

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Agriculture and Markets

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

#### Farm Wineries, Breweries, and Distilleries; Hops Processors; and Cideries

**I.D. No.** AAM-17-19-00001-P

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

**Proposed Action:** This is a consensus rule making to amend section 276.4(c)(1), (e)(2) and (f)(2)(i) of Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 16, 18, 251-z-4 and 251-z-9

**Subject:** Farm wineries, breweries, and distilleries; hops processors; and cideries.

**Purpose:** To update references to regulations and to exempt small hops processors from food processing licensing requirements.

**Text of proposed rule:** Paragraph (1) of subdivision (c) of section 276.4 of 1 NYCRR is amended to read as follows:

(1) such establishment is maintained in a sanitary condition and follows the current good manufacturing practices set forth in Part [261] 260 of this Title, *if applicable*; and

Paragraph (2) of subdivision (e) of section 276.4 of 1 NYCRR is amended to read as follows:

(2) Any person who processes hops in a volume that does not exceed 100,000 lbs. annually shall be exempt from the [license fee requirement] *licensing requirements* of Agriculture and Markets Law section 251-z-3, provided that:

(i) such establishment is maintained in a sanitary condition and follows the current good manufacturing practices set forth in Part [261] 260 of this Title, *if applicable*; and

(ii) no other food processing operations for which licensing under article 20-C of the Agriculture and Markets Law is required are being conducted at the establishment.

Subparagraph (i) of paragraph (2) of subdivision (f) of section 276.4 of 1 NYCRR is amended to read as follows:

(i) such establishment is maintained in a sanitary condition and follows the current good manufacturing practices set forth in Part [261] 260 of this Title, *if applicable*; and

**Text of proposed rule and any required statements and analyses may be obtained from:** Jon Greenberg, NYS Dept. of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, (518) 457-4492, email: Jon.Greenberg@agriculture.ny.gov

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

**Public comment will be received until:** 60 days after publication of this notice.

#### Consensus Rule Making Determination

The proposed rule will amend subdivision (e) of section 276.4 of 1 NYCRR that currently exempts hops processors who process not more than 100,000 lbs. of hops annually from the licensing fee requirement set forth in Article 20-C of the Agriculture and Markets Law to provide that such hops processors are exempt not only from the license fee requirement but all licensing requirements set forth in Article 20-C.

The proposed rule will further amend subdivision (e) of section 276.4 of 1 NYCRR, and will, as well, amend subdivisions (c) and (f) therein (the latter two subdivisions exempt farm wineries, farm breweries, and farm distilleries, and cideries, from the licensing requirements set forth in Article 20-C). Subdivisions (c), (e), and (f) of section 276.4 of 1 NYCRR will be amended to require that, in order to be exempt from Article 20-C's licensing requirements, the establishments referred to above must be in compliance with the good manufacturing practices ("GMPs") regulations set forth in 1 NYCRR Part 260; currently, such subdivisions require compliance with the GMPs set forth in Part 261 of 1 NYCRR but that Part, however, was repealed on March 6, 2019.

The Department believes that the proposed rule will not be controversial and that there will be no opposition thereto.

#### Job Impact Statement

The proposed rule will amend subdivision (e) of section 276.4 of 1 NYCRR that currently exempts hops processors who process not more than 100,000 lbs. of hops annually from the licensing fee requirement set forth in Article 20-C of the Agriculture and Markets Law to provide that such hops processors are exempt not only from the license fee requirement but all licensing requirements set forth in Article 20-C; these amendments will not have an adverse impact upon jobs.

The proposed rule will further amend subdivision (e) of section 276.4 of 1 NYCRR, and will, as well, amend subdivisions (c) and (f) therein (the latter two subdivisions exempt farm wineries, farm breweries, and farm distilleries, and cideries, from the licensing requirements set forth in Article 20-C). Subdivisions (c), (e), and (f) of section 276.4 of 1 NYCRR will be amended to require that, in order to be exempt from Article 20-C's licensing requirements, the establishments referred to above must be in compliance with the good manufacturing practices ("GMPs") regulations set forth in 1 NYCRR Part 260; currently, such subdivisions require compliance with the GMPs set forth in Part 261 of 1 NYCRR but that Part, however, was repealed on March 6, 2019; these amendments will, also, not have an adverse impact upon jobs.

## Department of Audit and Control

### NOTICE OF ADOPTION

#### Update Provisions Relating to Employer Reporting; Service Credit Determination for Certain Members; and Notice of Hearings

**I.D. No.** AAC-06-18-00002-A

**Filing No.** 313

**Filing Date:** 2019-04-05

**Effective Date:** 2019-04-24

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

**Action taken:** Amendment of sections 315.1, 315.3, 316.1, 316.2, 316.3, 317.2, 317.5 and 317.6 of Title 2 NYCRR.

**Statutory authority:** Retirement and Social Security Law, sections 11 and 311

**Subject:** Update provisions relating to Employer Reporting; Service Credit Determination for Certain members; and Notice of Hearings.

**Purpose:** To update language necessitated by the modernization and redesign of the retirement system's benefit administration system.

