regulation in Essex County.

Seven Finger Lakes were specifically listed instead of listing them as "All Finger Lakes except..."

The Fishing Regulations for Finger Lakes table were broken up into clauses for each row to add structure to the table.

The Special regulations for Lake Erie, Lake Ontario, Niagara River and St. Lawrence River table was broken up into clauses for each water body in the table to add structure to the table.

Text of proposed rule and any required statements and analyses may be obtained from: Gregory Kozlowski, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8896, email: greg.kozlowski@dec.ny.gov

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

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

Additional matter required by statute: A Programmatic Impact Statement pertaining to these actions is on file with the Department of Environmental Conservation.

Regulatory Impact Statement

1. Statutory Authority

Section 3-0301 of the Environmental Conservation Law (ECL) establishes the general functions, powers and duties of the Department of Environmental Conservation (department) and the Commissioner, including general authority to adopt regulations. Sections 11-0303 and 11-0305 of the ECL authorize the department to provide for the management and protection of the State's fisheries resources, taking into consideration ecological factors, public safety, and the safety and protection of private property. Section 11-0317 of the ECL empowers the department to adopt regulations, after consultation with the appropriate agencies of the neighboring states and the Province of Ontario, establishing open seasons, minimum size limits, manner of taking, and creel and seasonal limits for the taking of fish in the waters of Lake Erie, Lake Ontario, the Niagara River and the St. Lawrence River. Sections 11-1301 and 11-1303 of the ECL empower the department to fix by regulation open seasons, size and catch limits, and the manner of taking of all species of fish, except certain species of marine fish (listed in section 13-0339 of the ECL), in all waters of the State. Section 11-1316 of the ECL empowers the department to designate by regulation waters in which the use of baitfish is prohibited. Section 11-1319 of the ECL governs possession of fish taken in waters of the State.

2. Legislative Objectives

Open seasons, size restrictions, daily creel limits, and restrictions regarding the manner of taking fish are tools used by the department in achieving the intent of the legislation referenced above. The purpose of setting seasons is to prevent over-exploitation of fish populations during vulnerable periods, such as spawning, thereby ensuring a healthy population. Size limits are necessary to maintain quality fisheries and to ensure that adequate numbers survive to spawning age. Creel limits are used to distribute the harvest of fish among many anglers and optimize resource benefits. Catch and release fishing regulations are used in waters

capable of sustaining outstanding growth and providing a large population of desirable-sized fish, creating an outstanding opportunity for anglers willing to forego harvesting fish.

Regulations governing the manner of taking fish upgrade the quality of the recreational experience, provide for a variety of harvest techniques and angler preferences, limit exploitation, and guard against unethical practices such as “snagging”. Restrictions pertaining to the collection and use of baitfish are necessary for protecting against the spread of fish disease and the introduction of undesirable fish species and adversely impacting remote native trout populations.

3. Needs and Benefits

Most significant fishery resources in New York State are monitored through annual or periodic surveys and inventories, conducted by Bureau of Fisheries staff and DEC partners such as Cornell University and SUNY ESF. These fisheries surveys identify particular situations where changes in fishing regulations may be required to maintain the quality of a particular fishery or where significant opportunity for improvement or enhancement of the fishery exists. Additional regulation changes are prompted by the recommendation of user groups or the need to correct or clarify existing regulations. Concepts for regulation amendments that address identified needs are developed by Bureau of Fisheries staff and reviewed with sportsmen’s groups at the local, regional, or state-wide level, depending upon the significance of the proposal.

In order to facilitate compliance by the angling public, significant revisions of the department’s fishing regulations are currently conducted on a biennial schedule. The proposed amendments are necessary to maintain or improve the quality of the State’s fisheries resources, including as described above (#2 Legislative Objectives Section). Changes to sportfishing regulations are intended to promote optimum opportunity for public use consistent with resource conservation.

4. Costs

Enactment of the rules and regulations described herein governing fishing will not result in increased expenditures by the State, local governments, or the general public.

5. Local Government Mandates

These amendments of 6 NYCRR will not impose any programs, services, duties or responsibilities upon any county, city, town, village, school district, or fire district.

6. Paperwork

No additional paperwork will be required as a result of these proposed changes in regulations.

7. Duplication

There are no other State or federal regulations which govern the taking of freshwater sportfish. The proposed regulations also eliminate any duplication or conflicts with existing DEC regulations. Specifically, the proposal to clarify that the Great Lakes regulations, as outlined by section 10.2, do not apply to St. Lawrence River tributaries in Franklin and Clinton County will eliminate existing conflicting regulations. These tributaries do not have Pacific salmon runs and do not require the same special regulations that tributaries having Pacific salmon runs require. The current wording states that “statewide regulations apply” to the tributaries in Franklin and Clinton counties; however, this conflicts with the special regulations found in 10.3. The proposed change eliminates this conflict and treats the St. Lawrence River tributaries in Franklin and Clinton counties the same as any other waterbody in the state where statewide regulations apply unless an overriding special regulation is in place.

8. Alternatives

A no-action alternative would not likely improve fish communities, increase sportfishing opportunity, or wisely allocate New York’s fisher resources. In order to maintain or improve the quality of the State’s fishery resources, and the recreational opportunity the resource provides to New York’s anglers, significant revisions of the department’s fishing regulations are conducted on a biennial schedule. Making modifications every two years ensures that regulations are current with management findings and provides the opportunity to eliminate special regulations that were evaluated and found to be ineffective in meeting their intended objective.

9. Federal Standards

There are no minimum federal standards that apply to the regulation of sportfishing.

10. Compliance Schedule

These regulations, if adopted, will be in effect starting April 1, 2017. It is anticipated that regulated persons will be able to immediately comply with these regulations once they take effect.

Regulatory Flexibility Analysis

The purpose of this rule making is to amend and update the Department of Environmental Conservation’s (department) general regulations governing sportfishing. These amendments were developed as a result of the department’s biennial review of existing sportfishing regulations. Changes to these regulations are intended to promote optimum opportunity for public use consistent with resource conservation.

The department has determined that the proposed regulations will not impose an adverse impact or any new or additional reporting, record-keeping or other compliance requirements on small businesses or local governments. All reporting or record-keeping requirements associated with sportfishing are administered by the department. Since small businesses and local governments have no management or compliance role in the regulation of sport fisheries, there is no impact upon these entities. Small businesses may, and town or village clerks do issue fishing and sportsman licenses. However, the department’s rule making proposal does not change this process.

Fishing guides, and tackle/baitfish shops (to some extent), are the only business entities directly affected and impacted by changes to regulations pertaining to sport fishing. However, the actions proposed in this rule making (e.g. adjustments to season dates, bag limits, minimum size limits, gear restrictions etc.) are not measures that result in an overall loss of angling opportunities or diminish opportunities for taking fish. Therefore, while guide businesses may need to adjust techniques and schedules to comply with the proposed regulations, these businesses should not lose clientele as a result or otherwise be adversely impacted by the changes. Commercial baitfish operators are not expected to be adversely impacted. In fact, positive impacts are anticipated for these businesses because the proposed regulations would enhance the likelihood that angling opportunities will remain high and sustainable for future anglers and fishing-related businesses.

Based on the above, the department has determined that a regulatory flexibility analysis is not required.

Finally, Chapter 524 of the New York Laws of 2011 is not applicable as this proposed rule making does not establish or modify a violation or a penalty associated with a violation.

Rural Area Flexibility Analysis

The purpose of this rule making is to amend and update the Department of Environmental Conservation’s (department) general regulations governing sportfishing. These amendments were developed as a result of the department’s biennial review of existing sportfishing regulations. Changes to these regulations are intended to promote optimum opportunity for public use consistent with resource conservation.

The department has determined that the proposed rules will not impose an adverse impact or any new or additional reporting, record-keeping, or other compliance requirements on public or private entities in rural areas. All reporting or record-keeping requirements associated with sportfishing are administered by the department. The proposed regulations are not anticipated to negatively change the number of participants or the frequency of participation in regulated activities.

Fishing guides, and baitfish/tackle shop (to some extent), are the only entities directly affected and impacted by changes to regulations pertaining to sport fishing. However, the actions proposed in this rule making (e.g. adjustments to season dates, bag limits, minimum size limits, gear restrictions, etc.) are not measures that result in an overall loss of angling opportunities or diminish opportunities for taking fish. Therefore, while guide businesses may need to adjust techniques and schedules to comply with the proposed regulations, these businesses should not lose clientele as a result or otherwise be adversely impacted by the changes. Commercial baitfish operators are not expected to be adversely impacted. In fact, positive impacts are anticipated for these businesses because the proposed regulations would enhance the likelihood that angling opportunities will remain high and sustainable for future anglers and fishing-related businesses.

Small businesses may, and town or village clerks do issue fishing and sportsman licenses. However, the department’s rule making proposal does not change this process.

Since the department’s proposed rule making will not impose an adverse impact on public or private entities in rural areas and will have no effect on current reporting, record-keeping, or other compliance requirements, the department has concluded that a rural area flexibility analysis is not required for this regulatory proposal.

Job Impact Statement

The purpose of this rule making is to amend and update the Department of Environmental Conservation’s (department) general regulations governing sportfishing. These amendments were developed as a result of the department’s biennial review of existing sportfishing regulations. Changes to these regulations are intended to promote optimum opportunity for public use consistent with resource conservation.

Fishing guides, and baitfish/tackle shops (to some extent), are the only business entities directly affected and impacted by changes to regulations pertaining to sport fishing. However, the actions proposed in this rule making (e.g. adjustments to season dates, bag limits, minimum size limits, gear restrictions, etc.) are not measures that result in an overall loss of angling opportunities or diminish opportunities for taking fish. Therefore, while guide businesses may need to adjust techniques and schedules to

comply with the proposed regulations, these businesses should not lose clientele as a result or otherwise be adversely impacted by the changes, and no fishing guide jobs should be lost. Commercial baitfish operators are not expected to be adversely impacted. In fact, positive impacts are anticipated for these businesses because the proposed regulations would enhance the likelihood that angling opportunities will remain high and sustainable for future anglers and fishing-related businesses.

Based on the above, the department has concluded that the proposed regulatory changes will not have an adverse impact on jobs or employment opportunities in New York, and that a job impact statement is not required.

Department of Financial Services

EMERGENCY RULE MAKING

Establishment and Operation of Market Stabilization Mechanisms for Certain Health Insurance Markets

I.D. No. DFS-39-16-00001-E

Filing No. 845

Filing Date: 2016-09-09

Effective Date: 2016-09-09

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

Action taken: Amendment of Part 361 of Title 11 NYCRR.

Statutory authority: Financial Law, sections 202 and 302; Insurance Law, sections 301, 1109 and 3233

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

Specific reasons underlying the finding of necessity: Insurance Law § 3233 requires the Superintendent of Financial Services ("Superintendent") to promulgate regulations to ensure an orderly implementation and ongoing operation of the open enrollment and community rating requirements in Insurance Law § 3231 and 4317, applicable to small groups and individual health insurance policies and contracts, including member contracts under Article 44 health maintenance organizations ("HMOs") and Medicare Supplemental policies and contracts. The regulations may include mechanisms designed to share risks or prevent undue variations in issuer claims costs. Pursuant to this mandate, the Superintendent promulgated 11 NYCRR 361 (Insurance Regulation 146), under which the Department established risk adjustment for community rated small group and individual health insurance and Medicare Supplemental policies and contracts. Subsequently, the federal Affordable Care Act ("ACA") required the Center for Medicare and Medicaid Services to administer a risk adjustment program for the individual and small group health insurance markets, but not for Medicare Supplemental policies and contracts. A state may establish its own risk adjustment program pursuant to 45 C.F.R. § 153.310(a)(1). In addition, a U.S. Health and Human Services interim final rule, dated May 11, 2016, invites states to examine local approaches under state legal authority to help ease the transition to new health insurance markets. See 81 Fed. Reg. at 29152. Starting with plan year 2014, the Superintendent suspended New York's risk adjustment program for individual and small group health insurance markets because of the ACA, and New York's individual and small group health insurance markets since have been subject only to the federal program.

This rule establishes a market stabilization pool for the small group health insurance market for the 2017 plan year to ameliorate a possible disproportionate impact that federal risk adjustment may have on insurers and HMOs (collectively, "carriers"), address the needs of the small group health insurance market in New York, and prevent unnecessary instability in the health insurance market.

Carriers soon will begin binding coverage for policies written outside of the health exchange. In addition, New York State of Health, the official health insurance marketplace, has set September 9, 2016 as the date by which carriers must commit to selling certain policies or contracts on the health exchange. In order to implement the rule for the 2017 plan year and to minimize market issues, it is imperative that this rule be promulgated on an emergency basis for the general welfare.

Subject: Establishment and Operation of Market Stabilization Mechanisms for Certain Health Insurance Markets.

Purpose: To allow for the implementation of a market stabilization pool for the small group health insurance market.

Text of emergency rule: The title of Part 361 is amended to read as follows:

ESTABLISHMENT AND OPERATION OF MARKET STABILIZATION MECHANISMS FOR [INDIVIDUAL AND SMALL GROUP] CERTAIN HEALTH INSURANCE [AND MEDICARE SUPPLEMENT INSURANCE] MARKETS

The title of Section 361.6 is amended to read as follows:

Section 361.6 Pooling of variations of costs attributable to high cost claims beginning in 2006 through 2013 for individual and small group policies, other than Medicare supplement and Healthy New York policies.

Section 361.9 is added to read as follows:

Section 361.9 Market stabilization pools for the small group health insurance market for the 2017 plan year.

(a)(1) The superintendent has been assessing the federal risk adjustment program developed under the federal Affordable Care Act and its impact on the health insurance market in this State. In its simplest terms, the federal risk adjustment program requires that carriers whose insureds or members have relatively better loss experience pay into the risk adjustment pool and those with relatively worse experience receive payment from that pool. The broad purpose of the risk adjustment program is to balance out the experience of all carriers.

(2) In certain respects, however, the calculations for the federal risk adjustment program do not take into account certain factors, resulting in unintended consequences. The department has been working cooperatively with the Department of Health and Human Services and the Centers for Medicare and Medicaid Services (CMS) on risk adjustment. Recently, CMS has announced certain changes to the methodology. CMS has also stated that it will continue to review the methodology in the future.

(3) The federal risk adjustment program has led to a situation in which some carriers in this State are receiving large payments out of the risk adjustment program that are paid by other carriers. For many of these other carriers, the millions to be paid represent a significant portion of their revenue. The money transfers among carriers in this State under the federal risk adjustment program have been among the largest in the nation.

(4) CMS's changes and planned reviews are much appreciated and anticipated. The superintendent will continue to work with CMS and hopes that over time the federal risk adjustment program will be improved so that it fully meets its intended purposes. The federal risk adjustment methodology as applied in this State does not yet adequately address the impact of administrative costs and profit of the carriers and how this State counts children in certain calculations. These two factors are identifiable, quantifiable and remediable for the 2017 plan year in the small group market.

(5) This section applies only to risk adjustment experience in the small group health insurance market for the 2017 plan year to be applied to payments and receipts in 2018. The department will continue its review of the federal risk adjustment program and its impact on the individual and small group health insurance markets in this State. Among other issues, the department will continue to examine whether federal risk adjustment adequately accounts for demographic regional diversity in this State, as well as whether federal risk adjustment dissuades carriers from using networks and plan designs that seek to integrate care and deliver value. The superintendent will take all necessary and appropriate action to address the impact on both markets in the future.

(b)(1) The superintendent anticipates that the federal risk adjustment program will adversely impact the small group health insurance market in this State in 2017 to such a degree as to require a remedy. Several factors are expected to cause the adverse impact, including:

(i) the federal risk adjustment program results in inflated risk scores and payment transfers in this State because the calculation is based in part upon a medical loss ratio computation that includes administrative expenses, profits and claims rather than only using claims; and

(ii) the federal risk adjustment program results in inflated risk scores and payment transfers in this State because the program does not appropriately address this State's rating tier structure. For this State, the federal risk adjustment program alters the definition of billable member months to include a maximum of one child per contract in the billable member month count. This understatement of billable member month counts: (a) lowers the denominator of the calculation used to determine the statewide average premium and plan liability risk scores; (b) results in the artificial inflation of both the statewide average premium and plan liability risk scores; and (c) further results in inflated payments transfers through the federal risk adjustment program.

(2) Accordingly, if, for the 2017 plan year, the superintendent determines that the federal risk adjustment program has adversely impacted the small group health insurance market in the State and that amelioration is necessary, the superintendent shall implement a market stabilization pool for carriers participating in the small group health insurance market, other than for Medicare supplement insurance, pursuant

to subdivision (e) of this section to ameliorate the disproportionate impact that the federal risk adjustment program may have on carriers, to address the unique aspects of the small group health insurance market in this State, and to prevent unnecessary instability for carriers participating in the small group health insurance market in this State, other than for Medicare supplement insurance.

(c) As used in this section, small group health insurance market means all policies and contracts providing hospital, medical or surgical expense insurance, other than Medicare supplement insurance, covering one to 100 employees.

(d) Following the annual release of the federal risk adjustment results for the 2017 plan year, the superintendent shall review the impact of the federal risk adjustment program established pursuant to 42 U.S.C. section 18063 on the small group health insurance market in this State for that plan year.

(e) If, after reviewing the impact of the federal risk adjustment program on the small group health insurance market in this State for the 2017 plan year, including payment transfers, the statewide average premiums, and the ratio of claims to premiums, the superintendent determines that a market stabilization mechanism is a necessary amelioration, the superintendent shall implement a market stabilization pool in such market as follows:

(1) every carrier in the small group health insurance market that is designated as a receiver of a payment transfer from the federal risk adjustment program shall remit to the superintendent an amount equal to a uniform percentage of that payment transfer for the market stabilization pool. The uniform percentage shall be calculated as the percentage necessary to correct any one or more of the adverse market impact factors specified in subdivision (b)(1) of this section. The uniform percentage shall be determined by the superintendent based on reasonable actuarial assumptions and shall not exceed 30 percent of the amount to be received from the federal risk adjustment program;

(i) the superintendent shall send a billing invoice to each carrier required to make a payment into the market stabilization pool after the federal risk adjustment results are released pursuant to 45 CFR section 153.310(e);

(ii) each carrier shall remit its payment to the superintendent within ten business days of the later of its receipt of the invoice from the superintendent or receipt of its risk adjustment payment from the Secretary of the United States Department of Health and Human Services pursuant to 42 U.S.C. section 18063; and

(iii) payments remitted by a carrier after the due date shall include the amount due plus compound interest at the rate of one percent per month, or portion thereof, beyond the date the payment was due; and

(2) for the 2017 plan year:

(i) every carrier in the small group health insurance market that is designated as a payor of a payment transfer into the federal risk adjustment program shall receive from the superintendent an amount equal to the uniform percentage of that payment transfer, referenced in paragraph (1) of this subdivision, from the market stabilization pool;

(ii) the superintendent shall send notification to each carrier of the amount the carrier will receive as a distribution from the market stabilization pool after the federal risk adjustment results are released; and

(iii) the superintendent shall make a distribution to each carrier after receiving all payments from payors. However, nothing in this section shall preclude the superintendent from making a distribution prior to receiving all payments from payors.

(f) The superintendent may modify the amounts determined in subdivision (e) of this section to reflect any adjustments resulting from audits required under 45 CFR section 153.630.

(g) In the event the payments received by the superintendent pursuant to subdivision (e)(1) of this section are less than the amounts payable pursuant to subdivision (e)(2) of this section, the amount payable to each carrier pursuant to this section shall be reduced proportionally to match the funds available in the pool.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 7, 2016.

Text of rule and any required statements and analyses may be obtained from: Laura Evangelista, NYS Department of Financial Services, One State Street, New York, NY 10004, (212) 480-4738, email: Linda.Evangelista@dfs.ny.gov

Regulatory Impact Statement

1. Statutory authority: Financial Services Law §§ 202 and 302 and Insurance Law §§ 301, 1109, and 3233.

Financial Services Law § 202 establishes the office of the Superintendent of Financial Services (“Superintendent”). Financial Services Law § 302 and Insurance Law § 301, in material part, authorize the Superintendent to effectuate any power accorded to the Superintendent by the

Financial Services Law, Insurance Law, or any other law, and to prescribe regulations interpreting the Insurance Law.

Insurance Law § 1109 subjects health maintenance organizations (“HMOs”) complying with Public Health Law Article 44 to certain sections of the Insurance Law and authorizes the Superintendent to promulgate regulations effecting the purpose and provisions of the Insurance Law and Public Health Law Article 44.

Insurance Law § 3233 requires the Superintendent to promulgate regulations to assure an orderly implementation and ongoing operation of the open enrollment and community rating requirements in Insurance Law §§ 3231 and 4317, which may include mechanisms designed to share risks or prevent undue variations in insurer claims costs.

2. Legislative objectives: Insurance Law § 3233 requires the Superintendent to promulgate regulations to assure an orderly implementation and ongoing operation of the open enrollment and community rating requirements in Insurance Law §§ 3231 and 4317, applicable to small group and individual health insurance policies and contracts, including member contracts under Article 44 HMOs and Medicare Supplement policies and contracts. The regulations may include mechanisms designed to share risks or prevent undue variations in claims costs. A risk adjustment program is intended, in part, to reduce or eliminate premium differences between insurers and HMOs (collectively, “carriers”) based solely on expectations of favorable or unfavorable risk selection.

Pursuant to this mandate, the Superintendent promulgated 11 NYCRR 361 (Insurance Regulation 146), under which the Department established risk adjustment for community rated small group and individual health insurance and Medicare Supplement policies and contracts. Subsequently, the federal Affordable Care Act (“ACA”) required the Center for Medicare and Medicaid Services (“CMS”) to administer a risk adjustment program for the individual and small group health insurance markets, but not for Medicare Supplement policies and contracts. A state may establish its own risk adjustment program pursuant to 45 C.F.R. § 153.310(a)(1). In addition, a U.S. Health and Human Services (“HHS”) interim final rule, dated May 11, 2016, invites states to examine local approaches under state legal authority to help ease the transition to new health insurance markets. See 81 Fed. Reg. at 29152. Starting with policy year 2014, the Superintendent suspended New York’s risk adjustment program for individual and small group health insurance markets because of the ACA, and New York’s individual and small group health insurance markets since have been subject only to the federal program.

This rule accords with the public policy objectives that the Legislature sought to advance in Insurance Law § 3233 by establishing market stabilization pools for the small group health insurance market for the 2017 plan year to ameliorate a possible disproportionate impact that federal risk adjustment may have on carriers, address the unique aspects of the small group health insurance market in New York, and prevent unnecessary instability in the health insurance market.

3. Needs and benefits: In the early 1990s, the New York Legislature enacted Insurance Law § 3233 because it recognized the need for a mechanism to stabilize the health insurance markets and premium rates in New York so that premiums do not unduly fluctuate and carriers are reasonably protected against unexpected significant shifts in the number of insureds. More recently, the federal government recognized in the ACA that a federal risk adjustment mechanism would help provide affordable health insurance, reduce incentives for carriers to avoid enrolling less healthy people, and stabilize premiums in the individual and small group health insurance markets.

Prior to implementation of the ACA in 2014, the New York Department of Financial Services (“Department”), after consultation with carriers, concluded New York should use the federal risk adjustment program and the Superintendent suspended New York’s risk adjustment program for the individual and small group health insurance markets. CMS conducted risk adjustment in 2014 and announced preliminary risk adjustment results for plan year 2015 in April 2016. These results have had a disproportionate impact on certain carriers in the New York market as a whole.

CMS has proposed changes to its programs and may make additional changes. The Superintendent will continue to work with CMS and hopes that by the 2018 plan year the federal risk adjustment program will be improved to better accomplish its intended purposes. However, the federal risk adjustment methodology does not yet adequately address the impact of administrative costs or profit of the carriers, or the manner in which New York counts children in certain calculations. These factors are identifiable, quantifiable and remediable for the 2017 plan year. The Superintendent anticipates that the federal risk adjustment program will adversely impact the small group health insurance market in this State in 2017 to such a degree as to require a remedy. Many factors are expected to cause the adverse impact, including:

(1) the federal risk adjustment program results in inflated risk scores and payment transfers in this State because the calculation is based in part

upon a medical loss ratio computation that includes administrative expenses, profits and claims rather than only using claims; and

(2) the federal risk adjustment program results in inflated risk scores and payment transfers in this State because the program does not appropriately address this State's rating tier structure. For New York, the federal risk adjustment program alters the definition of billable member months to include a maximum of one child per contract in the billable member month count. This understatement of billable member month counts: (a) lowers the denominator of the calculation used to determine the statewide average premium and plan liability risk scores; (b) results in the artificial inflation of both the statewide average premium and plan liability risk scores; and (c) further results in inflated payments transfers through the federal risk adjustment program.

This rule authorizes the Superintendent to implement a market stabilization pool for the New York small group health insurance market if, after reviewing the impact of the federal risk adjustment program on this market for the 2017 plan year, the Superintendent determines that a market stabilization mechanism is a necessary amelioration.

The rule requires a carrier designated as a receiver of a payment transfer from the federal risk adjustment program to remit to the Superintendent an amount equal to a uniform percentage of that payment transfer for the market stabilization pool. The Superintendent will determine the uniform percentage based on reasonable actuarial assumptions, which may not exceed 30% of the amount to be received from the federal risk adjustment program. Department actuaries considered the fact that (1) the federal risk adjustment program calculates risk scores and payment transfers based in part upon a medical loss ratio computation that includes administrative expenses, profits, and claims, and (2) it does not appear to fully address New York's rating tier structure. The actuaries determined that up to 30% of the amount to be received from the federal risk adjustment program is the maximum amount that would be necessary for a payment transfer under this rule.

The market stabilization mechanism under the rule is distinct from the federal risk adjustment and will provide a more accurate representation of the state's market. The state mechanism would merely fine-tune the federal mechanism to address the needs of the New York market, not serve to undo the federal mechanism. It would not hinder or impede the ACA's implementation because the federal risk adjustment still would be performed. A carrier is able to comply with both the federal risk adjustment program and this state's market stabilization mechanism because the state risk adjustment would be implemented after the federal risk adjustment.

4. Costs: This rule imposes compliance costs on carriers that elect to issue policies or contracts subject to the rule. The costs are difficult to estimate and will vary from carrier to carrier depending on the impact of the federal risk adjustment program on the market, including federal payment transfers, statewide average premiums, and the ratio of claims to premiums.

The Department will incur costs for the implementation and continuation of this rule. Department staff are needed to review the impact that the federal risk adjustment program will have on the market. Furthermore, if the Superintendent implements a market stabilization pool, the Department must then send a billing invoice to each carrier required to make a payment into the pool, collect the payments, notify each carrier of the amount the carrier will receive from the market stabilization pool, and distribute the payments from the pool. However, the Department should be able to absorb these costs in its ordinary budget. Under § 361.7 of the existing rule, the Superintendent also could hire a firm to administer the pool. The cost necessary to hire such a firm would have to be determined.

This rule does not impose compliance costs on state or local governments.

5. Local government mandates: This rule does not impose any program, service, duty, or responsibility upon a county, city, town, village, school district, fire district, or other special district.

6. Paperwork: This rule requires carriers designated as receivers of a payment transfer from the federal risk adjustment program to remit a uniform percentage of that payment transfer to the Superintendent as determined by the Superintendent. The rule also requires the Superintendent to send a billing invoice to each carrier required to make a payment, collect the payments, notify each carrier of the amount the carrier will receive from the market stabilization pool, and make distributions from the pool to the carriers.

7. Duplication: This rule does not duplicate or conflict with any existing state or federal rules or other legal requirements. The rule supplements the federal risk adjustment mechanism under the ACA and merely serves to fine-tune that risk adjustment to meet the needs of the New York market.

8. Alternatives: The Department considered not establishing a market stabilization pool for the small group health insurance market for the 2017 plan year. However, the Department is concerned about the disproportionate impact that federal risk adjustment may have on carriers in the New

York market and possible unnecessary instability in the health insurance market that would adversely impact insureds. As a result, the Department determined that it is necessary to establish a market stabilization pool for the small group health insurance market.

The Department also considered a cap of other than 30% of the amount to be received from the federal risk program, with regard to the uniform percentage of the payment transfer for the market stabilization pool under this rule. However, Department actuaries considered the fact that (1) the federal risk adjustment program calculates risk scores and payments transfers based in part upon a medical loss ratio computation that includes administrative expenses, profits, and claims, and (2) it does not appear to fully address New York's rating tier structure. The actuaries determined that up to 30% of the amount to be received from the federal risk adjustment program is the maximum amount that would be necessary for a payment transfer under this rule.

9. Federal standards: The rule does not exceed any minimum standards of the federal government for the same or similar subject areas. Rather, the amendment to the rule complements the federal risk adjustment program.

10. Compliance schedule: The Department is promulgating this rule on an emergency basis so that the Superintendent may establish a New York risk adjustment pool for plan year 2017 if the Superintendent determines that it will be necessary following CMS's annual release of the federal risk adjustment results for the 2017 plan year. If the Superintendent does establish the pool, carriers will have to comply in 2018.

Regulatory Flexibility Analysis

Small businesses: The Department of Financial Services finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping, or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at insurers and health maintenance organizations ("HMOs") that elect to issue policies or contracts subject to the rule. Such insurers and HMOs do not fall within the definition of "small business" as defined by State Administrative Procedure Act § 102(8), because in general they are not independently owned and do not have fewer than 100 employees.

Local governments: The rule does not impose any impact, including any adverse impact, or reporting, recordkeeping, or other compliance requirements on any local governments. The basis for this finding is that this rule is directed at insurers and HMOs that elect to issue policies or contracts subject to the rule.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Insurers and health maintenance organizations ("HMOs") (collectively, "carriers") affected by this rule operate in every county in this state, including rural areas as defined by State Administrative Procedure Act § 102(10).

2. Reporting, recordkeeping and other compliance requirements; and professional services: The rule imposes additional reporting, recordkeeping, and other compliance requirements by requiring carriers, including carriers located in rural areas, designated as receivers of a payment transfer from the federal risk adjustment program, to remit a uniform percentage of that payment transfer to the Superintendent of Financial Services ("Superintendent") as determined by the Superintendent. However, no carrier, including carriers in rural areas, should need to retain professional services to comply with this rule.

3. Costs: This rule imposes compliance costs on carriers that elect to issue policies or contracts subject to the rule, including carriers in rural areas. The costs are difficult to estimate and will vary from carrier to carrier depending on the impact of the federal risk adjustment program on the market, including federal payment transfers, statewide average premiums, and the ratio of claims to premiums. However, any additional costs to carriers in rural areas should be the same as for carriers in non-rural areas.

4. Minimizing adverse impact: This rule uniformly affects carriers that are located in both rural and non-rural areas of New York State. The rule should not have an adverse impact on rural areas.

5. Rural area participation: The Department of Financial Services ("Department") is promulgating this rule on an emergency basis because carriers soon will begin binding coverage for policies written outside of the health exchange. In addition, the New York State of Health, the official health insurance marketplace, has set September 9, 2016 as the date by which carriers must commit to selling certain policies or contracts on the health exchange. In order to implement the rule for the 2017 plan year and to minimize market issues, it is imperative that this rule be promulgated on an emergency basis. Carriers in rural areas will have an opportunity to participate in the rule making process when the proposed rule is published in the State Register and posted on the Department's website.

Job Impact Statement

This rule should not adversely impact jobs or employment opportunities in New York State. This rule authorizes the Superintendent of Financial Services ("Superintendent") to implement a market stabilization pool for the small group health insurance market if, after reviewing the impact of the

federal risk adjustment program on this market, the Superintendent determines that a market stabilization mechanism is a necessary amelioration. This rule prudently ameliorates a possible disproportionate impact that federal risk adjustment may have on insurers and health maintenance organizations, addresses the needs of the small group health insurance market in New York, and prevents unnecessary instability in the health insurance market.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Charges for Professional Health Services

I.D. No. DFS-39-16-00007-P

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

Proposed Action: Amendment of section 68.6 (Regulation 83) of Title 11 NYCRR.

Statutory authority: Financial Services Law, sections 202 and 302; Insurance Law, sections 301, 2601, 5221 and art. 51

Subject: Charges for Professional Health Services.

Purpose: Limit reimbursement of no-fault health care services provided outside NYS to highest fees in fee schedule for services in NYS.

Text of proposed rule: Section 68.6 is amended to read as follows:

Section 68.6 Health services performed outside New York State.

(a)(1) If a professional health service reimbursable under [section 5102(a)(1) of the] Insurance Law *section 5102(a)(1)* is performed outside [New York] this State, the [permissible charge] amount that the insurer shall reimburse for [such] the service shall be the prevailing fee in the geographic location of the provider with respect to services:

(i) that constitute emergency care;

(ii) provided to an eligible injured person that is not a resident of this State, or

(iii) provided to an eligible injured person that is a resident of this State who is outside this State for a continuous period of at least fourteen days for reasons unrelated to the treatment.

(2) For purposes of this subdivision, *emergency care means all medically necessary treatment of a traumatic injury or a medical condition manifesting itself by acute symptoms of sufficient severity such that absence of immediate attention could reasonably be expected to result in: death; serious impairment to bodily functions; or serious dysfunction of a bodily organ or part. Emergency care shall include all medically necessary care immediately following an automobile accident, including immediate pre-hospitalization care, transportation to a hospital or trauma center, emergency room care, surgery, critical and acute care. Emergency care extends during the period of initial hospitalization until the patient is discharged from acute care by the attending physician. Emergency care shall be presumed when medical care is initiated at a hospital within 120 hours of the accident.*

(b) If a professional health service reimbursable under Insurance Law *section 5102(a)(1)* is performed outside this State with respect to an eligible injured person that is a resident of this State, the amount that the insurer shall reimburse for the service, except as provided in subdivision (a) of this section, shall be the fee set forth in the region of this State that has the highest value in the fee schedule for such services.

(c) Notwithstanding anything else in this subdivision, an insurer shall not reimburse an amount for a service that exceeds the amount that the provider is legally permitted to charge under the laws of the jurisdiction where the services are provided.

Text of proposed rule and any required statements and analyses may be obtained from: Hoda Nairooz, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 480-5595, email: hoda.nairooz@dfs.ny.gov

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

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

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

Regulatory Impact Statement

1. Statutory authority: Sections 202 and 302 of the Financial Services Law, and Sections 301, 2601, 5221, and Article 51 of the Insurance Law.

Insurance Law Section 301 and Financial Services Law Sections 202 and 302 authorize the Superintendent of Financial Services (the "Superintendent") to prescribe regulations interpreting the provisions of the Insurance Law, and effectuate any power granted to the Superintendent under the Insurance Law.

Insurance Law Section 2601 prohibits insurers from engaging in unfair claim settlement practices and requires insurers to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.

Insurance Law Section 5221 specifies the duties and obligations of the Motor Vehicle Accident Indemnification Corporation with respect to the payment of no-fault benefits to qualified persons.

Article 51 of the Insurance Law contains the provisions authorizing the establishment of a no-fault reparations system for persons injured in motor vehicle accidents, and Section 5108 specifically authorizes the Superintendent to adopt or promulgate fee schedules for health care benefits payable under the no-fault system.

2. Legislative objectives: Chapter 892 of the Laws of 1977 recognized the necessity of establishing schedules of maximum permissible charges for professional health services payable as no-fault insurance benefits in order to contain the costs of no-fault insurance. To that end, in accordance with Insurance Law section 5108(b), the Superintendent adopted those fee schedules that are promulgated by the Chairman of the Workers' Compensation Board (the "Chairman"). In addition, the Superintendent, after consulting with the Chairman and the Commissioner of Health, established fee schedules for those services for which schedules have not been prepared and established by the Chairman.

3. Needs and benefits: The current rule provides that the maximum permissible charge for health care services rendered outside this State to a person eligible for New York no-fault benefits shall be the prevailing fee in the geographic location of the provider. The proposed rule limits insurers' reimbursement of no-fault health care services provided outside the State at the election of a New York State eligible injured person to the fees set forth in the region of this State that has the highest value in the fee schedule for those services. An exception to the proposed amendment would be when the health care services constitute emergency care, are provided to an eligible injured person who does not reside in this State, or are provided to an eligible injured person who is a resident of this State and who is outside the State for a continuous period of at least 14 days for reasons unrelated to the treatment. In such cases, the current rule will continue to apply.

There has been no uniform interpretation of the prevailing fees outside the State. As a result, no-fault claimants are being referred to certain health care providers outside New York, usually in New Jersey, who take advantage of the absence of specific fee schedules and submit excessive charges under exaggerated claims, well above the corresponding New York State fee schedules applicable to those health care services rendered. Since basic personal injury protection coverage under no-fault is only \$50,000, the higher the bills, the sooner the injured person will find coverage exhausted. This results in no-fault benefits available to injured persons being depleted more quickly, to their detriment.

Representatives of both the insurance industry and the medical profession have conveyed to the Department that amending the current regulation is necessary in order to close these loopholes that have resulted in increased no-fault claim bills. In addition, numerous arbitrators that serve on the Department's no-fault arbitration panel have indicated that this issue has generated a significant number of disputes due to the significant disparity between the excessive fees being charged by out of state health care providers and those permitted under the current rule. By setting a maximum fee that out-of-state health care providers may receive as reimbursement for no-fault-related health services, this amendment should lead to reduced arbitration and litigation costs for insurers and self-insurers, which are typically passed to consumers in the form of higher premiums, as well as help to stem the rapid depletion of no-fault benefits available to eligible injured persons.

4. Costs: This rule imposes no compliance costs upon state or local governments. However, the rule will impact out-of-state health care providers who will now be reimbursed for health services pursuant to the applicable fee schedule prescribed in the proposed rule.

5. Local government mandates: This rule does not impose any requirement upon a city, town, village, school district, or fire district. However, local governments who are self-insurers for no-fault coverage shall only be required to reimburse out-of-state health care providers at the rates prescribed in the proposed rule, rather than the subjective prevailing rate in the geographic location of the out-of-state provider.

6. Paperwork: This rule does not impose any additional paperwork on any persons affected by the rule.

7. Duplication: This rule will not duplicate any existing state or federal rule.

8. Alternatives: In order to effectuate the cost savings goals of New York's no-fault laws, the Department has determined that there are no other viable alternatives to this rule.

9. Federal standards: There are no minimum federal standards for the same or similar subject areas. The rule is consistent with federal standards or requirements.

10. Compliance schedule: The rule will be effective 90 days after publication of the notice of adoption in the State Register, so as to provide enough lead time for insurers, self-insurers and out-of-state licensed health care providers to obtain copies of the applicable fee schedule and implement the rule.

Regulatory Flexibility Analysis

The Department of Financial Services finds that this rule will not impose any adverse economic impact or compliance requirements on small businesses in this State. This rule impacts all no-fault insurers authorized to do business in New York State, self-insurers of no-fault benefits, and the Motor Vehicle Accident Indemnification Corporation, none of which falls within the definition of "small business" as defined in State Administrative Procedure Act Section 102(8) as being both independently owned and having less than one hundred employees. Likewise, this rule will not impose any adverse economic impact or compliance requirements on local governments that are self-insurers. Instead, the rule will limit the amount that those local governments will reimburse for no-fault-related health care services provided outside the State at the election of a New York State eligible injured person, and therefore is likely to reduce arbitration and litigation costs, which are typically passed to consumers in the form of higher premiums, as well as help to stem the rapid depletion of no-fault benefits available to eligible injured persons.

Rural Area Flexibility Analysis

The Department of Financial Services (the "Department") finds that this rule does not impose any additional burden on persons located in rural areas, and that it will not have an adverse impact on rural areas in New York State. This rule serves to limit the amount that insurers and self-insurers in New York State will reimburse for no-fault-related health care services provided outside the State at the election of a New York State eligible injured person, and therefore is likely to reduce arbitration and litigation costs, which are typically passed to consumers in the form of higher premiums, as well as help to stem the rapid depletion of no-fault benefits available to eligible injured persons.

Job Impact Statement

The Department of Financial Services finds that this rule should have no adverse impact on jobs and employment opportunities. This proposed rule limits reimbursement of no-fault health care services provided outside New York State to the fees set forth in the region of this State that has the highest value in the fee schedule for such services. This amendment should lead to reduced arbitration and litigation costs for insurers and self-insurers, which are typically passed to consumers in the form of higher premiums, as well as help to stem the rapid depletion of no-fault benefits available to eligible injured persons.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Cybersecurity Requirements For Financial Services Companies

I.D. No. DFS-39-16-00008-P

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

Proposed Action: Addition of Part 500 to Title 23 NYCRR.

Statutory authority: Financial Services Law, sections 102, 201, 202, 301, 302 and 408

Subject: Cybersecurity Requirements For Financial Services Companies.

Purpose: To require effective cybersecurity to protect consumers and ensure the safe and sound operation of Department-regulated entities.

Substance of proposed rule (Full text is posted at the following State website: <http://www.dfs.ny.gov>): The following is a summary of the proposed rule:

Section 500.0, "Introduction," introduces the proposed rule.

Section 500.01, "Definitions," defines terms used throughout the proposed rule.

Section 500.02, "Cybersecurity Program," requires that each Covered Entity establish and maintain a cybersecurity program designed to ensure the confidentiality, integrity and availability of its Information Systems.

Section 500.03, "Cybersecurity Policy," requires each Covered Entity to implement and maintain a written cybersecurity policy addressing specified areas and also sets forth the requirements for internal review and approval of that policy.

Section 500.04, "Chief Information Security Officer," requires that each Covered Entity designate a qualified individual to serve as CISO, and that the CISO develop a report, at least bi-annually, which shall be reviewed internally and which shall address specified cybersecurity issues.

Section 500.05, "Penetration Testing and Vulnerability Assessments," requires each Covered Entity's cybersecurity program to include annual penetration testing and a quarterly vulnerability assessment of the Covered Entity's Information Systems.

Section 500.06, "Audit Trail," requires that the cybersecurity program for each Covered Entity shall include implementing and maintaining audit trail systems that meet specified requirements.

Section 500.07, "Access Privileges," requires that each Covered Entity shall limit access privileges to Information Systems that provide access to Nonpublic Information solely to those individuals who require such access and that the Covered Entity shall periodically review such privileges.