**Text or summary was published in** the February 7, 2018 issue of the Register, I.D. No. AAC-06-18-00002-RP.

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

**Text of rule and any required statements and analyses may be obtained from:** Jamie Elacqua, Office of the State Comptroller, 110 State Street, Albany, NY 12236, (518) 473-4146, email: jelacqua@osc.ny.gov

#### Revised Regulatory Impact Statement

1. **Statutory Authority:** This rule is authorized under Sections 11 and 311 of the Retirement and Social Security Law. These Sections authorize the Comptroller to make rules and regulations as he may deem necessary in the performance of the duties imposed upon him by law. Additionally, Section 34 of Retirement and Social Security Law (RSSL) provides legal authorization for collecting salary and service for nonmembers.

2. **Legislative Objectives:** With the implementation of a new retirement benefit administration system, the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System (collectively referred to as "the Retirement System" or "NYSLRS") is amending Title 2 of the New York Codes, Rules and Regulations Part 315.3 in order to collect additional payroll data for employees who work for a Retirement System participating employer. The New York State Teachers' Retirement System has been collecting data on all employees of their participating employers for quite some time.

Section 34 of the Retirement and Social Security Law (RSSL) provides legal authorization for collecting salary and service for nonmembers:

The comptroller shall adopt rules and regulations, which shall have the force and effect of law, for the reporting of service and salary information for all employees of participating employers.

However, Part 315.3 currently requires only that employers report information on active members who have been assigned a registration number. Effective with the implementation of the Employer Reporting component of the new benefit administration system, the regulation is being amended to require the reporting of all employees except those who actively participate in another public retirement system or program to NYSLRS.

The business improvements that will result from collecting salary, service and other employment information for all employees of Retirement System employers except those who actively participate in another public retirement system or program are many.

#### Employer Reporting

Collecting payroll data on all employees except those who actively participate in another public retirement system or program will simplify payroll reporting for all participating employers.

Collecting this information also facilitates timelier billing for employer prior year adjustments for members who receive previous service credit, thus lessening the amount of interest owed by employers.

#### Mandatory Membership

Collecting payroll data on all employees except those who actively participate in another public retirement system or program will assist

NYSLRS in determining if a new employee's membership in NYSLRS is optional or mandatory.

In general, Retirement System membership is mandatory for persons employed in full-time, permanent positions. In many cases, employers do not realize that a new employee is mandated to membership or already has a current or previous NYSLRS membership based on other employment. Once payroll data is reported for all employees, NYSLRS will be able to automatically enroll mandatory members, ensuring timely processing of membership. Employers will receive more timely notification of any required contributions, saving employees and employers from having to pay these costs later with the additional interest (often substantial) associated with delayed payment.

#### Optional Membership

Section 45 of the Retirement and Social Security Law requires employers hiring individuals whose Retirement System memberships are optional (generally part-time, temporary, or provisional employees) to inform such employees of their right to join the Retirement System. This Section states:

"Upon the employment of any employee whose right to membership in a public retirement system of the state, which for purposes of this section shall include any public retirement system other than the NYS Teachers' Retirement System, has been made optional by the head of the retirement system involved, the employer shall inform the employee in writing of the right to join the system. Each such employee shall acknowledge the receipt of such notice by signing a copy thereof and filing it with such employer; provided, however, the failure to inform such employee shall not in any way be construed to waive the requirement that membership for such an employee commences only when an application for membership is filed with the system".

The burden for Section 45 notification and recordkeeping falls on the employer and not the Retirement System, as the Retirement System has no way of knowing when employees are hired. Some employees have indicated that their employers are not always diligent in offering the right of membership to optional members.

Collecting information on all employees except those who actively participate in another public retirement system or program will input the data into our new benefit administration system for analysis and follow up. NYSLRS will be able to follow up with the employee to ensure they were properly advised at the time they were hired and proactively notify the employer/agency so they are also informed, although the employer maintains full responsibility for notifying new employees of their right to join the Retirement System. This will greatly reduce the problems and inconsistencies associated with the current process of relying solely on employers to explain the rights and benefits associated with membership.

Furthermore, if an employee decides to exercise the option and join the Retirement System days, months or even years after they were first hired, by gathering and storing data for all employees except those who actively participate in another public retirement system or program of participating employers, NYSLRS would already have in its possession the payroll information required to calculate the cost of purchasing the non-member service credit. As a result, NYSLRS would not require employers to research, complete and submit payroll certifications for that service, thus removing a substantial burden that employers currently face with the existing process. Delays related to this process add significant cost due to the compounding of interest for both the employer and the member.

#### Purchase of Previous Service

NYSLRS registers approximately 30,000 new members each year. We estimate that 90-95% of these new members list some type of previous employer service on their membership application that must be researched (27,000-28,500 cases per year). In addition, when new as well as current members request previous service with a participating employer, employment records are needed to verify salary and service. By obtaining this information from employers at the time the service is performed rather than years later when a service credit request is made, the System will be able to provide members with a more immediate cost and credit without delay. It will also help avoid administrative hearings due to employers being unable to provide salary and service information. Members will have better information when planning their retirement security.

#### Post-Retirement Employment

Collecting payroll data on all employees except those who actively participate in another public retirement system or program will assist NYSLRS with the process of monitoring the post-retirement employment of public retirees, as required by Sections 211 and 212 of RSSL. Early detection of instances where retirees are approaching or exceeding their post-retirement earnings limitations can avoid the suspension of pensions and potential pay back of pension payments.

#### Pension Integrity

Broader data collection will facilitate NYSLRS' enforcement of various provisions of law which prevent an individual from attempting to collect a benefit from one Retirement System while continuing to participate or initially join a second system, the existing ORP or the newer Voluntary Defined Contribution Program (VDPC).