Section 500.08, "Application Security," requires that each Covered Entity's cybersecurity program include written procedures and standards designed to ensure the use of secure development practices for in-house developed applications, and procedures for assessing and testing the security of externally developed applications, and also requires that such procedures and standards be reviewed, assessed and updated at least annually.

Section 500.09, "Risk Assessment," requires each Covered Entity to perform, at least annually, a risk assessment encompassing, among other things, evaluation, categorization and mitigation of risks, and to document the risk assessment in writing.

Section 500.10, "Cybersecurity Personnel and Intelligence," requires each Covered Entity to employ sufficient cybersecurity personnel, provide for and require such personnel to attend regular cybersecurity training, and require key cybersecurity personnel to stay abreast of changing cybersecurity threats and countermeasures.

Section 500.11, "Third Party Information Security Policy," requires each Covered Entity to develop policies and procedures designed to ensure the security of its Information Systems and Nonpublic Information accessible to, or held by, third parties doing business with the Covered Entity.

Section 500.12, "Multi-Factor Authentication," enumerates the circumstances in which a Covered Entity shall require Multi-Factor Authentication and in which a Covered Entity shall support Multi-Factor Authentication.

Section 500.13, "Limitations on Data Retention," requires each Covered Entity to have policies and procedures for the timely destruction of specified categories of Nonpublic Information.

Section 500.14, "Training and Monitoring," requires each Covered Entity to implement risk-based policies to monitor the activity of Authorized Users and detect unauthorized access or use of Nonpublic Information, and to provide for and require all personnel to attend regular cybersecurity awareness training sessions.

Section 500.15, "Encryption of Nonpublic Information," requires each Covered Entity to encrypt all Nonpublic Information held or transmitted by the Covered Entity both in transit and at rest; allows for the use of compensating controls for one year for Nonpublic Information in transit, if encryption of such is infeasible; and allows for the use of compensating controls for five years for Nonpublic Information at rest, if encryption of such is infeasible.

Section 500.16, "Incident Response Plan," requires each Covered Entity to establish a written incident response plan designed to promptly respond to, and recover from, a Cybersecurity Event.

Section 500.17, "Notices to Superintendent," requires each Covered Entity to submit to the Superintendent a written statement by January 15, certifying that the Covered Entity is in compliance with the requirements set forth in the proposed rule; to maintain for examination by the Department all records, schedules and data supporting the certificate for a period of five years; to notify the superintendent of any Cybersecurity Event that has a reasonable likelihood of materially affecting the normal operation of the Covered Entity or that affects Nonpublic Information; and to document the identification of areas that require material improvement, updating or redesign, as well as planned remedial efforts; in addition, to the extent that a Covered Entity has identified any material risk of imminent harm to its Information System from a Cybersecurity Event, the Covered Entity should notify the Superintendent within 72 hours and include such event in its annual report filed pursuant to this section.

Section 500.18, "Limited Exemption," provides that Covered Entities that have less than the specified number of customers, gross annual revenue, and year-end total assets shall be exempt from the requirements of the proposed rule other than the requirements enumerated in Section 500.18; and that a Covered Entity that ceases to qualify for the limited exemption must comply with all requirements of the proposed rule.

Section 500.19, "Enforcement," provides that the proposed rule will be enforced pursuant to, and is not intended to limit, the Superintendent's authority under any applicable laws.

Section 500.20, "Effective Date," provides that the proposed rule will be effective January 1, 2017, and that Covered Entities will be required to annually prepare and submit a certification of compliance pursuant to Section 500.17 commencing January 15, 2018.

Section 500.21, "Transitional Period," provides that Covered Entities shall have 180 days from the effective date of the proposed rule to comply with its requirements, except as otherwise specified.

Section 500.22, "Severability," states that in the event a specific provision of the proposed rule is adjudged invalid, such judgment will not impair the validity of the remainder of the proposed rule.

Text of proposed rule and any required statements and analyses may be obtained from: Cassandra Lentchner, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1675, email: CyberRegComments@dfs.ny.gov

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

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

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

Regulatory Impact Statement

1. **Statutory Authority:** In Section 102 of the New York Financial Services Law (the "Financial Services Law" or "FSL"), the legislature declares that the purpose of the FSL is "to ensure the continued safety and soundness of New York's banking, insurance and financial services industries, as well as the prudent conduct of the providers of financial products and services, through responsible regulation and supervision." Pursuant to FSL Section 201, the Department of Financial Services (the "Department") has broad authority to take such actions as are necessary to ensure the continued solvency, safety, soundness and prudent conduct of the providers of financial products and services; to protect users of financial products and services from financially impaired or insolvent providers of such services; and to eliminate financial fraud, other criminal abuse and unethical conduct in the industry. Further, FSL Section 301 gives the Department broad power "to protect users of financial products and services." In addition, FSL Section 302 provides the Department with equally broad authority to adopt regulations relating to "financial products and services," which are broadly defined in the Financial Services Law to mean essentially any product or service offered by a Department-regulated entity. Accordingly, the Department has ample authority to adopt the proposed rule.

Other statutory authority includes: FSL Sections 202 and 408.

2. **Legislative Objectives:** The Financial Services Law is intended to ensure the safe and sound operation of the financial system. Cybercriminals present an ever-growing threat to that system. They can cause significant financial losses for Department-regulated entities and for New York consumers who use the products and services of those entities. In addition, the private information of such consumers may be revealed and/or stolen by cybercriminals for illicit purposes. The proposed rule is intended to ensure that all financial services providers regulated by the Department have and maintain cybersecurity programs that meet certain minimum cybersecurity standards in order to protect consumers and continue operating in a safe and sound manner.

3. **Needs and Benefits:** The proposed rule is necessary to ensure that Department-regulated entities are effectively addressing ever-growing cybersecurity risks in order to protect consumers and continue operating in a safe and sound manner.

4. **Costs:** All Department-regulated entities will be responsible for ensuring that they are in compliance with the proposed rule, which will impose some costs on their operations. The proposed rule provides for a limited exemption for certain smaller entities, based on each entity's number of customers, gross annual revenue, and year-end total assets. Entities that qualify for this limited exemption will be required to comply with only a limited number of sections in the proposed rule; thus, the costs of compliance for such entities is likely to be lower.

It is also anticipated that the costs of compliance will be offset to varying degrees when, as a result of complying with the proposed rule, entities avoid or mitigate cyber attacks that might otherwise have caused financial and other losses.

There should be no costs to any local governments as a result of the proposed rule.

5. **Local Government Mandates:** The proposed amendments do not impose any new programs, services, duties or responsibilities on local government.

6. **Paperwork:** The proposed rule requires entities to maintain a written cybersecurity policy and other written cybersecurity procedures and plans; to develop cybersecurity reports for presentation to the entity's board or a senior officer; to submit to the superintendent an annual certification of compliance with the proposed rule; and to keep books and records documenting compliance.

Entities that qualify for the limited exemption have fewer written policy and record-keeping requirements.

7. **Duplication:** Part 421 of Title 11 of the New York Codes, Rules and Regulations, promulgated in conformance with the federal Gramm-Leach-

Bliley Act, requires insurance entities to implement a comprehensive written information security program. To a very limited extent, the proposed rule overlaps with Part 421, but the proposed rule includes requirements that are far more specific than Part 421 in order to achieve more robust cybersecurity coverage and to ensure that the Department's regulated entities have and maintain cybersecurity programs that meet certain minimum cybersecurity standards in order to protect consumers and continue operating in a safe and sound manner. Notably, Section 6807(b) of the Gramm-Leach-Bliley Act allows states to implement a statute, regulation, order, or interpretation affording protections that are greater than those listed in the Gramm-Leach-Bliley Act.

8. **Alternatives:** None.

9. **Federal Standards:** As noted earlier, see "Duplication," above, the proposed rule will, in some respects, exceed minimum standards established by the federal Gramm-Leach-Bliley Act. The Department believes that the proposed rule is not inconsistent with the federal Gramm-Leach-Bliley Act. Indeed, the proposed rule includes requirements that are more specific than those in the federal Gramm-Leach-Bliley Act in order to achieve more robust cybersecurity coverage and to ensure that the Department's regulated entities protect consumers and continue operating in a safe and sound manner. Section 6807(b) of the Gramm-Leach-Bliley Act allows states to implement a statute, regulation, order, or interpretation affording protections that are greater than those listed in the Gramm-Leach-Bliley Act.

10. **Compliance Schedule:** Regulated entities will have 180 days from the effective date of the proposed rule to comply with its requirements, except as otherwise specified. The proposed rule will be effective January 1, 2017. Covered Entities will be required to annually prepare and submit to the Superintendent a certification of compliance under Section 500.17 commencing January 15, 2018.

Regulatory Flexibility Analysis

1. **Effect of the Rule:** The proposed rule applies to all Department-regulated entities, but certain small businesses may qualify for a limited exemption provided for in Section 500.18 of the proposed rule. Those entities that qualify for the limited exemption – those that fall below the minimum specified number of customers, gross annual revenue, and year-end total assets – shall be exempt from the requirements of the proposed rule other than the requirements enumerated in Section 500.18.

The proposed rule does not apply to local governments and will not impose any adverse economic impact or any reporting, recordkeeping or other compliance requirements on local governments.

2. **Compliance Requirements:** Small businesses that do not qualify for the limited exemption found in Section 500.18 will be subject to all of the requirements of the proposed rule. If a small business does qualify for the limited exemption, such small business will be subject only to Sections 500.02, 500.03, 500.07, 500.09, 500.11, 500.13, 500.17, 500.18, 500.19, 500.20, and 500.21 of the proposed rule.

3. **Professional Services:** A small business will not necessarily need any professional services to comply with the proposed rule. However, under the proposed rule, a Department-regulated entity that is a small business (or any other Department-regulated entity) that does not qualify for the limited exemption under Section 500.18 may use a third party service provider as its Chief Information Security Officer.

The proposed rule does not apply to local governments.

4. **Compliance Costs:** Like all businesses subject to the proposed rule, small businesses will be responsible for ensuring that they are in compliance with the proposed rule, which will impose some costs on their operations. The Department believes that the need for compliance outweighs such costs.

5. **Economic and Technological Feasibility:** The Department believes it will be economically and technologically feasible for small businesses to comply with the requirements of the proposed rule.

6. **Minimizing Adverse Impact:** To minimize any adverse economic impact of the proposed rule on small businesses, the Department has included the limited exemption for smaller entities (Section 500.18 of the proposed rule). If a small business qualifies for the limited exemption, it will be subject to fewer compliance requirements.

7. **Small Business and Local Government Participation:** The proposed rule will be published publicly, including on the Department's website, for notice and comment, which will provide small businesses with the opportunity to participate in the rule making process.

The proposed rule does not impact local governments.

Rural Area Flexibility Analysis

1. **Types and Estimated Numbers of Rural Areas:** Entities subject to the requirements of the proposed rule operate throughout this state, including in rural areas.

2. **Reporting, Recordkeeping and Other Compliance Requirements:** Professional Services: Entities subject to the proposed rule will be required to keep and maintain accurate books and records, be subject to examina-

tions, and provide an annual certification to the superintendent certifying compliance with the requirements set forth in the proposed rule.

3. **Costs:** Entities subject to the proposed rule will be responsible for ensuring that they are in compliance with the proposed rule, which will impose some costs on their operations. The costs are not expected to be any higher for entities in rural areas than for any other entity subject to the proposed rule.

4. **Minimizing Adverse Impact:** The proposed rule is not expected to have an adverse impact on public or private sector interests in rural areas. The proposed rule is specifically tailored to the pressing need of addressing cybersecurity risks for Department-regulated entities; it is likely to have a positive impact on interests in rural areas as the proposed rule protects consumer data and protects financial services firms that provide services to consumers.

5. **Rural Area Participation:** The proposed rule will be published publicly, including on the Department’s website, for notice and comment, which will provide public and private interests in rural areas with the opportunity to participate in the rule making process.

Job Impact Statement

A Job Impact Statement is not being submitted because it is apparent from the nature and purposes of new Part 500 to 23 NYCRR that this proposed rulemaking will not have a substantial adverse impact on jobs and/or employment opportunities.

Department of Health

EMERGENCY RULE MAKING

Zika Action Plan; Performance Standards

I.D. No. HLT-39-16-00003-E

Filing No. 848

Filing Date: 2016-09-12

Effective Date: 2016-09-12

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 through 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 *Aedes 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:*

(i) *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 an emergency adoption, to be valid for 90 days or less. This rule expires December 10, 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

Statutory Authority:

Article 6 of the Public Health Law (PHL) sets forth the statutory framework for the Department’s State Aid program, which partially reimburses local health departments (LHDs) for eligible expenses related to specified public health services. PHL §§ 602(4), 603(1), and 619 authorize the commissioner to promulgate rules and regulations to effectuate the provisions of PHL Article 6. PHL § 619 specifies that such regulations

shall include establishing standards of performance for core public health services and for monitoring performance, collecting data, and evaluating the provision of such services.

Legislative Objectives:

PHL Article 6 establishes a program that provides State Aid to LHDs to partially reimburse the cost of core public health services, including communicable disease control and emergency preparedness and response.

Needs and Benefits:

Zika virus is newly emerging as a worldwide threat to public health, and it is spreading widely in the Western Hemisphere. 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 Guillain-Barré Syndrome, which can cause muscle weakness and sometimes paralysis. For these reasons, in February 2016, the World Health Organization declared the recent cluster of microcephaly and other neurological abnormalities associated with in utero exposure to the 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 through 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 2,300 patients, and 55 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 these infections have occurred in returning travelers from countries with active mosquito-borne transmission of Zika virus.

In the Western Hemisphere, the Zika virus has been primarily transmitted by a mosquito bite from the species *Aedes aegypti*. That species is not currently established in New York State; however, a related species of mosquito, *Aedes albopictus*, is established in New York City, as well as Orange, Nassau, Putnam, Rockland, Suffolk, and Westchester Counties. Additionally, Dutchess, Sullivan, and Ulster Counties are located on the northern border of these affected areas.

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 the Department and LHDs take action to protect the health and safety of all New Yorkers from the Zika virus.

LHDs are integral State partners and play important roles in human disease monitoring, response and control; health education and prevention; and mosquito trapping, testing, habitat inspection, 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 mosquitoes capable of transmitting Zika virus within their borders. However, those counties that do have mosquitoes capable of transmitting Zika virus generally have large human populations and a high number of travelers to affected areas.

Accordingly, these 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*, or other mosquitoes capable of transmitting the Zika virus, 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*, or other mosquitoes capable of transmitting the Zika virus, additional required activities include: enhanced human disease monitoring and disease control; enhanced education about Zika virus and its prevention; mosquito trapping, testing and habitat inspection specific to *Aedes albopictus*, or other mosquitoes capable of transmitting the Zika virus; mosquito control; and identification and commitment of appropriate 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.

Costs:

Although exact costs cannot be predicted at this time, the Department does not expect compliance to result in significant costs with respect to plan development, which can be achieved using existing staff. Preparation time will vary according to the demographics of the jurisdiction served by the LHD. However, the cost of these personnel hours is expected to be greatly outweighed by the benefit to public health. LHDs may incur costs including salaries and related expenditures associated with ongoing human disease monitoring, response and control, as well as public education activities and programs.

Those LHDs identified by the Department as jurisdictions where mosquitoes capable of transmitting the Zika virus are currently located or may be located in the future may incur additional costs, including salaries and related expenditures associated with mosquito trapping, testing, and habitat inspections as well as expenditures related to mosquito control, to the extent such counties are not already performing these activities.

Local Government Mandates:

Although compliance is not strictly mandatory, the adoption, implementation, and annual updating of a ZAP is a condition of State Aid for general public health work. As set forth in the regulation, the activities that must be performed to be eligible for State Aid vary by county, and are described in detail below.

By April 15, 2016 all LHDs must electronically transmit a ZAP to the Department that describes how they will conduct timely education, as well as human disease monitoring and reporting of Zika virus.

For those LHDs identified by the Department as jurisdictions where mosquitoes capable of transmitting the Zika virus are currently located or may be located in the future, their ZAP must include processes and procedures for:

- (1) enhanced human disease monitoring, response and control;
- (2) enhanced education to the public and health care providers regarding the possibility of local Zika virus transmission and the risk to pregnant women;
- (3) mosquito trapping, testing, and habitat inspections;
- (4) mosquito control plans tailored to local needs; and
- (5) names, roles and contact information of LHD and/or county staff that will join the state-coordinated rapid response teams.

Paperwork:

This regulation requires preparation of a ZAP to respond to an emergency threat to public health.

Duplication:

No relevant rules or legal requirements of the Federal and State governments duplicate, overlap or conflict with this rule.

Alternatives:

The alternative would be to continue a situation in which there is inconsistent approaches across the State with respect to monitoring and control of the spread of the Zika virus.

Federal Standards:

The rule does not exceed any minimum standards of the Federal government for the same or similar subject area.

Compliance Schedule:

The regulation became effective upon filing the Emergency Adoption with the Department of State on March 17, 2016. However, LHDs will have until April 15, 2016 to adopt and implement the ZAP.

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments:

Local health departments (LHDs) will be required to develop Zika Action Plans (ZAPs).

Compliance Requirements:

These regulations apply exclusively to local governments. Accordingly, please refer to the Regulatory Impact Statement.

Professional Services:

In response to the mosquito control plan requirement, those LHDs identified by the Department as jurisdictions where mosquitoes capable of transmitting the Zika virus are currently located, or may be located in the future, may need to obtain the services of a commercial pesticide applicator.

Compliance Costs:

The Department does not expect compliance to result in significant costs. Compliance can be achieved using existing staff. Preparation time will vary according to the demographics of the jurisdiction served by the LHD. However, the cost of these personnel hours is expected to be greatly outweighed by the benefit to public health.

Economic and Technology Feasibility:

The proposed regulatory changes will not impose any new technology requirements or costs, or otherwise pose feasibility concerns.

Minimizing Adverse Impact:

No adverse impacts have been identified.

Small Business and Local Government Input:

Because of the emergency nature of these regulations, local government input has not been solicited.

Cure Period:

Chapter 524 of the Laws of 2011 requires agencies to include a "cure period" or other opportunity for ameliorative action to prevent the imposition of penalties on the party or parties subject to enforcement under the proposed regulation. Zika virus represents a significant threat to public health, and the regulation provides the appropriate time for LHDs to adopt and implement their ZAPs. Hence, no cure period is necessary.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for these amendments is not being submitted because amendments will not impose any adverse impact or

significant reporting, record keeping or other compliance requirements on public or private entities in rural areas. There are no professional services, capital, or other compliance costs imposed on public or private entities in rural areas as a result of the proposed amendments.

Job Impact Statement

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial adverse impact on jobs and/or employment opportunities.

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

Non-Prescription Emergency Contraceptives Drugs

I.D. No. HLT-39-16-00031-P

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

Proposed Action: Amendment of section 505.3 of Title 18 NYCRR.

Statutory authority: Public Health Law, section 201(1)(v); Social Services Law, sections 363-a(2) and 367-a(9)(b)

Subject: Non-prescription Emergency Contraceptives Drugs.

Purpose: Allow pharmacies to dispense non-prescription emerg. contraceptive drugs for Medicaid female recipients without a written order.

Text of proposed rule: Paragraph (1) of subdivision (b) of Section 505.3 is amended to read as follows:

(1) Drugs may be obtained only upon the written order of a practitioner, except for *non-prescription emergency contraceptive drugs as described in subparagraph (i) of this paragraph, and for telephone and electronic orders for drugs filled in compliance with this section and 10 NYCRR Part 910.*

(i) Non-prescription emergency contraceptive drugs for females may be obtained without a written order subject to a utilization frequency limit of 6 courses of treatment in any 12-month period.

[(i)] (ii) The ordering/prescribing of drugs is limited to the practitioner’s scope of practice.

[(ii)] (iii) The ordering/prescribing of drugs is limited to practitioners not excluded from participating in the medical assistance program.

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

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

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

Regulatory Impact Statement

Statutory Authority:
Social Services Law (SSL) section 363-a and Public Health Law section 201(1)(v) provide that the Department is the single state agency responsible for supervising the administration of the State’s medical assistance (“Medicaid”) program and for adopting such regulations, not inconsistent with law, as may be necessary to implement the program. In addition, SSL section 365-a(4) authorizes the Department to adopt regulations specifying certain non-prescription drugs that will be covered under the Medicaid program.

Legislative Objectives:
Section 365-a of the SSL provides for Medicaid coverage of medically necessary medical, dental and remedial care, services and supplies, to the extent that such coverage is authorized in the State Medicaid statutes or in the regulations of the Department.

Needs and Benefits:
The proposed amendments would restore a provision, inadvertently removed from 18 NYCRR § 505.3(b) by a previous regulatory amendment, allowing coverage of non-prescription emergency contraceptive drugs without a written order.

In addition to changing the regulatory language to once again reflect a Medicaid coverage policy that has been in effect since 2007, the proposed amendments would conform to case law and to guidelines issued by the Food and Drug Administration and the Centers for Medicare and Medicaid Services, making non-prescription emergency contraceptive drugs available without age or point-of-sale restrictions.

As a result of the unintentional removal of language from the regulation, paragraph (1) of section 505.3(b) currently provides Medicaid coverage only for drugs obtained upon the written order of a practitioner. The proposed regulation would amend paragraph (1) to restore the exception

to this rule with respect to non-prescription emergency contraceptive drugs. In addition, the proposed regulation would renumber subparagraphs (i) and (ii) of paragraph (1) as (ii) and (iii), respectively, and add a new subparagraph (i) to specify that coverage of non-prescription emergency contraceptive drugs for females is subject to a utilization frequency limit of 6 courses of treatment in any 12-month period.

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

There are no direct costs associated with compliance.
Costs to State and Local Government:
This amendment will not increase costs to the State or local government. The proposed amendment would merely conform the regulation to existing policy.

Local Government Mandates:
The proposed regulation imposes no new mandates on any county, city, town or village government; or school, fire or other special district.

Paperwork:
The Department of Health anticipates no additional record keeping requirements.

Duplication:
The proposed regulation does not duplicate, overlap or conflict with any other state or federal law or regulations.

Alternatives:
Because the existing regulation does not conform to current Medicaid policy, as a result of the unintentional removal of language from the regulation in a previous amendment, no alternatives were considered.

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

Compliance Schedule:
The proposed amendment will become effective upon promulgation.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is required pursuant to section 202-(b)(3)(a) of the State Administrative Procedure Act. The proposed amendment pertains to a covered benefit under the State’s Medicaid program. It would not impose an adverse economic impact on small businesses or local governments, and it would not impose reporting, record keeping or other compliance requirements on small businesses or local governments.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for the proposed amendments is not being submitted because the amendments would not impose any adverse impact or significant reporting, record keeping or other compliance requirements on public or private entities in rural areas. There would be no professional services, capital, or other compliance costs imposed on public or private entities in rural areas as a result of the proposed amendments.

Job Impact Statement

A Job Impact Statement is not required. The proposed rule will not have an adverse impact on jobs and employment opportunities based upon its nature and purpose. The proposed regulations will allow non-prescription emergency contraceptive drugs to be obtained without a written order. The proposed regulations have no implications for job opportunities.

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

Expanded Syringe Access Program

I.D. No. HLT-39-16-00032-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 section 80.137 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 3308(2)

Subject: Expanded Syringe Access Program.

Purpose: To eliminate the word “demonstration”.

Text of proposed rule: Section 80.137 is amended as follows:

80.137 Expanded syringe access [demonstration] program.

- (a) Definitions. * * *
- (b) Registration. * * *

(4) The registration form must include, at a minimum, the following information:

* * *

(ii) the name, address, telephone and electronic mail address, if available, of the individual designated by the authorized provider to have administrative responsibility for the provider's participation in the expanded syringe access [demonstration] program;

* * *

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

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

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

Consensus Rule Making Determination

Statutory Authority:

Public Health Law Section 3308 authorizes the commissioner "to make any rules, regulations and determinations which in his judgment may be necessary or proper to supplement the provisions of this article to effectuate the purposes and intent thereof or to clarify its provisions so as to provide the procedure or details to secure effective and proper enforcement of its provisions." Public Health Law Section 3381(4) authorizes the commissioner to "designate persons, or by regulation, classes of persons who may obtain hypodermic syringes and hypodermic needles without prescription and the manner in which such transactions may take place and the records thereof which shall be maintained."

Basis:

The proposed regulatory change is non-substantive and non-controversial. It eliminates the word "demonstration" in the title of the regulation as well as in one of its subdivisions. The word "demonstration" was initially included in the regulation solely because the program to which it pertained in Public Health Law Section 3381 was intended by the legislature to remain in effect only until September 1, 2011 pending an evaluation, the nature of which was incorporated in the Public Health Law. (Part G of Chapter 56 of the Laws of 2000, as amended by Part B of Chapter 58 of the Laws of 2007). The evaluation has long since been completed and submitted to the governor and legislature, and the Public Health Law provision no longer contains a sunset provision. (Section 57-a of Part B of Chapter 58 of the Laws of 2009).

Job Impact Statement

No Job Impact Statement is required pursuant to section 201 a(2)(a) of the State Administrative Procedure Act. It is apparent from the nature of the proposed amendment that it will not have a substantial adverse impact on jobs and employment opportunities.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Clean Energy Standard

I.D. No. PSC-39-16-00012-P

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

Proposed Action: The Commission is considering a petition seeking rehearing of its August 1, 2016 Order Adopting a Clean Energy Standard filed on August 31, 2016 by Castleton Commodities International LLC and its affiliates Roseton Generating LLC and CCI Rensselaer LLC.

Statutory authority: Public Service Law, sections 4(1), 5(1)(2) and 66(2); Energy Law, section 6-104(5)(b)

Subject: Clean Energy Standard.

Purpose: To promote and maintain renewable and zero-emission electric energy resources.

Substance of proposed rule: The Public Service Commission is considering a petition filed on August 31, 2016 by Castleton Commodities International LLC and its affiliates Roseton Generating LLC and CCI Rensselaer LLC. (Castleton, et al.) that requests rehearing of the Commission's August 1, 2016 Order Adopting a Clean Energy Standard (CES Order). In the petition, Castleton, et al. claims the Commission (a) acted beyond the scope of its legislatively delegated authority; (b) acted in an area pre-empted by federal law; (c) imposed an unlawful burden on inter-

state commerce; and (d) failed to provide reasoned explanations for discriminating among sources of generation with reduced carbon attributes, for abandoning its commitment to competitive forces to manage the wholesale markets, and for how the Commission will administer the mixed reliance on competition and command and control regulation in the wholesale markets. Castleton, et al. argues that adoption of the ZEC program is outside the Commission's scope of authority as demonstrated by a number of factors. According to Castleton, et al. the ZEC Program is an explicit attempt by the Commission to weigh the competing social concerns of combating global warming against controlling the cost of electricity, but without any legislative guidance on how to balance those competing concerns. Castleton, et al. claims the ZEC Program and adoption of the Social Cost of Carbon is invalid because it is fundamentally focused on environmental concerns, which the Legislature has not delegated to the Commission and that it runs counter to a legislative goal. Castleton, et al. further argues that the novelty and disruptiveness of the ZEC program is further evidence the Commission acted beyond its authority. Castleton, et al. also claims that the Commission inappropriately intruded on an area of legislative debate as evidenced by the upstate nuclear fleet being a recurring topic of public discourse; the Governor's support for preservation of the upstate facilities and, the Legislature failure to address the issue through specific legislation. Finally, with regards to legislative authority, Castleton, et al. claims that the ZEC price formula inappropriately attempts to balance the social cost of carbon with the social cost of nuclear power generation and that such balancing is outside the Commission expertise. Castleton, et al. also argues that the CES Order incorrectly regulates the wholesale market for electricity which is exclusively within the jurisdiction of the Federal Energy Regulatory Commission (FERC). Castleton, et al. claims, that the ZEC Program directly inserts the Commission into the administration of the wholesale markets by: (a) modifying the prices received by the nuclear plants for wholesale sales; (b) directing LSE's as to what power resources to purchase from, in what quantities, and how much to pay for such power in the wholesale market; and (c) consequently interfering with the normal functioning of the wholesale markets for both capacity and energy. Castleton, et al. also claims the ZEC program is invalid because it burdens interstate commerce. According to Castleton, et al., the Commission ZEC Order inappropriately places a thumb of New York State on the scales of interstate commerce by compelling wholesale purchasers of electricity to buy a fixed amount of their power needs only from four upstate nuclear plants. Castleton, et al., argues that the terms of the ZEC program excludes from participation all out-of-state facilities simply based on their location. Castleton, et al. also characterizes the ZEC program as economic protectionism at its core. Castleton, et al. argues that the Commission also erred by failing to explain key aspects of the ZEC Order. Specifically, Castleton, et al. claims the Commission failed to explain (a) its divergence from existing policies and regulatory structures; (b) what the follow-on implications of that divergence will be; (c) how the Commission will reconcile the new paradigm facing wholesale market participants in New York with existing and, presumably, to-be-continued rules governing that market, and (d) the reasonableness or accuracy of the federal agencies' Social Cost of Carbon metric. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, NY 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, NY 12223, (518) 474-6530, email: kathleen.burgess@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(15-E-0302SP12)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Clean Energy Standard

I.D. No. PSC-39-16-00013-P

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

Proposed Action: The Commission is considering a petition seeking rehearing of its August 1, 2016 Order Adopting a Clean Energy Standard filed on August 31, 2016 by Brookfield Renewable Energy Group.

Statutory authority: Public Service Law, sections 4(1), 5(1)(2) and 66(2); Energy Law, section 6-104(5)(b)

Subject: Clean Energy Standard.

Purpose: To promote and maintain renewable and zero-emission electric energy resources.

Substance of proposed rule: The Public Service Commission is considering a petition filed on August 31, 2016 by Brookfield Renewable Energy Group (Brookfield) that requests rehearing of the Commission's August 1, 2016 Order Adopting a Clean Energy Standard (CES Order). Brookfield argues that the portions of the CES Order constitute legal and factual error which, in addition to new circumstances, warrant rehearing. Specifically, Brookfield argues that the Commission's determinations to continue a maintenance program which restricts eligibility to existing hydropower facilities of 5 MW or less and to exclude existing privately-owned hydropower facilities from the ZEC program are not supported by the record and legally insufficient. Brookfield claims that parties to the proceeding were not provided notice that the Commission was considering the exclusions and limitations ultimately imposed on eligibility for existing facilities. Brookfield further argues that the Commission's finding that opportunities for existing renewables to sell their emissions attributes outside of New York is factually incorrect and states that newly enacted legislation in Massachusetts represents new circumstances which highlights the fact that significant opportunities exist outside of New York. In addition, Brookfield argues that exclusion of large-scale existing hydropower in attainment of the goals of the CES without any compensation was both unjust and discriminatory, resulting in economic free-ridership by the State on the benefits of privately-owned non-emitting generation. Brookfield also posits that no consideration is given to how exports of renewable, non-emitting generation will be treated under the CES which could result in the potential for double-counting. Finally, Brookfield argues that LSEs should have the option to offset CES obligations through contracts with existing privately-owned hydropower facilities with a corresponding reduction in renewable compliance obligations. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, NY 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, NY 12223, (518) 474-6530, email: kathleen.burgess@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(15-E-0302SP17)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Clean Energy Standard

I.D. No. PSC-39-16-00014-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 seeking rehearing of its August 1, 2016 Order Adopting a Clean Energy Standard filed on August 30, 2016 by H.Q. Energy Services (U.S.) Inc.

Statutory authority: Public Service Law, sections 4(1), 5(1)(2) and 66(2); Energy Law, section 6-104(5)(b)

Subject: Clean Energy Standard.

Purpose: To promote and maintain renewable and zero-emission electric energy resources.

Substance of proposed rule: The Public Service Commission is considering a petition filed on August 30, 2016 by H.Q. Energy Services (U.S.) Inc. (HQ) that requests rehearing of the Commission's August 1, 2016 Order Adopting a Clean Energy Standard (CES Order). HQ argues that the

Commission's decision to exclude new storage impoundment hydroelectric power in the CES is arbitrary and unduly discriminatory and therefore, an error of law. HQ argues that all forms of generation included in the baseline of existing renewable generation as described in the CES Order should also be eligible for CES Tier 1 compensation and that exclusion of large impoundment hydroelectric related to environmental concerns is unsupported by the record. HQ argues that the Commission erred by including existing hydroelectric facilities in the baseline of renewable generation but excluding the same facilities from CES compensation. HQ argues that the Commission needs to provide emissions attribute compensation for all large-scale hydroelectric facilities or such facilities could shift sales of power and/or emission attributes to other states willing to pay more the attributes. HQ further argues that the Commission cannot claim the attributes associated with the electric power HQ has sold or will sell into New York unless HQ specifically sells the power bundled with the attributes. HQ states that if the Commission does not modify the order to provide CES compensation to large hydroelectric facilities, it may alter its internal accounting practices in an effort to prevent New York from counting HQ's large hydroelectric power in the State's renewable energy baseline. HQ argues that the Commission erred by not including in the CES all incremental large-scale hydroelectric generation, including impoundment and regardless of vintage that is delivered over new transmission lines. HQ claims that such exclusion is unreasonable and that the record supports allowing transmission into the CES program. Finally, HQ argues that exclusion from the CES of large scale hydroelectric generation and all hydroelectric involving storage impoundment is contrary to the public policy goals of New York and the Commission's obligation to ensure reliability and cost-effective electric service to the State's consumers. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, NY 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, NY 12223, (518) 474-6530, email: kathleen.burgess@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(15-E-0302SP10)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Clean Energy Standard

I.D. No. PSC-39-16-00015-P

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

Proposed Action: The Commission is considering a petition seeking rehearing of its August 1, 2016 Order Adopting a Clean Energy Standard filed on August 24, 2016 by Taylor Biomass, LLC.

Statutory authority: Public Service Law, sections 4(1), 5(1)(2) and 66(2); Energy Law, section 6-104(5)(b)

Subject: Clean Energy Standard.

Purpose: To promote and maintain renewable and zero-emission electric energy resources.

Substance of proposed rule: The Public Service Commission is considering a petition filed on August 24, 2016 by Taylor Biomass Energy LLC (Taylor) that requests rehearing of the Commission's August 1, 2016 Order Adopting a Clean Energy Standard (CES Order). Taylor argues that the Commission committed an error by failing to establish a fixed emission standard to determine eligibility of adulterated biomass facilities in the Clean Energy Standard. Taylor argues that the Commission's continuance of the comparative emission testing process, requiring a demonstration that electricity generated from adulterated biomass fuel results in no more emissions than generation fueled by unadulterated biomass feedstock, represents a mistake of fact. Taylor further argues that the comparative emissions testing process will have a negative impact on energy markets in contradiction to the Commission's stated goal of animating

energy markets. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, NY 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, NY 12223, (518) 474-6530, email: kathleen.burgess@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(15-E-0302SP9)

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

Clean Energy Standard

I.D. No. PSC-39-16-00016-P

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

Proposed Action: The Commission is considering a petition seeking rehearing of its August 1, 2016 Order Adopting a Clean Energy Standard filed on August 31, 2016 by the New York Association for Public Power.

Statutory authority: Public Service Law, sections 4(1), 5(1)(2) and 66(2); Energy Law, section 6-104(5)(b)

Subject: Clean Energy Standard.

Purpose: To promote and maintain renewable and zero-emission electric energy resources.

Substance of proposed rule: The Public Service Commission is considering a petition filed on August 31, 2016 by the New York Association of Public Power (NYAPP) that requests rehearing of the Commission's August 1, 2016 Order Adopting a Clean Energy Standard (CES Order). NYAPP seeks clarification that the four rural electric cooperatives and the municipal electric utilities taking their full requirement of power from the New York Power Authority (NYPA) are not subject to the CES Order. NYAPP indicates that these types of electric utilities do not fall under Commission Jurisdiction. NYAPP also seeks rehearing of the CES Order regarding its application to other municipal utilities. NYAPP argues that applying the ZEC and RES requirements to municipal utilities is inequitable and illogical because they the electricity their customers consume is already between 75% and 100% renewable with NYPA's hydroelectric facilities providing the bulk of that renewable power. NYAPP further argues that the municipal utilities have historically done their part in supporting hydroelectric power and nuclear power through historic purchases from NYPA's Niagara hydroelectric facility and FitzPatrick Nuclear Generation facility when it was previously owned by NYPA. NYAPP requests that its members be exempt from the requirements of the CES Order. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, NY 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, NY 12223, (518) 474-6530, email: kathleen.burgess@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(15-E-0302SP15)

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

Clean Energy Standard

I.D. No. PSC-39-16-00017-P

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

Proposed Action: The Commission is considering a petition seeking rehearing of its August 1, 2016 Order Adopting a Clean Energy Standard filed on August 31, 2016 by Energy Ottawa Inc.

Statutory authority: Public Service Law, sections 4(1), 5(1)(2) and 66(2); Energy Law, section 6-104(5)(b)

Subject: Clean Energy Standard.

Purpose: To promote and maintain renewable and zero-emission electric energy resources.

Substance of proposed rule: The Public Service Commission is considering a petition filed on August 31, 2016 by Energy Ottawa, Inc. that requests rehearing of the Commission's August 1, 2016 Order Adopting a Clean Energy Standard (CES Order). In its petition, Energy Ottawa claims that the CES order contains errors of law and fact, and that new circumstances exist, all of which warrant rehearing. Energy Ottawa requests that upon rehearing the Commission allow all forms of existing renewable generation, in particular small hydroelectric resources, be eligible for the Renewable Energy Standard or Zero Emission Standard programs. Specifically, Energy Ottawa argues that the CES Order inappropriately and without record support distinguishes between different existing sources of zero-emission generation, stating that the same factors requiring support of upstate nuclear generation facilities applies to existing hydropower facilities. Energy Ottawa argues that all existing zero-emission generation should be provided the same form, manner and level of compensation and that the ZEC program should be extended to every zero-emitting generation source within the State. Energy Ottawa further argues that the Commission erred in rejecting arguments related to the potential for existing renewable generation to be exported to other jurisdiction and failing to provide an explanation for the rejection. Energy Ottawa states that the Commission's conclusion regarding the potential for mass flight of existing renewable attributes into other states as hypothetical is contradicted by the record including findings in the Department of Public Service Staff's CES White Paper; several comments indicating real prospects for export to other states and the Large Scale Renewable Options Paper. Energy Ottawa also claims new circumstances, consisting of newly signed legislation in Massachusetts which requires utilities in the state to enter into long-term contracts for clean energy including the potential for hydropower from adjacent control areas. Energy Ottawa also argues that the Commission erred by recognizing existing renewable generation in its baseline determination but not compensating such generation through the CES. Energy Ottawa further argues that the Commission has no authority to claim environmental attributes that belong to generation owners. Finally, Energy Ottawa argues that continuation of the Tier 2 Maintenance Resource program is wholly without support on the record. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, NY 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, NY 12223, (518) 474-6530, email: kathleen.burgess@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(15-E-0302SP11)

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

Clean Energy Standard

I.D. No. PSC-39-16-00018-P

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

Proposed Action: The Commission is considering a petition seeking rehearing of its August 1, 2016 Order Adopting a Clean Energy Standard filed on August 23, 2016 by Ampersand Hydro, LLC.

Statutory authority: Public Service Law, sections 4(1), 5(1)(2) and 66(2); Energy Law, section 6-104(5)(b)

Subject: Clean Energy Standard.

Purpose: To promote and maintain renewable and zero-emission electric energy resources.

Substance of proposed rule: The Public Service Commission is considering a petition filed on August 23, 2016 by Ampersand Hydro, LLC (Ampersand) that requests rehearing of the Commission's August 1, 2016 Order Adopting a Clean Energy Standard (CES Order). Ampersand argues that the Commission committed an error of law by arbitrarily and capriciously excluding small hydro facilities from the Zero Emission Credit (ZEC) program and unreasonably discriminating against all other generation sources by providing nuclear generation facilities a significant competitive advantage in the form of ZEC payments. Ampersand requests a Commission order mandating compensation for the zero emission attribute of all small hydro facilities in the same manner as the CES Order providing compensation for the emission attributes of nuclear facilities. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Katheen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223, (518) 474-6530, email: kathleen.burgess@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(15-E-0302SP8)

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

Clean Energy Standard

I.D. No. PSC-39-16-00019-P

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

Proposed Action: The Commission is considering a petition seeking rehearing of its August 1, 2016 Order Adopting a Clean Energy Standard filed on August 31, 2016 by Transmission Developers, Inc.

Statutory authority: Public Service Law, sections 4(1), 5(1)(2) and 66(2); Energy Law, section 6-104(5)(b)

Subject: Clean Energy Standard.

Purpose: To promote and maintain renewable and zero-emission electric energy resources.

Substance of proposed rule: The Public Service Commission is considering a petition filed on August 31, 2016 by Transmission Developers, Inc. (TDI) that requests rehearing of the Commission's August 1, 2016 Order Adopting a Clean Energy Standard (CES Order). TDI argues that Massachusetts's enactment of "An Act to Promote Energy Diversity" on August 8, 2016 comprises a new circumstance which warrants rehearing of the CES Order. Specifically, TDI argues that the Massachusetts legislation could siphon off a significant portion of the renewable energy supply that would otherwise be available to New York State. TDI requests certain

language changes in the CES Order that would allow all renewable resources included in the 2014 baseline calculation to be eligible to produce renewable energy credits available for LSE compliance and would credit voluntary actions against the LSE obligation and the overall program goal. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Katheen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223, (518) 474-6530, email: kathleen.burgess@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(15-E-0302SP16)

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

Clean Energy Standard

I.D. No. PSC-39-16-00020-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 seeking rehearing of its August 1, 2016 Order Adopting a Clean Energy Standard filed on August 31, 2016 by the Independent Power Producers of New York, Inc. (IPPNY).

Statutory authority: Public Service Law, sections 4(1), 5(1)(2) and 66(2); Energy Law, section 6-104(5)(b)

Subject: Clean Energy Standard.

Purpose: To promote and maintain renewable and zero-emission electric energy resources.