Amendment of Title 2 of the New York Codes, Rules and Regulations Part 316

MEBEL (Member, Employer, Benefits, Executive and Legal) is the primary information system that supports the core business of the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System (collectively, "the Retirement Systems"). Using MEBEL, Retirement System staff process over 10 million transactions per month for active member salary and service credit postings alone. The development of MEBEL began in 1983 and while it is a secure and battle tested system, it does not lend itself easily to enabling modern customer service, increased quality and integrity of pension information and workflow efficiencies that the Retirement System is looking to leverage. In 2013, the Retirement System began a multi-year project to replace MEBEL.

The limitations of MEBEL make difficult the calculation of complex service crediting situations. These limitations are acutely evident when calculating service for individuals with employment at educational institutions. Depending upon the particular type of educational institution, the Retirement and Social Security Law ("RSSL") and relevant regulations require the crediting of service on the basis of 170, 180 or 200 days. When such employment is rendered on a part-time basis and combined with part-time employment on the standard 260 day schedule, the proper crediting becomes even more difficult. The limitations of the computer system often required manual intervention by Retirement Systems examiners in order to reconcile the various crediting requirements.

To prevent variances in examiner methodology, the rounding artifact codified in subdivision 3 of section 316 was adopted by the Retirement Systems to standardize the process. In order to standardize the calculations, subdivision 3 of section 316 was promulgated to provide that service credit rendered during any fiscal year beginning after April 1, 1982 shall be rounded to the next highest multiple of .05 years. The calculation of service credit was performed with manual assistance when needed and then rounded pursuant to this provision to standardize possible variances in the calculation.

As the result of the implementation of the new system being designed and implemented for the Retirement Systems, the rounding artifact will become obsolete. With the advent of the new system, manual calculations and rounding are no longer necessary. Enhanced employer reporting, combined with the ability to collect and recognize discrete job data, logical breaks in service, complex combinations of employment and the associated service crediting requirements of the RSSL, enable the new system to calculate and reconcile service credit accurately to two decimal places. Accordingly, with the implementation of this capability for the 2019-20 fiscal year, subdivision 3 of section 316 will become obsolete. Service credit values reported through the close of state fiscal year end 2019 will be preserved and will not be affected by this repeal.

Amendment of Title 2 of the New York Codes, Rules and Regulations Part 317

With the advancement of technology and technological capabilities, it is necessary to update certain regulations relating to notice of hearings to reflect the modern practices of the retirement system specifically, the receipt and dissemination of information electronically.

3. Needs and Benefits: In 2013, the Retirement System embarked on a multi-year project to replace its retirement benefit administration technology systems. This effort is known as the Redesign Project.

When the Redesign Project is complete, the Retirement System will possess a 21st century information system, ready to meet the needs of its stakeholders in a secure, flexible and stable environment. Among other Redesign Project goals, the Retirement System endeavors to eliminate the dependency on paper documents by providing the ability to accept and provide information electronically; increase the quality and quantity of pension related information and calculate and recognize service credit information accurately and consistent with the Retirement and Social Security Law. The proposed regulatory changes are needed to support the development of the new system.

4. Costs: There are no new costs to regulated parties for the implementation of this rule.

5. Local Government Mandates: Not applicable.

6. Paperwork: No new paperwork will be required.

7. Duplication: None.

8. Alternatives: No significant alternatives were considered.

9. Federal Standards: This rule does not exceed any Federal standard.

10. Compliance Schedule: It is estimated that regulated parties will be able to achieve compliance immediately. The proposed rule does not materially vary from the previously established regulatory guidelines.

**Revised Regulatory Flexibility Analysis**

This agency finds that the rule will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on small businesses or local governments because it relates to updating

language necessitated by the modernization and redesign of the retirement system's benefit administration system.

**Revised Rural Area Flexibility Analysis**

This agency finds that the rule will not impose any adverse impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in rural areas because it relates to updating language necessitated by the modernization and redesign of the retirement system's benefit administration system.

**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 2024, which is no later than the 5th year after the year in which this rule is being adopted.

**Assessment of Public Comment**

The agency received no public comment.

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## Department of Economic Development

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### EMERGENCY RULE MAKING

**START-UP NY Program**

**I.D. No.** EDV-17-19-00003-E

**Filing No.** 316

**Filing Date:** 2019-04-08

**Effective Date:** 2019-04-08

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

**Action taken:** Addition of Part 220 to Title 5 NYCRR.

**Statutory authority:** Economic Development Law, art. 21, sections 435-36; L. 2013, ch. 68

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

**Specific reasons underlying the finding of necessity:** On June 24, 2013, Governor Andrew Cuomo signed into law the SUNY Tax-free Areas to Revitalize and Transform UPstate New York (START-UP NY) program, which offers an array of tax benefits to eligible businesses and their employees that locate in facilities affiliated with New York universities and colleges. The START-UP NY program will leverage these tax benefits to attract innovative start-ups and high tech industries to New York so as to create jobs and promote economic development.

Regulatory action is required to implement the START-UP NY program. The legislation creating the START-UP NY program delegated to the Department of Economic Development the establishment of procedures for the implementation and execution of the START-UP NY program. Without regulatory action by the Department of Economic Development, procedures will not be in place to accept applications from institutions of higher learning desiring to create Tax-Free Areas, or businesses wishing to participate in the START-UP NY program.