Substance of proposed rule: The Public Service Commission is considering a petition filed on August 31, 2016 by the Independent Power Producers of New York, Inc. (IPPNY) that requests rehearing of the Commission's August 1, 2016 Order Adopting a Clean Energy Standard (CES Order). In the petition, IPPNY claims that the CES Order contained errors of law and fact and new circumstances have arisen since issuance of the order. IPPNY argues that excluding existing facilities from CES participation is arbitrary and not supported by the record. Specifically, IPPNY states that there is no evidence to support the Commission observation that the risk of existing facilities selling their emission attributes outside of New York is hypothetical. IPPNY also points to new Massachusetts legislation regarding renewable energy as changed circumstances warranting rehearing of the CES Order. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Katheen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223, (518) 474-6530, email: kathleen.burgess@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(15-E-0302SP13)

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

Clean Energy Standard

I.D. No. PSC-39-16-00021-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 seeking rehearing of its August 1, 2016 Order Adopting a Clean Energy Standard filed on August 31, 2016 by the Alliance for Green Energy (AGREE) and the Nuclear Information and Resource Service.

Statutory authority: Public Service Law, sections 4(1), 5(1)(2) and 66(2); Energy Law, section 6-104(5)(b)

Subject: Clean Energy Standard.

Purpose: To promote and maintain renewable and zero-emission electric energy resources.

Substance of proposed rule: The Public Service Commission is considering a petition filed on August 31, 2016 by Alliance for a Green Economy and Nuclear Information and Resource Service (AGREE) that requests rehearing of the Commission's August 1, 2016 Order Adopting a Clean Energy Standard (CES Order). AGREE argues that the CES Order constitutes an error of law, contains factual errors warranting rehearing. AGREE argues that the CES Order violates a number of statutory provisions. Specifically, AGREE claims that the CES Order violates the State Administrative Procedures Act (SAPA) § 202-a(1) which, AGREE notes, requires agencies to establish rules that are consistent with the objectives of applicable statutes and consider using approaches designed to avoid undue deleterious economic or overly burdensome impacts. AGREE further argues that the Commission violated SAPA § 202(1)(a) by failing to provide sufficient time for public comments for Staff's Responsive Proposal. AGREE argues that the CES Order violates Public Service Law § 5.2 which requires the Commission to encourage all jurisdictional persons and corporations, to formulate and carry out long-range programs, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values, and the conservation of natural resources. AGREE claims that the CES Order is uneconomical and highly inefficient; increases radioactive waste, environmental contamination, and risks to public safety; and it is a waste of public and natural resources in contradiction to the Public Service Law. AGREE also argues that the Commission environmental review of the actions taken in the CES violates the State Environmental Quality Review Act (SEQRA) because the Generic Environmental Impact Statement evaluated only two scenarios rather than all reasonable alternatives. In addition, AGREE claims that the Cost Study supporting the Clean Energy Standard was inadequate and misleading. AGREE also claims that the CES Order does not contain a proper factual basis or analysis to support the Commission decisions. Specifically, AGREE laments the lack of analysis regarding incremental production and storage of nuclear waste in New York; health cost related to radiation exposure and the increased risk of operating the facilities without adequate insurance. AGREE further claims that the CES Order represents an overreach of the Governor's authority. Finally, AGREE argues that the Commission inappropriately used the cost of carbon by equating the cost of carbon abatement with the cost of emissions releases. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Katheen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223, (518) 474-6530, email: kathleen.burgess@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(15-E-0302SP14)

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

Clean Energy Standard

I.D. No. PSC-39-16-00022-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 seeking rehearing of its August 1, 2016 Order Adopting a Clean Energy Standard filed on August 31, 2016 by the Alliance for Clean Energy, New York.

Statutory authority: Public Service Law, sections 4(1), 5(1)(2) and 66(2); Energy Law, section 6-104(5)(b)

Subject: Clean Energy Standard.

Purpose: To promote and maintain renewable and zero-emission electric energy resources.

Substance of proposed rule: The Public Service Commission is considering a petition filed on August 31, 2016 by the Alliance for Clean Energy, New York (ACE NY) that requests rehearing of the Commission's August 1, 2016 Order Adopting a Clean Energy Standard (CES Order). ACE NY argues that the Commission erred factually in its determination that existing renewable energy resources are not at risk due to closure or export, claiming that several renewable generators have real and imminent opportunities to sell renewable attributes outside of New York. ACE NY also claims that new circumstances in the form of newly enacted legislation in Massachusetts related to long-term purchase of power agreements for renewable power warrants rehearing of the CES Order. ACE NY also argues that by establishing a 50% by 2030 requirement in New York, and then counting all existing renewable resources towards that 50% mandate, but not providing a mechanism for compensating those existing renewables at a value that is competitive with adjacent markets, the CES Program is creating confusion, market disruption, and unfair complications for existing generators. ACE NY claims that Tier 2 eligibility should be broadened to include all technology types eligible for Tier 1 that were in operation before 2015 because these resources have the same environmental attributes and export of the resources would have the same effect on climate goals, local economies, and the achievement of the 50% mandate as other resources included in the CES and differential treatment of the various resources is arbitrary. ACE NY requests that the Commission better align and integrate Tier 2 with the rest of the Clean Energy Standard structure, and allow existing renewable resources to fully participate in the CES and contribute to achievement of 50% renewable energy by 2030. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Katheen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223, (518) 474-6530, email: kathleen.burgess@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(15-E-0302SP18)

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

Clean Energy Standard

I.D. No. PSC-39-16-00023-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 seeking rehearing of its August 1, 2016 Order Adopting a Clean Energy Standard filed on September 1, 2016 by ReEnergy Holdings, LLC.

Statutory authority: Public Service Law, sections 4(1), 5(1)(2) and 66(2); Energy Law, section 6-104(5)(b)

Subject: Clean Energy Standard.

Purpose: To promote and maintain renewable and zero-emission electric energy resources.

Substance of proposed rule: The Public Service Commission is considering a petition filed on September 1, 2016 by ReEnergy Holdings, LLC (ReEnergy) that requests rehearing of the Commission's August 1, 2016 Order Adopting a Clean Energy Standard (CES Order). ReEnergy argues that the Commission's decision on existing renewable resources was not supported in the record and relied on two erroneous factual assumptions: that existing renewable resources do not have high going-forward costs and are not at imminent risk of exporting to other regions. ReEnergy requests that the Commission reconsider implementing Tier 2A as described in Staff's White Paper. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, NY 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, NY 12223, (518) 474-6530, email: kathleen.burgess@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(15-E-0302SP19)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Clean Energy Standard

I.D. No. PSC-39-16-00024-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 seeking rehearing of its August 1, 2016 Order Adopting a Clean Energy Standard filed on September 1, 2016 by RENEW Northeast, Inc.

Statutory authority: Public Service Law, sections 4(1), 5(1)(2) and 66(2); Energy Law, section 6-104(5)(b)

Subject: Clean Energy Standard.

Purpose: To promote and maintain renewable and zero-emission electric energy resources.

Substance of proposed rule: The Public Service Commission is considering a petition filed on September 1, 2016 by RENEW Northeast, Inc. (RENEW) that requests rehearing of the Commission's August 1, 2016 Order Adopting a Clean Energy Standard (CES Order). RENEW argues that the Commission erred by limiting the eligibility for maintenance contracts to run-of-river hydroelectric facilities of 5 MW or less in size with a commercial operation date prior to January 1, 2013 and that compromised the baseline of renewable resources for the Renewable Portfolio Standard when it was adopted. RENEW requests that all renewable resources having commercial operation before January 1, 2015 be eligible for maintenance contracts and/or that all LSE's have an obligation to purchase renewable energy credits from all existing resources. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, NY 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, NY 12223, (518) 474-6530, email: kathleen.burgess@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(15-E-0302SP20)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Clean Energy Standard

I.D. No. PSC-39-16-00025-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 seeking rehearing of its August 1, 2016 Order Adopting a Clean Energy Standard filed on September 1, 2016 by the Public Utility Law Project, New York (PULP).

Statutory authority: Public Service Law, sections 4(1), 5(1)(2) and 66(2); Energy Law, section 6-104(5)(b)

Subject: Clean Energy Standard.

Purpose: To promote and maintain renewable and zero-emission electric energy resources.

Substance of proposed rule: The Public Service Commission is considering a petition filed on September 1, 2016 by the Public Utility Law Project of New York (PULP) that requests rehearing of the Commission's August 1, 2016 Order Adopting a Clean Energy Standard (CES Order). PULP argues that the Commission's CES Order violated the State Administrative Procedure Act (SAPA) by failing to provide an opportunity to be heard in a meaningful manner at a meaningful time related to Staff's Responsive Proposal. PULP argues that Staff's Responsive Proposal constitutes a substantial revision under SAPA § 102(9) from the original proposal and should have been subject to an additional 45 day comment period. PULP requests that the Commission reconsider its CES Order based on the alleged failure to comply with SAPA. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, NY 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, NY 12223, (518) 474-6530, email: kathleen.burgess@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(15-E-0302SP21)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Clean Energy Standard

I.D. No. PSC-39-16-00026-P

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

Proposed Action: The Commission is considering a petition seeking rehearing of its August 1, 2016 Order Adopting a Clean Energy Standard filed on September 1, 2016 by the Council on Intelligent Energy & Conservation Policy, et al.

Statutory authority: Public Service Law, sections 4(1), 5(1)(2) and 66(2); Energy Law, section 6-104(5)(b)

Subject: Clean Energy Standard.

Purpose: To promote and maintain renewable and zero-emission electric energy resources.

Substance of proposed rule: The Public Service Commission is considering a petition filed on September 1, 2016 by the Council on Intelligent Energy & Conservation Policy; Promoting Health and Sustainable Energy (PHASE); Promoting Health and Sustainable Energy; Physicians for Social Responsibility, New York; Rockland Sierra Club and Sierra Club Lower Hudson Group; Indian Point Safe Energy Coalition; Goshen Green

Farms, LLC.; Ellen Jaffe, Assembly Member, 97th District; and Andrew Stewart, Orangetown Supervisor (CIECP, et al.) that requests rehearing of the Commission's August 1, 2016 Order Adopting a Clean Energy Standard (CES Order). CIECP, et al. argues that the CES Order violates a number of statutory provisions. Specifically, CIECP claims that the CES Order violates the State Administrative Procedures Act (SAPA) § 202-a(1) which, CIECP notes, requires agencies to establish rules that are consistent with the objectives of applicable statutes and consider using approaches designed to avoid undue deleterious economic or overly burdensome impacts. CIECP, et al. further argues that the Commission violated SAPA § 202(1)(a) by failing to provide sufficient time for public comments for Staff's Responsive Proposal. CIECP, et al. argues that the CES Order violates Public Service Law § 5.2 which requires the Commission to encourage all jurisdictional persons and corporations, to formulate and carry out long-range programs, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values, and the conservation of natural resources. CIECP, et al. claims that the CES Order is uneconomical and highly inefficient; increases radioactive waste, environmental contamination, and risks to public safety; and it is a waste of public and natural resources in contradiction to the Public Service Law. CIECP, et al. also argues that the Commission environmental review of the actions taken in the CES Order violates the State Environmental Quality Review Act (SEQRA) because the Generic Environmental Impact Statement evaluated only two scenarios rather than all reasonable alternatives. In addition, CIECP, et al. claims that the Cost Study supporting the Clean Energy Standard was inadequate and misleading. CIECP, et al. also claims that the CES Order does not contain a proper factual basis or analysis to support the Commission decisions. Specifically, CIECP, et al. laments the lack of analysis regarding incremental production and storage of nuclear waste in New York; health cost related to radiation exposure and the increased risk of operating the facilities without adequate insurance. CIECP further claims that the CES Order represents an overreach of the Governor's authority. Finally, CIECP argues that the Commission inappropriately used the cost of carbon by equating the cost of carbon abatement with the cost of emissions releases. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Katheen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223, (518) 474-6530, email: kathleen.burgess@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(15-E-0302SP22)

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

Clean Energy Standard

I.D. No. PSC-39-16-00027-P

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

Proposed Action: The Commission is considering a petition seeking rehearing of its August 1, 2016 Order Adopting a Clean Energy Standard filed on September 1, 2016 by CH4 Biogas.

Statutory authority: Public Service Law, sections 4(1), 5(1)(2) and 66(2); Energy Law, section 6-104(5)(b)

Subject: Clean Energy Standard.

Purpose: To promote and maintain renewable and zero-emission electric energy resources.

Substance of proposed rule: The Public Service Commission is considering a petition filed on September 1, 2016 by CH4 Biogas (CH4) that requests rehearing of the Commission's August 1, 2016 Order Adopting a Clean Energy Standard (CES Order). CH4 argues that the CES program will not support development of waste to energy anaerobic digestion (biogas) projects in New York State. CH4 further argues that biogas projects

have the potential to provide environmental and economic benefits beyond the production of renewable energy and therefore, should be eligible for increased attribute payments in order to recognize these additional attributes and related increased costs. Specifically, CH4 argues that biogas provides benefits related to diversion of organic waste from landfills; elimination of spreading untreated organic waste on cropland (avoiding potential for nutrient pollution of surface waters); and reduces the carbon footprint of farms and food processors. The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Katheen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, NY 12223, (518) 474-6530, email: kathleen.burgess@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(15-E-0302SP23)

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

Consolidated Edison Company of New York, Inc.'s Replevin Acts and Practices

I.D. No. PSC-39-16-00028-P

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

Proposed Action: The Commission is considering a petition by Public Utility Law Project of New York, Inc. for review and to recommend changes to Consolidated Edison Company of New York, Inc.'s replevin acts and practices.

Statutory authority: Public Service Law, sections 65 and 66

Subject: Consolidated Edison Company of New York, Inc.'s replevin acts and practices.

Purpose: To review Consolidated Edison Company of New York, Inc.'s replevin acts and practices.

Substance of proposed rule: The Commission is considering a petition filed by the Public Utility Law Project of New York, Inc. (PULP) that seeks a Commission review of the acts and practices of Consolidated Edison Company of New York, Inc. (Con Edison or the Company) in replevin actions (the Petition). Con Edison uses the civil remedy of replevin as a means of physically disconnecting electric or gas services to customers who have not paid their electric or gas charges. The petition seeks review and relief, where warranted, of Con Edison's implementation of the requirements in the Home Energy Fair Practices Act (HEFPA) and seeks review of Con Edison's acts and practices when carrying out its notice and hearing process with respect to civil replevin actions. Specifically, PULP asks the Commission to review (1) whether Con Edison should be allowed to schedule voluntary replevin meetings inside a courthouse, which, PULP believes, gives the "appearance that the Company is acting under color of law and that the 'hearing' carries judicial authority;" (2) whether Con Edison's actions with respect to meter replevin proceedings comply with the spirit and notice requirements of CPLR Article 71 actions. PULP seeks "more transparent and accountable ways for the Company to seek its goals consistent with law and Commission policy while also keeping its customers well informed of the proceedings and available remedies;" and (3) whether replevin of meters absent specific notice procedures is against the public interest because replevin "is inherently dangerous." The petition states that PULP "does not assert here that there is evidence of intentional wrongdoing by the Company" and asserts that, when meeting with customers at the courthouse, Con Edison is not able to offer deferred payment agreements (DPAs) that comply with the Home Energy Fair Practices Act (HEFPA) because HEFPA-compliant DPAs are based upon the customer's ability to pay, which is difficult to discern at a courthouse meeting. The remedies PULP seeks include, at least, the following: (1) requiring Con Edison to offer

“written and fully compliant” DPAs before beginning replevin proceedings; (2) requiring Con Edison to make certain that customers are adequately informed of the rights they have under HEFPA, particularly with respect to replevin proceedings “to oppose issuance of a pre-judgment seizure order being requested by” Con Edison; (3) barring Con Edison from conducting replevins of gas or electric meters without a formal judicial proceeding; and (4) barring Con Edison from conducting replevin actions during cold weather periods as defined in 16 NYCRR 11.5(c). The Commission may adopt, reject, or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(16-M-0501SP1)

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

Minor Rate Filing

I.D. No. PSC-39-16-00029-P

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

Proposed Action: The Commission is considering proposed tariff amendments, filed by Mohawk Municipal Commission, to P.S.C. No. 2—Electricity, by which it would increase its annual electric revenues by approximately \$158,709 or 20%.

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

Subject: Minor rate filing.

Purpose: To consider an increase in annual revenues of about \$158,709 or 20%.

Substance of proposed rule: The Commission is considering proposed tariff amendments, filed by Mohawk Municipal Commission, to P.S.C. No. 2 – Electricity, by which it would increase its annual electric revenues by approximately \$158,709 or 20%. Under the proposal, the monthly bill of a residential customer using 750 kilowatt-hours of electricity would increase from \$37.56 to \$42.46 or 13.05%. The proposed amendments have an effective date of January 1, 2017. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(16-E-0488SP1)

Department of State

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

Requirements Regarding Brokers Receiving Funds, Course Subjects and Hours, and Business Cards

I.D. No. DOS-39-16-00005-P

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

Proposed Action: Amendment of sections 175.1, 175.7, 175.25(d)(2), 176.3(a), 177.3(g) and 177.7 of Title 19 NYCRR.

Statutory authority: Executive Law, section 91; Real Property Law, section 442-k(1)

Subject: Requirements regarding brokers receiving funds, course subjects and hours, and business cards.

Purpose: To provide clarity regarding brokers obligations when receiving compensation, instruction requirements, and business cards.

Text of proposed rule: Section 175.1 of Title 19 NYCRR is amended to read as follows:

Section 175.1. Commingling money of principal.

A real estate broker shall not commingle the money or other property of his principal with his own and shall at all times maintain a separate, special bank account to be used exclusively for the deposit of said monies and which deposit shall be made [as promptly as practicable] *within three business days. Until such time as the money is deposited into a separate, special bank account, it shall be safeguarded in a secure location so as to prevent loss or misappropriation.* Said monies shall not be placed in any depository, fund or investment other than a federally insured bank account. Accrued interest, if any, shall not be retained by, or for the benefit of, the broker except to the extent that it is applied to, and deducted from, earned commission, with the consent of all parties.

Section 175.7 of Title 19 NYCRR is amended to read as follows:

Section 175.7. Compensation.

A real estate broker shall make it clear for which party he is acting and he shall not receive compensation from more than one party except with the full knowledge and consent of [all parties] *the broker's client.*

Section 176.3(a) of Title 19 NYCRR is amended to read as follows:

Section 176.3. Subjects for study--real estate salespersons.

(a) The following are the required subjects to be included in the course of study in real estate for licensure as a real estate salesperson, and the required number of hours to be devoted to each subject:

Salesperson’s Course	Hours:
Subject Matter:	
License Law and Regulations	3
Law of Agency	11
Legal Issues	10
The Contract of Sales and Leases	3
Real Estate Finance	5
Land Use Regulations	3
Construction and Environmental Issues	5
Valuation Process and Pricing Properties	3
Human Rights and Fair Housing	4
Real Estate Mathematics	1
Municipal Agencies	2
Property Insurance	[2] 1
License Safety	1
Taxes and Assessments	3
Condominiums and Cooperatives	4
Commercial and Investment Properties	10
Income Tax Issues in Real Estate Transactions	3
Mortgage Brokerage	1
Property Management	2

Instruction	75
Final Examination	3
TOTAL	78

Section 177.3(g) of Title 19 NYCRR is amended to read as follows:

(g) a detailed outline of the subject matter of each course or seminar containing at least 22½ hours of instruction, or of each course module containing at least [three hours] *one hour* of instruction, together with the time sequence of each segment thereof, the faculty for each segment, and teaching techniques used in each segment;

Section 177.7 of Title 19 NYCRR is amended to read as follows:

Section 177.7. Computation of instruction time.

To meet the minimum statutory requirement, attendance shall be computed on the basis of an hour equaling [60] 50 minutes.

Section 175.25(d)(2) of Title 19 NYCRR is amended to read as follows:

Section 175.25. Business cards.

(2) Notwithstanding subdivision (c) of this section, business cards must contain the business address of the licensee, *license type*, and the name of the real estate broker or real estate brokerage with whom the associate real estate broker or real estate salesperson is associated. All business cards must also contain the office telephone number for the associate real estate broker, real estate salesperson or team.

Text of proposed rule and any required statements and analyses may be obtained from: David A. Mossberg, NYS Dept. of State, 123 William St., 20th Fl., New York, NY 10038, (212) 417-2063, email: david.mossberg@dos.ny.gov

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

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

Regulatory Impact Statement

1. Statutory authority:

Real Property Law § 442-k(1) (“NY RPL”) authorizes, in part, the New York State Department of State (the “Department”) and the State Real Estate Board (the “Board”) to promulgate regulations regarding real estate brokers and salespersons. To fulfill this purpose, the Department and the Board have issued rules and regulations which are found at Part 175 of Title 19 NYCRR and are proposing this rule.

2. Legislative objectives:

Article 12-A of the NY RPL protects consumers by ensuring competency of real estate brokers and salespeople. These proposed regulations further legislative objectives in the following ways: By ensuring that principal money entrusted to a licensee is safely secured pending the closing or abandonment of the transaction, and ensuring that brokers and salespeople disclose sources of compensation to their clients, the legislative objective of consumer protection is furthered. By requiring mandatory course instruction in License Safety, the legislative objectives of ensuring competent licensees will be furthered, because it will provide such licensees with the knowledge needed to safely interact with the public; this knowledge is equally beneficial to the public as it is to the licensee. By requiring license type on broker and salesperson business cards, the legislative objectives of protecting consumers against misleading practices is furthered.

3. Needs and benefits:

19 NYCRR 175.1 currently requires real estate brokers to deposit principal money “as promptly as practicable.” This vague requirement has resulted in confusion in the industry. As a result, there are divergent opinions by licensees as to when principal money must be deposited and what must be done prior to the deposit to safeguard this money. To provide necessary clarification the Department is proposing the instant rule.

19 NYCRR 175.7 currently requires brokers to obtain consent from “all parties” prior to receiving compensation from multiple parties. In working with the industry, the Department has been advised that the current regulation has been used as a basis to discourage or deny a buyer’s broker representation in a particular transaction. The proposed rule change will help protect buyer’s brokers and encourage meaningful participation in real estate transactions. Accordingly, to aid buyers by helping ensure they can be represented by a broker of their choosing, the Department is proposing the instant rule.

19 NYCRR 176.3 currently requires real estate courses of study to devote 2 hours to Property Insurance and does not include License Safety as a required subject. The Department has been advised of reports of real estate brokers and salespersons being victims of robberies and other crimes while conducting broker-related duties. The proposed rule change will provide lessons to licensees with respect to awareness of surroundings and safety while conducting broker-related duties. Accordingly, to increase broker and salesperson safety, the Department is proposing the instant rule.

19 NYCRR 177.3(g) currently requires that requests for approval of courses of study include a form which shall include, inter alia, a detailed outline of the subject matter of each course or seminar containing at least 22 and ½ hours of instruction or a detailed outline of each course module containing at least three hours of instruction. However, course module hours comprising the 22 and ½ minimum could only last one hour. The proposed rule change will permit outlines for course modules containing at least one hour of instruction to reflect, in part, the proposal contained herein regarding safety as well as other courses already required which only require one hour of education. Accordingly, to permit outlines of course modules that last only one hour, the Department is proposing the instant rule.

19 NYCRR 177.7 currently requires real estate course attendance to be computed on the basis of an hour equaling 60 minutes. The Department has been advised that computing increments of sixty minutes is less efficient than computing increments of fifty minutes. The proposed rule change will require attendance to be computed on the basis of an hour equaling 50 minutes. Accordingly, to facilitate the efficient use of technology and resources, the Department is proposing the instant rule.

19 NYCRR 175.25(d)(2) currently does not require brokers and salespersons to display their license type on their business cards. Business cards constitute the most immediate and commonly used means by which consumers can view the credentials authorizing individuals to provide real estate broker or salesperson services. By requiring the display of the license type on business cards, the proposed rule will safeguard consumers against misleading information being provided by licensees. The proposed rule will also add clarity to the public regarding a salesperson association with a particular brokerage. Accordingly, to protect consumers the Department is proposing the instant rule.

4. Costs:

a. Costs to regulated parties:

Because the proposed amendment to Section 175.1 does not affect the current requirement that real estate brokers retain an escrow account for the deposit of a principal’s money, the Department does not anticipate that it will impose any new costs upon real estate brokers. Because the proposed amendment to Section 175.7 solely requires the consent of the broker’s client rather than all parties, where a broker receives compensation from more than one party, the Department does not anticipate that it will impose any new costs upon real estate brokers. Because the proposed amendment to Section 176.3(a) rearranges the required number of hours for two subjects, the Department does not anticipate that it will impose any new costs upon real estate brokers. Because the proposed amendment to Section 177.3 changes the minimum amount of instruction that a course approval request can describe in an outline of a single course module, the Department does not anticipate that it will impose any new costs upon real estate brokers. Because the proposed amendment to Section 177.7 makes the computation of attendance more efficient, the Department does not anticipate that it will impose any new costs upon real estate brokers. Because the proposed amendment to Section 177.25(d)(2) requires additional or possibly new information to be printed on some licensee’s business cards, the Department anticipates that a nominal cost to comply with this proposal may be incurred. The Department estimates that purchasing new business cards could cost as little as \$10.00 for 500 cards.

b. Costs to the Department of State:

The Department does not anticipate any additional costs to implement the rule. Existing staff will handle answering questions about the new escrow requirements, disclosure obligations, the number of subject hours required for courses of study, the new course module length permitted to be outlined in a course approval request, computation of attendance and information displayed on business cards. In addition, existing enforcement staff will investigate and enforce compliance with the proposed rules.

5. Local government mandates:

The rule does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or other special district.

6. Paperwork:

19 NYCRR 175.1 currently requires real estate brokers to place money belonging to a principal into an escrow account. The proposed rule will continue this requirement while making amendments to the existing regulation to better define when the money must be deposited and the steps which must be taken in the interim to safeguard the money. It is anticipated that brokers will need to maintain account ledgers to track the deposit and withdrawal of escrow money and will need to submit deposit and withdrawal slips to financial institutions to complete these tasks.

19 NYCRR 175.7 currently requires real estate brokers and salespeople to make affirmative disclosures to all parties to a transaction prior to accepting compensation for services. The proposed rule will ease current obligations including paperwork by reducing the number of consents a regulated individual is required to obtain.

19 NYCRR 176.3 currently requires real estate courses of study as a

salesperson to devote 2 hours to Property Insurance and does not include License Safety as a required subject. Although it is anticipated that owners of courses of study will have to draft instructional coursework with respect to License Safety, this may be mitigated by the reduction in any paperwork related to the decrease in hours required for Property Insurance.

19 NYCRR 177.3(g) currently requires that requests for approval of courses of study include a form which shall include, inter alia, a detailed outline of the subject matter of each course or seminar containing at least 22 and ½ hours of instruction or a detailed outline of each course module containing at least three hours of instruction. The amount of information remains the same regardless of the length of the course module being outlined in course approval requests. Therefore, the change in module length available for outlining does not impact paperwork.

19 NYCRR 177.7 currently requires real estate course attendance to be computed on the basis of an hour equaling 60 minutes. The Department has been advised that computing increments of sixty minutes is less efficient than computing increments of fifty minutes. The proposed rule change will require attendance to be computed on the basis of an hour equaling 50 minutes. By changing the computation of attendance to increments of 50 minutes, the administration of paperwork will be made more efficient and, therefore, will be reduced. No additional paperwork is therefore required by this proposal.

19 NYCRR 175.25(d)(2) currently does not require brokers and salespersons to display their license type on their business cards. Any resulting increase in paperwork would be negligible given that the proposed amendment only requires additional type on business cards that were already being produced and circulated by brokers as a matter of common business practice.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

In preparing this proposed rule making, the Department, worked closely with the Board to consider different alternatives. The Department contemplated not proposing 19 NYCRR 175.1, but determined that the existing regulation did not provide required clarity on when principal money must be deposited and did not explain the need to safeguard this money prior to deposit into escrow. The Department has also learned that there is confusion and divergent interpretations of these requirements throughout the State. The Department considered not amending Section 175.7, but was concerned that if remained unchanged, buyers may become disadvantaged if the current regulation remained a tool to discourage or deny buyers' brokers. The Department considered not amending 19 NYCRR 176.3, but was concerned that broker and salesperson safety would continue to be at risk. The Department considered not amending 19 NYCRR 177.3(g), but determined that real estate course approval requests would be improved by permitting outlines for shorter course modules containing at least one hour of instruction. The Department considered not amending 19 NYCRR 177.7, but was concerned that requiring attendance computation on the basis of an hour equaling 60 minutes, rather than the proposed 50 minutes, was inefficient. The Department also considered not amending 19 NYCRR 175.25(d)(2), but determined that requiring the listing of license types on broker and salesperson business cards would that this proposal was necessary to clarify existing advertising rules as well as protect the public from possibly misleading information. The Department also considered making the rule effective immediately upon adoption yet ultimately determined that a delayed effective date would provide adequate time to notify and educate licensees about the new requirements and would afford the Department sufficient time to modify its existing procedures so as to implement and enforce the rule.

9. Federal standards:

There are no federal standards relating to this rule.

10. Compliance schedule:

The rule will be effective 60 days following publication of the notice of adoption to afford sufficient time to notify and educate licensees on the new requirements.

Regulatory Flexibility Analysis

1. Effect of rule:

The rule will apply to licensed real estate brokers and salespeople. The Department of State (the "Department") currently licenses approximately 126,028 real estate professionals, many of whom operate small businesses.

The rule does not apply to local governments.

2. Compliance requirements:

19 NYCRR 175.1 currently requires real estate brokers to place transaction deposits into an escrow account. The proposed rule adds needed clarity by providing a timeframe for the required deposit and the steps which must be taken prior to the deposit to safeguard said deposit. 19 NYCRR 175.7 currently requires disclosure and consent of all parties to a transaction prior to a broker and/or salesperson accepting compensation. The proposed rule clarifies that a broker or salesperson must obtain

consent of their client prior to receiving compensation. 19 NYCRR 176.3 currently requires real estate courses of study as a salesperson to devote 2 hours to Property Insurance and does not include License Safety as a required subject. Reducing the Property Insurance minimum to one hour enhances broker and salesperson safety, while maintaining the necessary instruction relating to Property Insurance as well as the regulatory requirement of 78 minimum subject hours. 19 NYCRR 177.3 (g) currently requires that requests for approval of courses of study include a form which shall include, inter alia, a detailed outline of the subject matter of each course or seminar containing at least 22 and ½ hours of instruction or a detailed outline of each course module containing at least three hours of instruction. The proposed rule change will permit outlines for shorter course modules containing at least one hour of instruction. 19 NYCRR 177.7 currently requires real estate course attendance to be computed on the basis of an hour equaling 60 minutes. The proposed rule change increases efficiency by requiring attendance to be computed on the basis of an hour equaling 50 minutes. 19 NYCRR 175.25 (d)(2) currently does not require brokers and salespersons to display their license type on their business cards. The proposed rule will better inform the public about who they are dealing with if such information is required to be printed on a licensee's business card.

3. Professional services:

Real estate brokers will not need to rely on professional services to comply with the requirements of the proposed amendment to Section 175.1. Brokers are currently required to maintain an escrow account if they collect money from a principal. For those who do not, any needed assistance may be obtained from the financial institution where the account will be held. Real estate brokers will not need to rely on professional services to comply with the requirements of the proposed amendment to Section 175.7. Requiring brokers to receive consent only from the broker's client prior to receiving compensation from multiple parties does not require professional services. Real estate brokers will not need to rely on professional services to comply with the requirements of the proposed amendment to Section 176.3. Real estate brokers will not need to rely on professional services to comply with the requirements of the proposed amendment to Section 177.3 (g). Real estate brokers will not need to rely on professional services to comply with the requirements of the proposed amendment to Section 177.7. Real estate brokers will not need to rely on professional services to comply with the requirements of the proposed amendment to Section 175.25 (d)(2).

4. Compliance costs:

Because the proposed amendment to Section 175.1 does not affect the current requirement that real estate brokers retain an escrow account for the deposit of a principal's money, the Department does not anticipate that it will impose any new costs upon real estate brokers. Because the proposed amendment to Section 175.7 solely requires the consent of the broker's client rather than all parties, where a broker receives compensation from more than one party, the Department does not anticipate that it will impose any new costs upon real estate brokers. Because the proposed amendment to Section 176.3 (a) rearranges the required number of hours for two subjects, the Department does not anticipate that it will impose any new costs upon real estate brokers. Because the proposed amendment to Section 177.3 changes the minimum amount of instruction that a course approval request can describe in an outline of a single course module, the Department does not anticipate that it will impose any new costs upon real estate brokers. Because the proposed amendment to Section 177.7 makes the computation of attendance more efficient, the Department does not anticipate that it will impose any new costs upon real estate brokers. Because the proposed amendment to Section 177.25 (d)(2) requires additional or possibly new information to be printed on some licensee's business cards, the Department anticipates that a nominal cost to comply with this proposal may be incurred. The Department estimates that purchasing new business cards could cost as little as \$10.00 for 500 cards.

5. Economic and technological feasibility:

The Department has determined that it will be economically and technologically feasible for small businesses to comply with 19 NYCRR 175.1. Because the proposed rule making amends the regulation to better define the timing requirements to deposit a principal's funds into an escrow account and the prior steps which must be taken to safeguard these funds, it does not increase the costs of doing business. Compliance will be technologically feasible because real estate brokers, including those working for small businesses, will not have to rely on special technology to conform their business practices to the requirements of the proposed rule making.

The Department has determined that it will be economically and technologically feasible for small businesses to comply with 19 NYCRR 175.7. Because the proposed rule making requires the consent of the broker's client as opposed to all parties to the transaction, it will not increase costs to real estate brokers, including those working for small businesses. Compliance will be technologically feasible because real estate brokers,

including those working for small businesses, will not have to rely on special technology to conform their business practices to the requirements of the proposed rule making.

The Department has determined that it will be economically and technologically feasible for small businesses to comply with 19 NYCRR 176.3 (a). Because the proposed rule making simply rearranges the required number of hours for two subjects, the Department does not anticipate that it will impose any costs upon real estate brokers, including those working for small businesses. The Department has determined that it will be economically and technologically feasible for small businesses to comply with 19 NYCRR 177.3 (g). The existing rule already allows a detailed outline of at least three hours of the instruction contained in a course module set forth for approval. Because the proposed rule making simply permits outlines of at least one hour, it does not impose costs on real estate brokers, including those who work for small businesses. The Department has determined that it will be economically and technologically feasible for small businesses to comply with 19 NYCRR 177.3 (g). Because the proposed rule making makes the computation of attendance more efficient by changing the increment of measuring attendance to 50 minutes, it does not impose costs on real estate brokers, including those who work for small businesses.

The Department has determined that it will be economically and technologically feasible for small businesses to comply with 19 NYCRR 175.25 (d)(2). Because the printing of business cards is common practice among real estate brokers, including those in small businesses, adding license type to the information already presented on business cards does not impose significant costs. It will also be technologically feasible for small businesses to comply with the proposed rule given that the rule making simply requires added type on business cards.

6. Minimizing adverse impact:

The Department has not identified any adverse economic impact associated with 19 NYCRR 175.1. Rather, the proposed rule should have a positive economic impact by ensuring that money belonging to a principal is safely secured once tendered to a real estate broker. This will help prevent the loss or diversion of these moneys and prevent any potential lawsuits resulting from said loss. The Department has not identified any adverse economic impact associated with 19 NYCRR 175.7. Rather, the proposed rule should have a positive economic impact on brokers by encouraging broker participation in transactions. The Department has not identified any adverse economic impact associated with 19 NYCRR 176.3 (a). The one hour of License Safety required for course of study approval in the proposed rule is offset by its one hour reduction in required hours devoted to Property Insurance. The Department has not identified any adverse economic impact associated with 19 NYCRR 177.3. There are no adverse impacts associated with expanding the minimum amount of instruction that a course approval request can outline for a single course module. The Department has not identified any adverse economic impact associated with 19 NYCRR 177.7. Rather, the proposed rule should have a positive economic impact by increasing the efficiency of the computation of course attendance. The Department has not identified any adverse economic impact associated with 19 NYCRR 177.25 (d)(2). The cost to brokers associated with design and printing of new business cards is nominal and is needed to provide greater clarity to the public.

7. Small business participation:

Prior to proposing the rule, the Department discussed the rules at several meetings of the NYS Board of Real Estate (the "Board"), which meetings are open to the public and contain a public comment period. No comments were received. The Department of State will continue its outreach after the rule is formally proposed as a Notice of Proposed Rule Making in the State Register. The publication of the rule in the State Register will provide additional notice to interested parties. Additional comments will be received and entertained by the Department.

8. Compliance:

The rule will be effective sixty (60) days following publication of the Notice of Adoption.

9. Cure Period:

The Department is not providing for a cure period prior to enforcement of these regulations. The proposed rule making will be effective sixty (60) days following publication of the Notice of Adoption. Prior to proposing this rule, the Department notified regulated parties about the new requirements discussing it at open meetings of the Board. As such, licensees have been given adequate notice of the proposed regulation and sufficient time within which to amend their businesses practices so as to comply with the requirements of the proposed rule.

Rural Area Flexibility Analysis

1. Effect of the rule:

The rule will apply to individuals licensed pursuant to Article 12-A of the NY Real Property Law ("NY RPL"). The Department of State (the "Department") currently licenses approximately 126,028 real estate professionals, some of whom work in rural areas. This proposal does not

impose different or additional requirements for individuals in rural areas of the state.

2. Compliance requirements:

19 NYCRR 175.1 currently requires real estate brokers to place transaction deposits into an escrow account. The proposed rule adds needed clarity by providing a timeframe for the required deposit and the steps which must be taken prior to the deposit to safeguard money belonging to a principal.

19 NYCRR 175.7 currently requires disclosure and consent of all parties to a transaction prior to a broker and/or salesperson accepting compensation. The proposed rule clarifies that a broker or salesperson must obtain consent from their client prior to receiving compensation.

19 NYCRR 176.3 currently requires real estate courses of study as a salesperson to devote 2 hours to Property Insurance and does not include License Safety as a required subject. By reducing the Property Insurance minimum to one hour, broker and salesperson safety will be enhanced while maintaining the necessary instruction relating to Property Insurance as well as the regulatory requirement of 78 minimum hours.

19 NYCRR 177.3 (g) currently requires that requests for approval of courses of study include a form which shall include, inter alia, a detailed outline of the subject matter of each course or seminar containing at least 22 and ½ hours of instruction or a detailed outline of each course module containing at least three hours of instruction. The proposed rule change will permit outlines for shorter course modules containing at least one hour of instruction.

19 NYCRR 177.7 currently requires real estate course attendance to be computed on the basis of an hour equaling 60 minutes. The proposed rule change increases efficiency by requiring attendance to be computed on the basis of an hour equaling 50 minutes.

19 NYCRR 175.25 (d)(2) currently does not require brokers and salespersons to display their license type on their business cards. The proposed rule will provide protect the public against misleading information from licensees.

3. Professional services:

Licensees will not need to rely on professional services to comply with the requirements of the proposed amendment to Section 175.1. Brokers are currently required to maintain an escrow account if they collect money from a principal. For those who do not, any needed assistance may be obtained from the financial institution where the account will be held.

Licensees will not need to rely on professional services to comply with the requirements of the proposed amendment to Section 175.7. Requiring brokers to receive consent only from the broker's client prior to receiving compensation from multiple parties does not require professional services.

Licensees will not need to rely on professional services to comply with the requirements of the proposed amendment to Section 176.3. Adding License Safety as a subject requirement and limiting the required hours of Property Insurance as a subject to one hour is self-explanatory and compliance does not require professional services.

Licensees will not need to rely on professional services to comply with the requirements of the proposed amendment to Section 177.3 (g).

Licensees will not need to rely on professional services to comply with the requirements of the proposed amendment to Section 177.7.

Licensees will not need to rely on professional services to comply with the requirements of the proposed amendment to Section 175.7 (d)(2).

4. Compliance costs:

Because the proposed amendment to Section 175.1 does not affect the current requirement that real estate brokers retain an escrow account for the deposit of a principal's money, the Department does not anticipate that it will impose any new costs upon real estate brokers. Because the proposed amendment to Section 175.7 solely requires the consent of the broker's client rather than all parties, where a broker receives compensation from more than one party, the Department does not anticipate that it will impose any new costs upon real estate brokers. Because the proposed amendment to Section 176.3 (a) rearranges the required number of hours for two subjects, the Department does not anticipate that it will impose any new costs upon real estate brokers. Because the proposed amendment to Section 177.3 changes the minimum amount of instruction that a course approval request can describe in an outline of a single course module, the Department does not anticipate that it will impose any new costs upon real estate brokers. Because the proposed amendment to Section 177.7 makes the computation of attendance more efficient, the Department does not anticipate that it will impose any new costs upon real estate brokers. Because the proposed amendment to Section 177.25 (d)(2) requires additional or possibly new information to be printed on some licensee's business cards, the Department anticipates that a nominal cost to comply with this proposal may be incurred. The Department estimates that purchasing new business cards could cost as little as \$10.00 for 500 cards.

5. Minimizing adverse impacts:

The Department has not identified any adverse economic impact associated with 19 NYCRR 175.1. Rather, the proposed rule should have a

positive economic impact by ensuring that money belonging to a principal is safety secured once tendered to a real estate broker. This will help prevent the loss or diversion of these moneys and prevent any potential lawsuits resulting from said loss. The Department has not identified any adverse economic impact associated with 19 NYCRR 175.7. Rather, the proposed rule should have a positive economic impact on brokers by encouraging broker participation in transactions. The Department has not identified any adverse economic impact associated with 19 NYCRR 176.3 (a). The one hour of License Safety required for course of study approval in the proposed rule is offset by its one hour reduction in required hours devoted to Property Insurance. The Department has not identified any adverse economic impact associated with 19 NYCRR 177.3. There are no adverse impacts associated with expanding the minimum amount of instruction that a course approval request can outline for a single course module. The Department has not identified any adverse economic impact associated with 19 NYCRR 177.7. Rather, the proposed rule should have a positive economic impact by increasing the efficiency of the computation of course attendance. The Department has not identified any adverse economic impact associated with 19 NYCRR 177.25(d)(2). The cost to brokers associated with design and printing of new business cards is nominal and is needed to provide greater clarity to the public.

6. Rural area participation:

Prior to proposing the rule, the Department discussed the amendments at several meetings of the NYS Board of Real Estate, which meetings are open to the public and contain a public comment period. No comments were received. The Department will continue its outreach after the rule is formally proposed as a Notice of Proposed Rule Making in the State Register. The publication of the rule in the State Register will provide additional notice to interested parties located in rural areas. Additional comments will be received and entertained by the Department.