Adoption of this rule will enable the State to begin accepting applications from businesses to participate in the START-UP NY program, and represent a step towards the realization of the strategic objectives of the START-UP NY program: attracting and retaining cutting-edge start-up companies, and positioning New York as a global leader in high tech industries.

**Subject:** START-UP NY Program.

**Purpose:** Establish procedures for the implementation and execution of START-UP NY.

**Substance of emergency rule (Full text is posted at the following State website: <https://startup.ny.gov/university-and-college-resources>):** START-UP NY is a new program designed to stimulate economic development and promote employment of New Yorkers through the creation of tax-free areas that bring together educational institutions, innovative companies, and entrepreneurial investment.

1) The regulation defines key terms, including: "business in the formative stage," "campus," "competitor," "high tech business," "net new job," "new business," and "underutilized property."

2) The regulation establishes that the Commissioner shall review and approve plans from State University of New York (SUNY) colleges, City

University of New York (CUNY) colleges, and community colleges seeking designation of Tax-Free NY Areas, and report on important aspects of the START-UP NY program, including eligible space for use as Tax-Free Areas and the number of employees eligible for personal income tax benefits.

3) The regulation creates the START-UP NY Approval Board, composed of three members appointed by the Governor, Speaker of the Assembly and Temporary President of the Senate, respectively. The START-UP NY Approval Board reviews and approves plans for the creation of Tax-Free NY Areas submitted by private universities and colleges, as well as certain plans from SUNY colleges, CUNY colleges, and community colleges, and designates Strategic State Assets affiliated with eligible New York colleges or universities. START-UP NY Approval Board members may designate representatives to act on their behalf during their absence. START-UP NY Approval Board members must remain disinterested, and recuse themselves where appropriate.

4) The regulation establishes eligibility criteria for Tax-Free Areas. Eligibility of vacant land and space varies based on whether it is affiliated with a SUNY college, CUNY college, community college, or private college, and whether the land or space in question is located upstate, downstate, or in New York City. The regulation prohibits any allocation of land or space that would result in the closure or relocation of any program or service associated with a university or college that serves students, faculty, or staff.

5) The regulation establishes eligibility requirements for businesses to participate in the START-UP program, and enumerates excluded industries. To be eligible, a business must: be a new business to the State at the time of its application, subject to exceptions for NYS incubators, businesses restoring previously relocated jobs, and businesses the Commissioner has determined will create net new jobs; comply with applicable worker protection, environmental, and tax laws; align with the academic mission of the sponsoring institution (the Sponsor); demonstrate that it will create net new jobs in its first year of operation; and not be engaged in the same line of business that it conducted at any time within the last five years in New York without the approval of the Commissioner. Businesses locating downstate must be in the formative stages of development, or engaged in a high tech business. To remain eligible, the business must, at a minimum, maintain net new jobs and the average number of jobs that existed with the business immediately before entering the program.

6) The regulation describes the process for approval of Tax-Free Areas. An eligible institution may submit a plan to the Commissioner identifying land or space to be designated as a Tax-Free Area. This plan must: identify precisely the location of the applicable land or space; describe business activities to be conducted on the land or space; establish that the business activities in question align with the mission of the institution; indicate how the business would generate positive community and economic benefits; summarize the Sponsor's procedures for attracting businesses; include a copy of the institution's conflict of interest guidelines; attest that the proposed Tax-Free Area will not jeopardize or conflict with any existing tax-exempt bonds used to finance the Sponsor; and certify that the Sponsor has not relocated or eliminated programs serving students, faculty, or staff to create the vacant land. Applications by private institutions require approval by both the Commissioner and START-UP NY Approval Board. The START-UP NY Approval Board is to approve applications so as to ensure balance among rural, urban and suburban areas throughout the state.

7) A sponsor applying to create a Tax-Free Area must provide a copy of its plan to the chief executive officer of any municipality in which the proposed Tax-Free Area is located, local economic development entities, the applicable university or college faculty senate, union representatives and the campus student government. Where the plan includes land or space outside of the campus boundaries of the university or college, the institution must consult with the chief executive officer of any municipality in which the proposed Tax-Free Area is to be located, and give preference to underutilized properties identified through this consultation. The Commissioner may enter onto any land or space identified in a plan, or audit any information supporting a plan application, as part of his or her duties in administering the START-UP program.

8) The regulation provides that amendments to approved plans may be made at any time through the same procedures as such plans were originally approved. Amendments that would violate the terms of a lease between a sponsor and a business in a Tax-Free Area will not be approved. Sponsors may amend their plans to reallocate vacant land or space in the case that a business, located in a Tax-Free Area, is disqualified from the program but elects to remain on the property.