Job Impact Statement

1. Impact of the rule

The rule will impact real estate brokers, salespeople working under the supervision of real estate brokers, and course of study owners.

19 NYCRR 175.1 currently requires real estate brokers to place transaction deposits into an escrow account. The proposed rule making provides clarity as to when this money must be deposited and clarifies that steps must be taken prior to said deposit to safeguard the deposit money. The Department of State (the "Department") has not identified any adverse impact of this rule making on jobs and employment opportunities.

19 NYCRR 175.7 currently requires disclosure and consent of all parties to a transaction prior to a broker and/or salesperson accepting compensation. The proposed rule clarifies that a broker or salesperson must obtain the consent of their client, rather than the consent of all parties, prior to receiving compensation. The Department has not identified any adverse impact of this rule making on jobs and employment opportunities.

19 NYCRR 176.3 currently requires real estate courses of study as a salesperson to devote 2 hours to Property Insurance and does not include License Safety as a required subject. By reducing the Property Insurance minimum to one hour, broker and salesperson safety will be enhanced while maintaining the necessary instruction relating to Property Insurance and the regulatory requirement of 78 minimum hours. The Department has not identified any adverse impact of this rule making on jobs and employment opportunities.

19 NYCRR 177.3 (g) currently requires that requests for approval of courses of study include a form which shall include, inter alia, a detailed outline of the subject matter of each course or seminar containing at least 22 and ½ hours of instruction or a detailed outline of each course module containing at least three hours of instruction. The proposed rule change will permit outlines for shorter course modules containing at least one hour of instruction. The Department has not identified any adverse impact of this rule making on jobs and employment opportunities.

19 NYCRR 177.7 currently requires real estate course attendance to be computed on the basis of an hour equaling 60 minutes. The proposed rule change increases efficiency by requiring attendance to be computed on the basis of an hour equaling 50 minutes. The Department has not identified any adverse impact of this rule making on jobs and employment opportunities.

19 NYCRR 175.25 (d)(2) currently does not require brokers and salespersons to display their license type on their business cards. The Department has not identified any adverse impact of this rule making on jobs and employment opportunities.

2. Categories and numbers affected

The rule will apply to licensed real estate brokers, real estate salespeople, and real estate course owners. Currently, the Department licenses approximately 126, 028 professionals subject to this rule.

3. Regions of adverse impact

The Department has not identified any region of the state where the rule would have a disproportionate adverse impact on jobs or employment opportunities. Licensees work in all areas of the state.

4. Minimizing adverse impact

The Department has not identified any adverse impacts of this rule on employment or employment opportunities.

To provide adequate time for licensees to bring themselves into compliance with the rule requirements, the Department will not make the rule effective until sixty days following publication of the notice of adoption.

Office of Temporary and Disability Assistance

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Standard Utility Allowances (SUAs) for the Supplemental Nutrition Assistance Program (SNAP)

I.D. No. TDA-39-16-00010-EP

Filing No. 861

Filing Date: 2016-09-13

Effective Date: 2016-10-01

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

Proposed Action: Amendment of section 387.12 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 17(a)-(b), (j), 20(3)(d) and 95; 7 USC, section 2014(e)(6)(C); 7 CFR, section 273.9(d)(6)(iii)

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

Specific reasons underlying the finding of necessity: It is of great importance that the federally-mandated and most currently approved standard utility allowances for the Supplemental Nutrition Assistance Program (SNAP) are applied to SNAP benefit calculations effective October 1, 2016, and thereafter until new amounts eventually are approved by the United States Department of Agriculture (USDA). If past standard utility allowances were to be used, in the absence of federal authority, in calculating ongoing SNAP benefits, thousands of SNAP households would receive SNAP overpayments each month. Households receiving such overpayments could be subject to an extended period of SNAP recoupments at the rate of 10% of their monthly SNAP benefits to recover the resulting overpayments of SNAP benefits. Thousands of SNAP households throughout New York State could thus be adversely affected. Such recoupments would constitute hardships to these households and impact their ability to purchase needed food, for as long as the recoupments are in effect. These emergency amendments protect the public health and general welfare by setting forth the federally mandated and approved standard utility allowances effective as of October 1, 2016, and by helping to prevent future recoupments and hardship.

As stated above, there is no federal authority to use past standard utility allowances after the October 1, 2016 effective date of the new federally approved allowance amounts. As such, the State option to use the standard utility allowance in lieu of the actual utility cost portion of SNAP household shelter expenses would not have the required approval of the USDA. Without federal approval of this State option, the State may be forced to use the actual utility cost portion of the shelter expenses of each SNAP household. This would necessitate all 58 social services districts in New York State to require all 1.63 million SNAP households to provide verification of the actual utility cost portions of their shelter expenses. This would create a tremendous burden on both social services districts as well as recipient households. In addition, as actual utility costs are generally significantly less than the standard utility allowances, SNAP households would have a much smaller shelter deduction resulting in a sizeable reduction in their SNAP benefits. This reduction in SNAP benefits for up to 1.63 million SNAP households would result in significant harm to the health and welfare of these households.

It is noted that the regulatory amendments are being promulgated pursuant to a combined Notice of Emergency Adoption and Proposed Rule Making, instead of a Notice of Proposed Rule Making, due to time constraints. On July 22, 2016, the USDA approved the Office of Temporary and Disability Assistance's (OTDA's) proposed federal fiscal year 2017 standard utility allowances, effective October 1, 2016. The USDA then provided its approval to OTDA. This did not provide sufficient time

for OTDA to publish a Notice of Proposed Rule Making and for the new standard utility allowances to become effective on October 1, 2016. An emergency adoption is necessary to have the new standard utility allowances be effective on October 1, 2016. Although these regulations are being promulgated on an emergency basis to protect the public health and general welfare, OTDA will receive public comments on its combined Notice of Emergency Adoption and Proposed Rule Making until 45 days after publication of this notice.

Subject: Standard Utility Allowances (SUAs) for the Supplemental Nutrition Assistance Program (SNAP).

Purpose: These regulatory amendments set forth the federally mandated and approved SUAs as of 10/1/16.

Text of emergency/proposed rule: Clauses (a) and (b) of subparagraph (v) of paragraph (3) of subdivision (f) of § 387.12 of Title 18 NYCRR are amended to read as follows:

(a) The standard allowance for heating/cooling consists of the costs for heating and/or cooling the residence, electricity not used to heat or cool the residence, cooking fuel, sewage, trash collection, water fees, fuel for heating hot water and basic service for one telephone. The standard allowance for heating/cooling is available to households which incur heating and/or cooling costs separate and apart from rent and are billed separately from rent or mortgage on a regular basis for heating and/or cooling their residence, or to households entitled to a Home Energy Assistance Program (HEAP) payment or other Low Income Home Energy Assistance Act (LIHEAA) payment. A household living in public housing or other rental housing which has central utility meters and which charges the household for excess heating or cooling costs only is not entitled to the standard allowance for heating/cooling unless they are entitled to a HEAP or LIHEAA payment. Such a household may claim actual costs which are paid separately. Households which do not qualify for the standard allowance for heating/cooling may be allowed to use the standard allowance for utilities or the standard allowance for telephone. As of October 1, [2015] 2016, but subject to subsequent adjustments as required by the United States Department of Agriculture (“USDA”), the standard allowance for heating/cooling for SNAP applicant and recipient households residing in New York City is [\$768] \$758; for households residing in either Suffolk or Nassau Counties, it is [\$716] \$706; and for households residing in any other county of New York State, it is [\$636] \$627.

(b) The standard allowance for utilities consists of the costs for electricity not used to heat or cool the residence, cooking fuel, sewage, trash collection, water fees, fuel for heating hot water and basic service for one telephone. It is available to households billed separately from rent or mortgage for one or more of these utilities other than telephone. The standard allowance for utilities is available to households which do not qualify for the standard allowance for heating/cooling. Households which do not qualify for the standard allowance for utilities may be allowed to use the standard allowance for telephone. As of October 1, [2015] 2016, but subject to subsequent adjustments as required by the USDA, the standard allowance for utilities for SNAP applicant and recipient households residing in New York City is [\$304] \$300; for households residing in either Suffolk or Nassau Counties, it is [\$281] \$277; and for households residing in any other county of New York State, it is [\$257] \$254.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire December 11, 2016.

Text of rule and any required statements and analyses may be obtained from: Richard P. Rhodes, Jr., New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, NY 12243-0001, (518) 486-7503, email: richard.rhodesjr@otda.ny.gov

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

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

Regulatory Impact Statement

1. Statutory authority:

The United States Code (U.S.C.), at 7 U.S.C. § 2014(e)(6)(C), provides that in computing shelter expenses for budgeting under the federal Supplemental Nutrition Assistance Program (SNAP), a State agency may use a standard utility allowance as provided in federal regulations.

The Code of Federal Regulations (C.F.R.), at 7 C.F.R. § 273.9(d)(6)(iii), provides for standard utility allowances in accordance with SNAP. Clause (A) of this subparagraph states that with federal approval from the Food and Nutrition Services (FNS) of the United States Department of Agriculture, a State agency may develop standard utility allowances to be used in place of actual costs in calculating a household’s excess shelter deduction. Federal regulations allow for the following types of standard utility allowances: a standard utility allowance for all utilities that includes heating or cooling costs; a limited utility allowance that includes electricity and fuel for purposes other than heating or cooling, water, sewerage, well

and septic tank installation and maintenance, telephone, and garbage or trash collection; and an individual standard for each type of utility expense. Clause (B) of the subparagraph provides that a State agency must review the standard utility allowances annually and make adjustments to reflect changes in costs. Also State agencies must provide the amounts of the standard utility allowances to the FNS when they are changed and submit methodologies used in developing and updating the standard utility allowances to the FNS for approval whenever the methodologies are developed or changed.

Social Services Law (SSL) § 17(a)-(b) and (j) provide, in part, that the Commissioner of the Office of Temporary and Disability Assistance (OTDA) shall “exercise such other powers and perform such other duties as may be imposed by law.”

SSL § 20(3)(d) authorizes OTDA to promulgate regulations to carry out its powers and duties.

SSL § 95 authorizes OTDA to administer SNAP in New York State and to perform such functions as may be appropriate, permitted or required by or pursuant to federal law.

2. Legislative objectives:

It was the intent of the Legislature to implement the federal SNAP Act in New York State in order to provide SNAP benefits to eligible New York State residents.

3. Needs and benefits:

The regulatory amendments set forth the standard utility allowances within New York State as of October 1, 2016. OTDA is amending its standard utility allowances in 18 NYCRR § 387.12(f)(3)(v)(a) and (b) to reflect a decrease in fuel and utility costs, which is indicated in the Consumer Price Index (CPI) fuel and utilities values (which includes components for water, sewage and trash collection).

The following chart sets forth the standard utility allowance categories; the past standard utility allowances (“Past SUA”) that were in effect for federal fiscal year (FFY) 2016, from October 1, 2015 through September 31, 2016; and the new standard utility allowances (“New SUA”) that are in effect for FFY 2017, effective October 1, 2016:

	New York City		Nassau/Suffolk Counties		Rest of State	
	Past SUA	New SUA	Past SUA	New SUA	Past SUA	New SUA
Heating/Air Conditioning SUA	\$768	\$758	\$716	\$706	\$636	\$627
Basic Utility SUA	\$304	\$300	\$281	\$277	\$257	\$254
Phone SUA	\$33 (Unchanged for all Counties)					

To determine the new standard utility allowance values for FFY 2017, the CPI Fuel and Utility value for June 2016 was compared to the CPI Fuel and Utility value for June 2015, the CPI value that was used to determine the adjustment for the FFY 2016 standard utility allowance values. The percentage change between June 2015 and June 2016 was then applied to the FFY 2016 standard utility allowance figures. The June 2016 CPI Fuel and Utility value was 1.359% lower than the June 2015 value. The June CPI values were used because they were the most recent month for which CPI values were available at the time when the programming of the new SUA values into the Welfare Management System (WMS) had to be done in order to comply with the October 1, 2016 effective date.

OTDA has all required approvals from the FNS pertaining to these changes and is required to apply the standard utility allowances for FFY 2017 in its SNAP budgeting effective October 1, 2016. As of October 1, 2016, OTDA does not have federal approval or authority to apply past standard utility allowances in its prospective SNAP budgeting.

It is of great importance that the federally mandated and most currently approved standard utility allowances for the Supplemental Nutrition Assistance Program (SNAP) are applied to SNAP benefit calculations effective October 1, 2016, and thereafter until new amounts eventually are approved by the United States Department of Agriculture (USDA). If past standard utility allowances were to be used, in the absence of federal authority, in calculating ongoing SNAP benefits, thousands of SNAP households would receive SNAP overpayments each month. Households receiving such overpayments could be subject to an extended period of SNAP recoupments at the rate of 10% of their monthly SNAP benefits to recover the resulting overpayments of SNAP benefits. Thousands of SNAP households throughout New York State could thus be adversely affected. Such recoupments would constitute hardships to these households and impact their ability to purchase needed food, for as long as the recoupments are in effect. These emergency amendments protect the public interest by setting forth the federally mandated and approved standard utility allowances effective as of October 1, 2016, and by helping to prevent future recoupments and hardship.

As stated above, there is no federal authority to use past standard utility allowances after the October 1, 2016 effective date of the new federally approved allowance amounts. As such, the State option to use the standard utility allowance in lieu of the actual utility cost portion of SNAP household shelter expenses would not have the required approval of the USDA. Without federal approval of this State option, the State may be forced to use the actual utility cost portion of the shelter expenses of each SNAP household. This would necessitate all 58 social services districts in New York State to require all 1.63 million SNAP households to provide verification of the actual utility cost portions of their shelter expenses. This would create a tremendous burden on both social services districts as well as recipient households. In addition, as actual utility costs are generally significantly less than the standard utility allowances, SNAP households would have a much smaller shelter deduction resulting in a sizeable reduction in their SNAP benefits. This reduction in SNAP benefits for up to 1.63 million SNAP households would result in significant harm to the health and welfare of these households.

4. Costs:

The regulatory amendments will not result in any impact to the State financial plan, they will not impose costs upon the social services districts because SNAP benefits are 100 percent federally-funded, and they comply with federal statute and regulation to implement federally-approved standard utility allowances.

5. Local government mandates:

The regulatory amendments do not impose any mandates upon social services districts since the amendments simply set forth the federally approved standard utility allowances, effective October 1, 2016. Additionally, the calculation of SNAP budgets, which incorporates the standard utility allowances, and the resulting issuances of SNAP benefits are mostly automated processes in New York City and the rest of the State using OTDA's Welfare Management System. To the extent that these processes are not automated, the regulatory amendments do not impose any additional requirements upon the social services districts in terms of calculating SNAP budgets.

6. Paperwork:

The regulatory amendments do not impose any new forms, new reporting requirements or other paperwork upon the State or the social services districts.

7. Duplication:

The regulatory amendments do not duplicate, overlap or conflict with any existing State or federal statutes or regulations.

8. Alternatives:

An alternative to the regulatory amendments would be to refrain from implementing the revised standard utility allowances. However, this alternative is not a viable option because if New York State were to opt not to implement the new standard utility allowances or were otherwise judicially precluded from doing so, then New York State would be out of compliance with federal statutory and regulatory requirements.

9. Federal standards:

The regulatory amendments do not conflict with or exceed minimum standards of the federal government.

10. Compliance schedule:

Since the regulatory amendments set forth the federally-approved standard utility allowances effective October 1, 2016, the State and all social services districts will be in compliance with the regulatory amendments upon the effective date of the regulatory amendments.

Regulatory Flexibility Analysis

1. Effect of Rule:

The regulatory amendments will have no effect on small businesses. The regulatory amendments do not impose any mandates upon social services districts since the amendments simply set forth the federally approved standard utility allowance amounts, effective October 1, 2016. The calculation of Supplemental Nutrition Assistance Program (SNAP) budgets, which incorporates the standard utility allowances, and the resulting issuances of SNAP benefits are mostly automated processes in New York City and the rest of the State using the Office of Temporary and Disability Assistance's (OTDA's) Welfare Management System, and to the extent these processes are not automated, the regulatory amendments do not impose any additional requirements upon the social services districts in terms of calculating SNAP budgets.

2. Compliance Requirements:

The regulatory amendments do not impose any reporting, recordkeeping or other compliance requirements on social services districts.

3. Professional Services:

The regulatory amendments do not require social services districts to hire additional professional services to comply with the new regulations.

4. Compliance Costs:

The regulatory amendments do not impose initial costs or any annual costs upon social services districts because SNAP benefits are 100 percent federally funded, and these regulatory amendments also comply with

federal statute and regulation to implement federally-approved standard utility allowances.

5. Economic and Technological Feasibility:

All social services districts have the economic and technological ability to comply with the regulatory amendments.

6. Minimizing Adverse Impact:

The regulatory amendments will not have an adverse impact on social services districts.

7. Small Business and Local Government Participation:

OTDA plans to provide a General Information System (GIS) release to social services districts in New York State setting forth, in part, the new standard utility allowances for SNAP effective October 1, 2016. In past years, social services districts have not raised any concerns or objections related to the implementation of the new standard utility allowances. After OTDA releases its GIS reflecting the standard utility allowances effective October 1, 2016, social services districts will have an opportunity to contact OTDA with any concerns, questions, or other issues. The GIS will be posted to OTDA's internet site.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The regulatory amendments will have no effect on small businesses in rural areas. The regulatory amendments do not impose any mandates upon the 44 social services districts in rural areas of the State. Rather, the regulatory amendments simply set forth the federally-approved standard utility allowance amounts, effective October 1, 2016. The calculation of Supplemental Nutrition Assistance Program (SNAP) budgets, which incorporates the standard utility allowances, and the resulting issuances of SNAP benefits are mostly automated processes in New York City and the rest of the State using the Office of Temporary and Disability Assistance's (OTDA's) Welfare Management System. To the extent these processes are not automated, the regulatory amendments do not impose any additional requirements upon the social services districts in terms of calculating SNAP budgets.

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

The regulatory amendments do not impose any reporting, recordkeeping or other compliance requirements on the social services districts in rural areas. Social services districts in rural areas do not need to hire additional professional services to comply with the regulations.

3. Costs:

The regulatory amendments do not impose initial capital costs or any annual costs upon the social services districts in rural areas because SNAP benefits are 100 percent federally-funded, and these regulatory amendments comply with federal statute and regulation to implement federally-approved standard utility allowances.

4. Minimizing adverse impact:

The regulatory amendments will not have an adverse impact on the social services districts in rural areas.

5. Rural area participation:

OTDA plans to provide a General Information System (GIS) release to social services districts in New York State setting forth, in part, the new standard utility allowances for SNAP effective October 1, 2016. In past years, social services districts have not raised any concerns or objections related to the implementation of the new standard utility allowances. After OTDA releases its GIS reflecting the standard utility allowances effective October 1, 2016, social services districts will have an opportunity to contact OTDA with any concerns, questions or other issues. The GIS will be posted to OTDA's internet site.

Job Impact Statement

A Job Impact Statement is not required for the regulatory amendments. It is apparent from the nature and the purpose of the regulatory amendments that they will not have a substantial adverse impact on jobs and employment opportunities in either the public or the private sectors. The regulatory amendments will have no effect on small businesses. The regulatory amendments will not affect, in any significant way, the jobs of the workers in the social services districts or the State. These regulatory amendments set forth the federally-approved standard utility allowances for the Supplemental Nutrition Assistance Program (SNAP) as of October 1, 2016. The calculation of SNAP budgets, which incorporates the standard utility allowances, and the resulting issuances of SNAP benefits are mostly automated processes in New York City and the rest of the State using the Office of Temporary and Disability Assistance's Welfare Management System. To the extent these processes are not automated, the regulatory amendments do not impose any additional requirements upon the social services districts in terms of calculating SNAP budgets. Thus, the regulatory amendments will not have any adverse impact on jobs and employment opportunities in either the public or private sectors of New York State.

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

Operational Plans for Uncertified Shelters for the Homeless

I.D. No. TDA-39-16-00006-P

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

Proposed Action: Addition of section 352.39 to Title 18 NYCRR.

Statutory authority: Social Services Law, sections 17(a)-(b), (j), 20(2)-(3), 34, 460-c and 460-d

Subject: Operational Plans for Uncertified Shelters for the Homeless.

Purpose: Require social services districts to submit to the Office of Temporary and Disability Assistance for review and approval operational plans and closure reports for each publicly-funded emergency shelter that currently does not fall within the scope of section 352.3(e)-(h), Part 491 or Part 900 of Title 18 NYCRR.

Text of proposed rule: New section 352.39 of Title 18 of the NYCRR is added to read as follows:

§ 352.39. *Operational Plans for Uncertified Shelters for the Homeless*

(a) For purposes of this section, "emergency shelter" shall mean any facility with overnight sleeping accommodations, the primary purpose of which is to provide temporary shelter to recipients of temporary housing assistance, including but not limited to shelters for adults as defined in section 491.2 of this Title and shelters for families, either with or without children, as defined in section 900.2 of this Title.

(b) This section shall apply to emergency shelters for which social services districts receive reimbursement which do not otherwise fall within the scope of section 352.3(e)-(h), Part 491 or Part 900 of this Title and emergency shelters operated by social services districts which do not otherwise fall within the scope of section 352.3(e)-(h), Part 491 or Part 900 of this Title.