9) The regulation describes application and eligibility requirements for businesses to participate in the START-UP program. Businesses are to submit applications to sponsoring universities and colleges by 12/31/20. An applicant must: (1) authorize the Department of Labor (DOL) and Department of Taxation and Finance (DTF) to share the applicant's tax in-

formation with the Department of Economic Development (DED); (2) allow DED to monitor the applicant's compliance with the START-UP program and agree to submit an annual report in such form as the Commissioner shall require; (3) provide to DED, upon request, information related to its business organization, tax returns, investment plans, development strategy, and non-competition with any businesses in the community but outside of the Tax-Free Area; (4) certify efforts to ascertain that the business would not compete with another business in the same community but outside the Tax-Free Area, including an affidavit that notice regarding the application was published in a daily publication no fewer than five consecutive days; (5) include a statement of performance benchmarks as to new jobs to be created through the applicant's participation in START-UP; (6) provide a statement of consequences for non-conformance with the performance benchmarks, including proportional recovery of tax benefits when the business fails to meet job creation benchmarks in up to three years of a ten-year plan, and removal from the program for failure to meet job creation benchmarks in at least four years of a ten-year plan; (7) identify information submitted to DED that the business deems confidential, proprietary, or a trade secret. Sponsors forward applications deemed to meet eligibility requirements to the Commissioner for further review. The Commissioner shall reject any application that does not satisfy the START-UP program eligibility requirements or purpose, and provide written notice of the rejection to the Sponsor. The Commissioner may approve an application any time after receipt; if the Commissioner approves the application, the business applicant is deemed accepted into the START-UP NY Program and can locate to the Sponsor's Tax-Free NY Area. Applications not rejected will be deemed accepted after sixty days. The Commissioner is to provide documentation of acceptance to successful applicants.

10) The regulation allows a business to amend a successful application at any time in accordance with the procedure of its original application. No amendment will be approved that would contain terms in conflict with a lease between a business and a SUNY college when the lease was included in the original application.

11) The regulation permits a business that has been rejected from the START-UP program to locate within a Tax-Free Area without being eligible for START-UP program benefits, or to reapply within sixty days via a written request identifying the reasons for rejection and offering verified factual information addressing the reasoning of the rejection. Failure to reapply within sixty days waives the applicant's right to resubmit. Upon receipt of a timely resubmission, the Commissioner may use any resources to assess the claim, and must notify the applicant of his or her determination within sixty days. Disapproval of a reapplication is final and non-appealable.

12) With respect to audits, the regulation requires businesses to provide access to DED, DTF, and DOL to all records relating to facilities located in Tax-Free Areas at a business location within the State during normal business hours. DED, DTF, and DOL are to take reasonable steps to prevent public disclosure of information pursuant to Section 87 of the Public Officers Law where the business has timely informed the appropriate officials, the records in question have been properly identified, and the request is reasonable.

13) The regulation provides for the removal of a business from the program under a variety of circumstances, including violation of New York law, material misrepresentation of facts in its application to the START-UP program, or relocation from a Tax-Free Area. Upon removing a business from the START-UP program, the Commissioner is to notify the business and its Sponsor of the decision in writing. This removal notice provides the basis for the removal decision, the effective removal date, and the means by which the affected business may appeal the removal decision. A business shall be deemed served three days after notice is sent. Following a final decision, or waiver of the right to appeal by the business, DED is to forward a copy of the removal notice to DTF, and the business is not to receive further tax benefits under the START-UP program.

14) To appeal removal from the START-UP program, a business must send written notice of appeal to the Commissioner within thirty days from the mailing of the removal notice. The notice of appeal must contain specific factual information and all legal arguments that form the basis of the appeal. The appeal is to be adjudicated in the first instance by an appeal officer who, in reaching his or her decision, may seek information from outside sources, or require the parties to provide more information. The appeal officer is to prepare a report and make recommendations to the Commissioner. The Commissioner shall render a final decision based upon the appeal officer's report, and provide reasons for any findings of fact or law that conflict with those of the appeal officer.

15) With regard to disclosure authorization, businesses applying to participate in the START-UP program authorize the Commissioner to disclose any information contained in their application, including the projected new jobs to be created.

16) In order to assess business performance under the START-UP

program, the Commissioner may require participating businesses to submit annual reports on or before March 15 of each year describing the businesses' continued satisfaction of eligibility requirements, jobs data, an accounting of wages paid to employees in net new jobs, and any other information the Commissioner may require. Information contained in businesses' annual reports may be made public by the Commissioner.

17) The Freedom of Information Law is applicable to the START-UP program, subject to disclosure waivers to protect certain proprietary information submitted in support of an application to the START-UP program.

18) All businesses must keep relevant records throughout their participation in the START-UP program, plus three years. DED has the right to inspect all such documents upon reasonable notice.

19) If the Commissioner determines that a business has acted fraudulently in connection with its participation in the START-UP program, the business shall be immediately terminated from the program, subject to criminal penalties, and liable for taxes that would have been levied against the business during the current year.

20) The regulation requires participating universities and colleges to maintain a conflict of interest policy relevant to issues that may arise during the START-UP program, and to report violations of said policies to the Commissioner for publication.

*This notice is intended* to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires July 6, 2019.

**Text of rule and any required statements and analyses may be obtained from:** Thomas Regan, New York State Department of Economic Development, 625 Broadway, Albany, NY 12207, (518) 292-5123, email: thomas.regan@esd.ny.gov

#### **Regulatory Impact Statement**

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

Chapter 68 of the Laws of 2013 requires the Commissioner of Economic Development to promulgate rules and regulations to establish procedures for the implementation and execution of the SUNY Tax-free Areas to Revitalize and Transform UPstate New York program (START-UP NY). These procedures include, but are not limited to, the application processes for both academic institutions wishing to create Tax-Free NY Areas and businesses wishing to participate in the START-UP NY program, standards for evaluating applications, and any other provisions the Commissioner deems necessary and appropriate.