(c) A social services district may be reimbursed for costs incurred for emergency shelters and services provided by emergency shelters subject to this section only when the emergency shelters are operated pursuant to operational plans that have been approved by the Office of Temporary and Disability Assistance (the "Office"). A separate operational plan must be submitted by the social services district for each emergency shelter for which the district seeks reimbursement, or for each portfolio of emergency shelters where the emergency shelters within the portfolio are operated by a single operator and are comprised of individual apartment units within residential apartment buildings, and the operators are reimbursed by the social services district on a per diem basis.

(d) Operational Plan: For emergency shelters within the scope of this section, the operational plan must provide all of the following information concerning the facility:

- (1) name and location of the facility;
- (2) name and address of the entity which will operate the facility;
- (3) names, addresses and occupations of the members of the board of directors, if the operator is a corporation;
- (4) name and address of the owner of the land and premises, if other than the operator;
- (5) financial resources and sources of future revenue of the facility;
- (6) a financial statement for the shelter's most recently completed fiscal year, if any;
- (7) a proposed one year budget, including estimated income and expenditures, on forms and in a manner prescribed by the Office. Such proposed budget must set forth the amount reasonable and necessary to operate and maintain the shelter;
- (8) the emergency shelter's policies and procedures;
- (9) admissions policies;
- (10) policies ensuring access by legal representatives and legal counsel to their clients who are residents of the facility;
- (11) in shelters for families with children, policies and procedures for providing needed care, services and support of children and families consistent with applicable regulations;
- (12) in shelters for families with children, arrangements for facilitating school attendance by school-age children residing in the facility, including any necessary transportation arrangements;
- (13) plan for health services, including evidence of any arrangement with a fully accredited medical institution or clinic for the referral of resident families for emergency treatment. In addition, if medical supplies are to be stored at the facility or refrigeration is to be provided for personal medical supplies of residents, the arrangements for safekeeping and refrigeration of such medical supplies must be specified;
- (14) procedures for assisting residents in making application for public benefits such as, but not limited to, public assistance, medical as-

sistance, the supplemental nutrition assistance program, Supplemental Security Income, title XX or child welfare or unemployment benefits;

(15) facility staffing schedules and a description of each position, including job duties, and qualifications;

(16) plan for staff training including training concerning the emergency and disaster plan for the facility and fire safety;

(17) bathroom arrangements, including the number of toilets, sinks, showers and bathtubs and, where appropriate, the facility's provision for the bathing and changing of infants and young children;

(18) food service arrangements. If a food service provider is used, written evidence of such arrangement must be included. If food is prepared onsite provide the number of refrigerators, stoves, and microwaves. A description of the dining area and the number of chairs, tables and seating must also be included;

(19) physical structure, including land, buildings and equipment, certificate of occupancy and building descriptions including type of construction, planned renovations, and room layouts with dimensions;

(20) fire safety measures and emergency and disaster plan;

(21) resident capacity;

(22) resident rules and rights;

(23) procedures for handling involuntary discharges or transfers;

(24) description of any other programs that are operating in the building and copies of the applicable licenses and certifications;

(25) procedures and environmental safeguards designed to ensure the well-being and safety of residents if the shelter facility is located in the same building or on the same premises where another program is or will be operated; such procedures must indicate the circumstances under which common staff or joint services will be utilized; and procedures for safeguarding the confidentiality of medical records concerning residents of the shelter;

(26) procedures for informing residents of their rights as residents and a listing of said rights;

(27) facility leave and absence policy;

(28) a description of the community services available to the shelter population including public transportation, parks and recreation areas, medical and mental health services, restaurants and stores;

(29) procedures for advising residents of the conduct or activities for which temporary housing assistance may be discontinued as provided in section 352.35 of this Part;

(30) procedures which describe the facility's responsibilities in relation to the social services district's requirements for discontinuing temporary housing assistance, including notification to the social services district of acts which may be grounds for the discontinuance of temporary housing assistance;

(31) procedures for providing shelter residents with services which include at a minimum: necessary medical referrals; assistance with obtaining permanent housing; assistance with securing necessary supportive social and mental health services including but not limited to psychiatric and alcohol abuse services; assistance with securing employment assessments, job training placements, educational opportunities; and information and referral services for community agencies and programs whose services might assist residents to return to permanent housing. If any of these services are provided off site, the name, location, contact information, and description of the service provider must be included;

(32) a plan for the shelter to provide security and help ensure the physical safety of residents and staff, as required by section 352.38 of this Part;

(33) procedures for handling and documenting individual emergencies, including arranging for medical care or other emergency services, maintaining records of any special medical needs or conditions, the prescribed regimens to be followed, and the names and phone numbers of medical doctors to contact should an emergency arise concerning these conditions;

(34) procedures for handling resident complaints and grievances; and

(35) such other information as may be requested by the Office.

(e) Submission and approval:

(1) The social services district must submit a proposed operational plan for each emergency shelter addressed by this section in writing to the Office no less than 45 days before planned use of a facility as an emergency shelter or 120 days from the date this regulation becomes effective for emergency shelters currently in operation.

(2) An operational plan will be approved only when it is established that the facility will be operated in accordance with the operational plan and all applicable laws and regulations.

(f) An operational plan approved by the Office under this section will remain in effect for a maximum period of five years. No later than 60 days prior to the expiration of an operational plan, the social services district must submit on forms and in the manner prescribed by the Office, a request to renew the approval of the operational plan. Such request must include

appropriate financial data; any proposed new, or changes to existing, contracts; any proposed revisions to leases or rental agreements; documentation that the facility is in compliance with applicable State and local laws, regulations, and codes; and information regarding any other changes being proposed to the current operational plan. The social services district may request an extension of the 60-day period in order to submit appropriate financial data, and the Office may grant one extension, not to exceed six months. If an extension is granted, the Office may either continue reimbursement at the approved rate or establish an interim per diem rate. State reimbursement may not exceed these per diem rates, and will continue until such time as either the appropriate financial data is submitted and the operational plan is approved, or operational plan approval by the Office is withdrawn or expired.

(g) Proposed revisions to an approved operational plan must be submitted by the social services district to the Office for approval prior to implementation. Proposed revisions are subject to the requirements of subdivision (d) of this section.

(h) In the event that an operator elects to close an emergency shelter falling within the scope of this section:

a. the social services district shall notify the Office in writing at least 120 days prior to the anticipated closure;

b. such written notice shall include a proposed plan for closure. The plan shall be subject to Office approval and shall include timetables and shall describe the procedures and actions the operator will take to:

i. notify residents of the closure, including provisions for termination of admission agreements and involuntary discharge;

ii. assess the needs and preferences of the individual residents;

iii. assist residents in locating and transferring to appropriate alternative settings; and

iv. maintain compliance with the Office's regulations until all residents have relocated.

(i) For costs incurred by a facility that begins operation after the effective date of this Part, reimbursement may be available from the date the social services district submits its proposed operational plan provided:

(1) the facility is operational at the time the plan is submitted or within 45 days after the date of submittal;

(2) if the Office has requested additional information, the social services district submits such information within 30 days; and

(3) the operational plan is fully approved no later than one year from the date the social services district submits its proposed operational plan or a lesser time period as specified by the Office.

Text of proposed rule and any required statements and analyses may be obtained from: Richard P. Rhodes, Jr., New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, New York 12243, (518) 486-7503, email: richard.rhodesjr@otda.ny.gov

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

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

Regulatory Impact Statement

1. Statutory Authority:

Social Services Law (SSL) § 17(a)-(b) and (j) provide, in part, that the Commissioner of the Office of Temporary and Disability Assistance ("OTDA") shall "determine the policies and principles upon which public assistance, services and care shall be provided within the state both by the [S]tate itself and by the local governmental units ...", shall "make known his policies and principles to local social services officials and to public and private institutions and welfare agencies subject to his regulatory and advisory powers ...", and shall "exercise such other powers and perform such other duties as may be imposed by law."

SSL § 20(2) provides, in part, that the OTDA shall "supervise all social services work, as the same may be administered by any local unit of government and the social services officials thereof within the state, advise them in the performance of their official duties and regulate the financial assistance granted by the [S]tate in connection with said work." Pursuant to SSL § 20(3)(d) and (e), OTDA is authorized to promulgate rules, regulations, and policies to fulfill its powers and duties under the SSL and "to withhold or deny State reimbursement, in whole or in part, from or to any social services district ("SSD") or any city or town thereof, in the event of [their] failure... to comply with law, rules or regulations of [OTDA] relating to public assistance and care or the administration thereof."

SSL § 34(3)(c) requires OTDA's Commissioner to "take cognizance of the interests of health and welfare of the inhabitants of the state who lack or are threatened with the deprivation of the necessities of life and of all matters pertaining thereto." Pursuant to SSL § 34(3)(f), OTDA's Commissioner must establish regulations for the administration of public assistance and care within the state by the SSDs and by the State itself, in accordance with the law. In addition, pursuant to SSL § 34(3)(d), OTDA's Commissioner must exercise general supervision over the work of all

SSDs, and SSL § 34(3)(e) provides that OTDA's Commissioner must enforce the SSL and the State regulations within the state and in the local governmental units. Pursuant to SSL § 34(6), OTDA's Commissioner "may exercise such additional powers and duties as may be required for the effective administration of the department and of the [S]tate system of public aid and assistance."

SSL § 460-c (1) confers authority upon OTDA to "inspect and maintain supervision over all public and private facilities or agencies whether [S]tate, county, municipal, incorporated or not incorporated which are in receipt of public funds," which includes emergency shelters. SSL § 460-d confers enforcement powers upon the OTDA Commissioner, or any person designated by the OTDA Commissioner, to "undertake an investigation of the affairs and management of any facility subject to the inspection and supervision provision of this article, or of any person, corporation, society, association or organization which operates or holds itself out as being authorized to operate any such facility, or of the conduct of any officers or employers of any such facility."

2. Legislative Objectives:

It is the intent of the Legislature in enacting the above-referenced statutes that OTDA establish rules, regulations and policies to provide for the health, safety and general welfare of vulnerable families and individuals who are placed in emergency homeless shelters.

3. Needs and Benefits:

New York State's shelter system includes a variety of homeless shelter types that provide emergency housing for homeless families with children, homeless "adult families" without children, and homeless single adults. All shelters currently are categorized as either certified – meaning they have been approved to operate a certified shelter in accordance with applicable regulations – or uncertified. Certified shelters and their operators undergo a rigorous program review, including budget reviews and supportive services program evaluations. Of the 916 homeless shelters inspected during OTDA's recent Shelter Inspection Initiative, only 151 were certified.

The proposed regulation will require all publicly-funded uncertified emergency shelters to become certified. Specifically, the regulation will require social services districts ("SSDs") to submit to OTDA for review and approval an operational plan for each emergency shelter currently not falling within the scope of section 352.3(e)-(h) (hotels and motels when no other suitable housing is available) or Part 491(certified adult shelters), or Part 900 (certified shelters for families) of Title 18 of the New York Codes, Rules and Regulations. However, SSDs that use cluster/scatter sites, (i.e. individual apartment units within residential apartment buildings that are used to provide temporary housing assistance) subject to the qualifications set forth in proposed subdivision § 352.39(c), are required to submit only one operational plan for each portfolio of such sites. The operational plans will include, among other things, the emergency shelter's plans and procedures to provide security and ensure the physical safety of residents and staff, provide health services, assist residents in making applications for public benefits, and procedures for providing shelter residents with services such as medical referrals; assistance with obtaining permanent housing, assistance with securing necessary supportive social and mental health services including psychiatric and alcohol abuse services, and assistance with securing employment assessments, job training placements, and educational opportunities.

SSDs may be reimbursed for costs incurred for emergency shelters subject to this section only where those emergency shelters are certified, or in other words, operated pursuant to operational plans that have been approved by OTDA.

Expanding the certification requirement across all shelters in New York State will enable OTDA to gather in-depth information regarding uncertified shelters operating within the state, to review and approve all aspects of the operation of those shelters, and most importantly, to assure that residents of those emergency shelters are provided with safe and secure accommodations and access to necessary health and supportive services.

SSDs also will be required to provide written notice to OTDA in the event an operator elects to close the shelter subject to the proposed regulation. Such written notice will include a proposed plan for closure.

The proposed regulation is necessary to protect vulnerable, low-income individuals and families with limited or no housing options, who have placed their trust and well-being in a system that should ensure that they have access to safe and habitable emergency shelter during their difficult times. These individuals and families are being placed in emergency shelters at great expense to the taxpayers of New York, who should expect that their funds are used effectively to provide safe and secure emergency shelter to those in need. It is important for OTDA and the SSDs to be fiscally prudent and to help ensure that State, federal, and local funds are properly used when housing homeless individuals and families.

4. Costs:

For rural governments, the fiscal impact of the new regulations is anticipated to be insignificant because relatively few rural SSDs have any

emergency shelters, and the rural SSDs primarily utilize commercial hotels and motels for temporary housing assistance.

For urban local governments, it is estimated that the cost to operationalize this regulation will be approximately \$190,000 on an annual basis, statewide.

It is estimated that State costs associated with implementation of this regulation will be approximately \$342,000 on an annual basis excluding fringe and indirect costs.

5. Local Government Mandates:

Each SSD will be responsible for preparing a separate operational plan for each emergency shelter operating within the district and submitting the operational plans to OTDA for review and approval. However, SSDs that use cluster/scatter sites, (i.e. individual apartment units within residential apartment buildings that are used to provide temporary housing assistance) subject to the qualifications set forth in proposed subdivision § 352.39(c), are required to submit only one operational plan for each portfolio of such sites. As noted above, SSDs also will be required to provide written notice to OTDA in the event an operator elects to close a shelter subject to the proposed regulation. Such written notice will include a proposed plan for closure.

6. Paperwork:

The regulatory amendments will require SSDs to prepare a separate operational plan for each emergency shelter operating within the district and submit the operational plan to OTDA for review and approval. As noted above, SSDs that use cluster/scatter sites, (i.e. individual apartment units within residential apartment buildings that are used to provide temporary housing assistance) subject to the qualifications set forth in proposed subdivision § 352.39(c), are required to submit only one operational plan for each portfolio of such sites. OTDA will approve an operational plan only when it is established that the emergency shelter will be operated in accordance with the operational plan and all applicable regulations and provisions of law. SSDs will also need to submit a written notice, including a proposed plan for closure, in the event an operator elects to close a shelter, subject to the proposed regulation.

7. Duplication:

The regulatory amendments would not duplicate, overlap, or conflict with any existing State or federal regulations.

8. Alternatives:

Inaction would jeopardize the health, welfare and safety of vulnerable individuals and families by allowing potentially dangerous conditions to continue to exist at emergency shelters that currently are not subject to OTDA oversight. OTDA does not consider this a viable alternative to the regulatory amendments.

9. Federal Standards:

The regulatory amendments would not conflict with federal statutes, regulations or policies.

10. Compliance Schedule:

The regulatory amendments would be effective on the date the Notice of Adoption is filed with the Department of State. SSDs would have 120 days from the effective date of the amendments to submit a proposed operational plan for each emergency shelter addressed by this new section if the emergency shelter is currently in operation.

Regulatory Flexibility Analysis

1. Effect of rule:

Pursuant to the State Administrative Procedure Act § 102(8), a “small business,” in part, is any business which is independently owned and operated and employs 100 or fewer individuals. This regulation will apply to small businesses that provide emergency shelters, namely approximately 800 shelters administered by not-for-profit agencies that are not heretofore subject to specific Office of Temporary and Disability Assistance (“OTDA”) regulations and reporting requirements. This regulation will also apply to all 58 social services districts (“SSDs”) in the State.

2. Compliance requirement:

The regulation will require that SSDs submit to OTDA the proposed operational plans, the contents of which are set forth in the regulation, for all emergency shelters for which a SSD receives reimbursement or emergency shelters operated by SSDs not falling within the scope of section 352.3(e)-(h), Part 491 or Part 900 of this Title. However, SSDs that use cluster/scatter sites, (i.e. individual apartment units within residential apartment buildings that are used to provide temporary housing assistance) subject to the qualifications set forth in proposed subdivision § 352.39(c), are required to submit only one operational plan for each portfolio of such sites. OTDA will assess the adequacy of the plan and will approve same only if it is established that the facility will be operated in accordance with the operational plan and all applicable regulations and provisions of law. For shelters subject to the proposed regulation, SSDs also will be required to provide written notice to OTDA in the event an operator elects to close the shelter. Such written notice will include a proposed plan for closure.

3. Professional services:

It is anticipated that the need for additional professional services will be limited. The regulation establishes reporting requirements upon SSDs who will likely implement such requirements on operators of emergency shelters which OTDA anticipates should be fulfilled without the need for securing professional services.

4. Compliance costs:

For rural governments, the fiscal impact of the new regulations is anticipated to be insignificant because relatively few rural SSDs have any emergency shelters, and the rural SSDs primarily utilize commercial hotels and motels for temporary housing assistance.

For urban local governments, it is estimated that the cost to operationalize this regulation will be approximately \$190,000 on an annual basis, statewide.

5. Economic and technological feasibility:

Operators of emergency shelters and SSDs should already have the economic and technological abilities to comply with the regulation.

6. Minimizing adverse impact:

OTDA does not anticipate that the reporting requirements established by the regulation will adversely impact emergency shelters and SSDs. The regulation should not provide exemptions because this would not serve the purposes of helping to ensure the health and safety of all emergency shelter residents and protecting these vulnerable residents from dangerous conditions.

7. Small business and local government participation:

It is anticipated that small businesses and SSDs will be dedicated to implementing the regulation and protecting the health, safety, and general welfare of residents and staff of emergency shelters.

Rural Area Flexibility Analysis

1. Types and estimate numbers of rural areas:

The regulation will apply to all social services districts (“SSDs”), which includes 44 rural SSDs and the emergency shelters located in those areas. The regulation would also apply to small businesses, including not-for-profit entities that are considered uncertified emergency shelters and which provide temporary shelter to recipients of temporary housing in those rural counties.

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

Rural SSDs will be responsible for producing and submitting the required operational plans to the Office of Temporary and Disability Assistance (“OTDA”) for emergency shelters for which rural SSDs receive reimbursement or emergency shelters operated by rural SSDs, which do not otherwise fall within the scope of section 352.3(e)-(h), Part 491 or Part 900. The rural SSDs will be responsible for verifying that the operational plans are consistent with statutory and regulatory requirements. As a result, there would be additional reporting requirements for rural SSDs that have uncertified emergency shelters in their districts. However, since many of the uncertified shelters are in urban districts, the rural SSDs will be less impacted by the addition of the regulation. The rural SSDs also will be required to provide written notice to OTDA when a shelter subject to the proposed regulation is to be closed.

Pursuant to the proposed regulation, rural SSDs would need to comply with new requirements concerning the submission to, and approval by, OTDA of operational plans for uncertified emergency shelters, and the submission of required closing plans. The reporting costs are not expected to be significant because rural SSDs primarily utilize commercial hotels and motels for temporary housing assistance placements and will not be required to submit operational plans for those hotels and motels.

3. Costs:

The proposed regulation will likely require some local resources as rural SSDs will have new reporting and budget development requirements. The reporting costs are not expected to be significant because, as discussed above, rural SSDs primarily utilize commercial hotels and motels for temporary housing assistance placements and will not be required to submit operational plans.

4. Minimizing adverse impact:

The proposed regulation attempts to minimize any adverse economic impact on emergency shelters in rural counties and in rural SSDs. The regulations should not provide exemptions relating to the required submission of operational plans because this would not serve the purposes of ensuring the health and safety of all residents in rurally-located emergency shelters and protecting these vulnerable individuals from dangerous conditions. As noted above, the fiscal impact of the regulation is anticipated to be insignificant in rural SSDs.

Rural area participation:

It is anticipated that small businesses and rural SSDs will be dedicated to implementing the proposed regulation and protecting the health, safety and general welfare of residents of temporary housing placements.

Job Impact Statement

A Job Impact Statement is not required for this regulation. The purpose of the regulation is to require social services districts (“SSDs”) to submit to

the Office of Temporary and Disability Assistance (the “Office”) an operational plan for each emergency shelter within the SSD that does not fall within the scope of Section 352.3(e)-(h), Part 491, or Part 900 of Title 18 of the New York Code of Rules and Regulations. SSDs will be reimbursed for costs incurred for emergency shelters and services provided by emergency shelters subject to this section only where those emergency shelters are operated pursuant to operational plans that have been approved by OTDA. A separate operational plan must be submitted by a SSD for each emergency shelter for which a SSD seeks reimbursement. However, SSDs that use cluster/scatter sites, (i.e. individual apartment units within residential apartment buildings that are used to provide temporary housing assistance) subject to the qualifications set forth in proposed subdivision § 352.39(c), are required to submit only one operational plan for each portfolio of such sites. SSDs also will be required to provide written notice to OTDA in the event an operator elects to close a shelter subject to the proposed regulation. Such written notice will include a proposed plan for closure. It is apparent from the nature and the purpose of the regulation that it will not have a substantial adverse impact on jobs and employment opportunities in the private sector, in the SSDs, or in the State. Thus, the regulatory amendments will not have an adverse impact on jobs and employment opportunities in New York State.