##### **LEGISLATIVE OBJECTIVES:**

The proposed rule is in accord with the public policy objectives the New York State Legislature sought to advance by enacting the START-UP NY program, which provides an incentive to businesses to locate critical high-tech industries in New York State as opposed to other competitive markets in the U.S. and abroad. It is the public policy of the State to establish Tax-Free Areas affiliated with New York universities and colleges, and to afford significant tax benefits to businesses, and the employees of those businesses, that locate within these Tax-Free Areas. The tax benefits are designed to attract and retain innovative start-ups and high-tech industries, and secure for New York the economic activity they generate. The proposed rule helps to further such objectives by establishing the application process for the program, clarifying the nature of eligible businesses and facilities, and describing key provisions of the START-UP NY program.

##### **NEEDS AND BENEFITS:**

The emergency rule is necessary in order to implement the statute contained in Article 21 of the Economic Development Law, creating the START-UP NY program. The statute directs the Commissioner of Economic Development to establish procedures for the implementation and execution of the START-UP NY program.

Upstate New York has faced longstanding economic challenges due in part to the departure of major business actors from the region. This divestment from upstate New York has left the economic potential of the region unrealized, and left many upstate New Yorkers unemployed.

START-UP NY will promote economic development and job creation in New York, particularly the upstate region, through tax benefits conditioned on locating business facilities in Tax-Free NY Areas. Attracting start-ups and high-tech industries is critical to restoring the economy of upstate New York, and to positioning the state as a whole to be competitive in a globalized economy. These goals cannot be achieved without first establishing procedures by which to admit businesses into the START-UP NY program.

The proposed regulation establishes procedures and standards for the implementation of the START-UP program, especially rules for the creation of Tax-Free NY Areas, application procedures for the admission of businesses into the program, and eligibility requirements for continued receipt of START-UP NY benefits for admitted businesses. These rules allow for the prompt and efficient commencement of the START-UP NY program, ensure accountability of business participants, and promote the general welfare of New Yorkers.

##### **COSTS:**

I. Costs to private regulated parties (the business applicants): None. The proposed regulation will not impose any additional costs to eligible business applicants.

II. Costs to the regulating agency for the implementation and continued administration of the rule: None.

III. Costs to the State government: None.

IV. Costs to local governments: None.

##### **LOCAL GOVERNMENT MANDATES:**

The rule establishes certain property tax benefits for businesses locating in Tax-Free NY Areas that may impact local governments. However, as described in the accompanying statement in lieu of a regulatory flexibility analysis for small businesses and local governments, the program is expected to have a net-positive impact on local government.

##### **PAPERWORK:**

The rule establishes application and eligibility requirements for Tax-Free NY Areas proposed by universities and colleges, and participating businesses. These regulations establish paperwork burdens that include materials to be submitted as part of applications, documents that must be submitted to maintain eligibility, and information that must be retained for auditing purposes.

##### **DUPLICATION:**

The proposed rule will create a new section of the existing regulations of the Commissioner of Economic Development, Part 220 of 5 NYCRR. Accordingly, there is no risk of duplication in the adoption of the proposed rule.

##### **ALTERNATIVES:**

No alternatives were considered in regard to creating a new regulation in response to the statutory requirement. The regulation implements the statutory requirements of the START-UP NY program regarding the application process for creation of Tax-Free NY Areas and certification as an eligible business. This action is necessary in order to clarify program participation requirements and is required by the legislation establishing the START-UP NY program.

##### **FEDERAL STANDARDS:**

There are no federal standards applicable to the START-UP NY program; it is purely a State program that offers tax benefits to eligible businesses and their employees. Therefore, the proposed rule does not exceed any federal standard.

##### **COMPLIANCE SCHEDULE:**

The affected State agency (Department of Economic Development) and the business applicants will be able to achieve compliance with the regulation as soon as it is implemented.

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

Participation in the START-UP NY program is entirely at the discretion of qualifying business that may choose to locate in Tax-Free NY Areas. Neither statute nor the proposed regulations impose any obligation on any business entity to participate in the program. Rather than impose burdens on small business, the program is designed to provide substantial tax benefits to start-up businesses locating in New York, while providing protections to existing businesses against the threat of tax-privileged start-up companies locating in the same community. Local governments may not be able to collect tax revenues from businesses locating in certain Tax-Free NY Areas. However, the regulation is expected to have a net-positive impact on local governments in light of the substantial economic activity associated with businesses locating their facilities in these communities.

Because it is evident from the nature of the proposed rule that it will have a net-positive impact on small businesses and local government, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local government is not required and one has not been prepared.

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

The START-UP NY program is open to participation from any business that meets the eligibility requirements, and is organized as a corporation, partnership, limited liability company, or sole proprietorship. A business's decision to locate its facilities in a Tax-Free NY Area associated with a rural university or college would be no impediment to participation; in fact, START-UP NY allocates space for Tax-Free NY Areas specifically to the upstate region which contains many of New York's rural areas. Furthermore, START-UP NY specifically calls for the balanced allocation of space for Tax-Free NY Areas between eligible rural, urban, and suburban areas in the state. Thus, the regulation will not have a substantial adverse economic impact on rural areas, and instead has the potential to generate significant economic activity in upstate rural areas designated as Tax-Free NY Areas. Accordingly, a rural flexibility analysis is not required and one has not been prepared.

##### **Job Impact Statement**

The regulation establishes procedures and standards for the administration of the START-UP NY program. START-UP NY creates tax-free areas

designed to attract innovative start-ups and high-tech industries to New York so as to stimulate economic activity and create jobs. The regulation will not have a substantial adverse impact on jobs and employment opportunities; rather, the program is focused on creating jobs. Because it is evident from the nature of the rulemaking that it will have either no impact or a positive impact on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

## EMERGENCY RULE MAKING

### Empire Zones Reform

**I.D. No.** EDV-17-19-00004-E

**Filing No.** 317

**Filing Date:** 2019-04-08

**Effective Date:** 2019-04-08

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

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

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

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

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

**Subject:** Empire Zones reform.

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

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

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

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

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

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

4. The emergency rule also adds several other definitions (such as applicant municipality, chief executive, concurring municipality, empire zone capital tax credits or zone capital tax credits, clean energy research and development enterprise, change of ownership, benefit-cost ratio, capital investments, single business enterprise and regionally significant project) and conforms several existing regulatory definitions to statutory definitions, including zone equivalent areas, women-owned business enterprise, minority-owned business enterprise, qualified investment project, zone development plans, and significant capital investment projects. The emergency rule also clarifies regionally significant project eligibility. Additionally, the emergency rule makes reference to the following tax

credits and exemptions: the Qualified Empire Zone Enterprise ("QEZE") Real Property Tax Credit, QEZE Tax Reduction Credit, and the QEZE Sales and Use Tax Exemption. The emergency rule also reflects the eligibility of agricultural cooperatives for Empire Zone tax credits and the QEZE Real Property Tax Credit.

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

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

7. The emergency rule provides a description of the elements to be included in a zone development plan and requires that the plan be resubmitted by the local zone administrative board as economic conditions change within the zone. Changes to the zone development plan must be approved by the Commissioner of Economic Development ("the Commissioner"). Also, the rule adds additional situations under which a business enterprise may be granted a shift resolution.

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

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

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

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

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

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

emergency rule further provides for a process to appeal revocations of certifications based on (a) or (b) above to the Empire Zones Designation Board. The emergency rule also provides that the Commissioner may revoke the certification of a firm upon a finding of any one of the other criteria for revocation of certification set forth in the rule.

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

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

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

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

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

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

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

The full text of the emergency rule is available at [www.empire.state.ny.us](http://www.empire.state.ny.us)

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires July 6, 2019.

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

### **Regulatory Impact Statement**

#### **STATUTORY AUTHORITY:**

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

#### **LEGISLATIVE OBJECTIVES:**

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

#### **NEEDS AND BENEFITS:**

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

#### **COSTS:**

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

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

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

#### **LOCAL GOVERNMENT MANDATES:**

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

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

#### **PAPERWORK:**

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

#### **DUPLICATION:**

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

#### **ALTERNATIVES:**

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

#### **FEDERAL STANDARDS:**

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

#### **COMPLIANCE SCHEDULE:**

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

### **Regulatory Flexibility Analysis**

#### **1. Effect of rule**

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

#### **2. Compliance requirements**

Each small business and large business choosing to participate in the Empire Zones program must establish and maintain complete and accurate

books, records, documents, accounts, and other evidence relating to such business's application for entry into the Empire Zone program and relating to existing annual reporting requirements. Local governments are unaffected by this rule.

#### 3. Professional services

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

#### 4. Compliance costs

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

#### 5. Economic and technological feasibility

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

#### 6. Minimizing adverse impact

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

#### 7. Small business and local government participation

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

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

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

#### **Job Impact Statement**

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

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## Education Department

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### EMERGENCY RULE MAKING

#### To Implement New York State's Every Student Succeeds Act (ESSA) Plan

**I.D. No.** EDU-19-18-00006-E

**Filing No.** 324

**Filing Date:** 2019-04-09

**Effective Date:** 2019-04-13

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

**Action taken:** Amendment of sections 100.2(m), (ff), 100.18, 100.19, Part 120; addition of section 100.21 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101, 112, 207, 210, 215, 305, 309 and 3713; The Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802)

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

**Specific reasons underlying the finding of necessity:** On December 10, 2015, the Every Student Succeeds Act (ESSA) was signed into law by President Obama. This bipartisan measure reauthorized the 50-year-old Elementary and Secondary Education Act, which provides federal funds to improve elementary and secondary education in the nation's public schools and requires states and school districts, as a condition of funding, to take a variety of actions to ensure all children, regardless of race, income, background, or where they live, receive the education they need to prepare them for success in postsecondary education, careers, and citizenship. New York State receives approximately \$1.6 billion annually in funding through ESSA.

After an extensive, 18-month long public engagement process, the Department, with Board approval, submitted New York State's ESSA plan to the USDE for review on September 17, 2018. Subsequently, the Department met regularly with the USDE to provide clarifications on the plan. On January 17, 2018, the USDE approved the State's plan. In January 2018, the Department provided the Board of Regents with an update on the approved plan and in March 2018, the Department provided an update regarding the financial transparency requirements related to ESSA. In April 2018, the Department provided Board of Regents with a detailed summary of the proposed amendment and the Board of Regents voted to authorize Department staff to publish the proposed amendment in the State Register for the 60-day public comment period so that the Department had an opportunity to receive as much public comment as possible before adoption as an emergency rule for the 2018-2019 school year, as required under ESSA.

In order to implement the State's USDE approved ESSA Plan and to prepare for implementation of the plan beginning with the 2018-19 school year, a new section 100.21 and amendments to Commissioner's Regulations sections 100.2(ff), 100.2(m), 100.18, 100.19 and Part 120 were made to align the Commissioner's Regulations with the approved ESSA plan, relating to New York State's updated accountability system.

A Notice of Proposed Rulemaking was published in the State Register on May 9, 2018 and based on comments from the field, revisions were made to the proposed amendment. As a result, a Notice of Emergency Adoption and Revised Rule Making was published in the State Register on July 18, 2018. Based on comments received during the public comment period on the revised rule making, the Department made further revisions to the regulation and a Notice of Emergency Adoption and Revised Rule Making was published in the State Register on October 3, 2018. Because the Board of Regents meets at scheduled intervals, the December 2018 Regents meeting is the earliest the proposed rule could be presented for adoption, after expiration of the 30-day public comment period required under the State Administrative Procedure Act for a revised rulemaking. However, since the 2018-2019 school year began on July 1, 2018 emergency adoption is necessary for the preservation of the general welfare to ensure that the emergency rule adopted at the June 2018 Regents meeting and subsequently revised at the September, November and December meetings, and again adopted as an emergency action at the February 2019 meeting, can remain continuously in effect until the rule can be adopted as a permanent rule in order to timely implement New York State's approved ESSA plan, so that school districts may timely meet school/school district accountability requirements for the 2018-2019 school year and beyond, consistent with the approved ESSA plan and pursuant to statutory requirements. It is anticipated that the proposed rule will be presented to the Board of Regents for permanent adoption at its April 2019 meeting.

**Subject:** To implement New York State's Every Student Succeeds Act (ESSA) plan.

**Purpose:** Implement NY's USDE-approved ESSA plan and to comply with the provisions of the Elementary and Secondary Education Act of 1965.

**Substance of emergency rule (Full text is posted at the following State website: [http://www.counsel.nysed.gov/rules\\_andregs](http://www.counsel.nysed.gov/rules_andregs)):** The Commissioner of Education proposes to amend sections 100.2(ff), 100.2(m), 100.18, 100.19 and Part 120 of the Regulations of the Commissioner of Education relating to Relating to the implementation of the State's Approved Every Student Succeeds Act (ESSA) Plan. The following is a summary of the proposed rule:

The proposed amendment to subdivision 100.2(ff) relates to the enrollment of youth released or conditionally released from residential facilities. This amendment clarifies the existing requirement that districts designate an employee(s) to be the transition liaison(s) with residential facility personnel, parents, students, and State and other local agencies for the purpose of facilitating a student's effective educational transition into, between, and out of such facilities to ensure that each student receives appropriate educational and appropriate supports, services, and opportunities; and this amendment also provides an overview of the duties of the liaison(s).

The proposed amendment to subdivision 100.2(m) relates to requirements for the New York State report card for schools and districts. This amendment updates the information to be provided in report cards to align with the provisions of ESSA and requires local educational agencies (LEAs) to post the local report cards on their website, where one exists, to satisfy ESSA's local report card requirements. If an LEA does not operate a website, the LEA must provide the information to the public in another manner determined by the LEA.

The proposed amendments to 100.18 clarify that this section, which contains provisions relating to implementation of New York's approved ESEA flexibility waiver, only applies to accountability designations made prior to July 1, 2018, except as otherwise provided in the new section 100.21.

In order to implement the State's approved ESSA plan, the proposed amendments to section 100.19 clarify that Failing Schools means schools that have been identified as Priority Schools and/or Comprehensive Support and Improvement Schools (CSI) for at least three consecutive years. (See Attachment A for criteria for identification of a Comprehensive Support and Improvement School.) These amendments also clarify that beginning with the 2018-19 school year, removal from receivership will be based upon a school's status as a CSI rather than as a Priority School.

The proposed creation of section 100.21 implements the new accountability and support and interventions of the State's approved ESSA plan commencing with the 2018-2019 school year. Such provisions shall include, but not be limited to, the following:

- Subdivision (a) sets forth an applicability clause which says that section 100.21 supersedes paragraphs (p)(1) through (11) and (14) through (16) of section 100.2 and section 100.18, which are the provisions of Commissioner's Regulations that were in place under the No Child Left Behind Act (NCLB) and the Department's Elementary and Secondary Education Act (ESEA) flexibility waiver, and that the new section 100.21 shall apply in lieu of such provisions during the period of the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act, and any revisions and extensions thereof, except as otherwise provided in section 100.21. If a provision of section 100.2(p) or of section 100.18 conflicts with section 100.21, the provisions of section 100.21 shall prevail.

- Subdivision (b) defines various terms, which are divided into general definitions, definitions related to school and district accountability, definitions related to school and district accountability designations, and definitions related to interventions for designated schools and districts to implement the new accountability system in New York State's approved ESSA plan.

- Subdivision (c) outlines the procedures and requirements for registration of public schools, which remain the same as under the previous accountability regulations.

- Subdivision (d) relates to the requirements for the registration of public schools.

- Subdivision (e) provides that, commencing with the 2017-2018 school year results, the Commissioner will annually review the performance of all public schools, charter schools, and school districts in the State. The Commissioner shall determine whether such public school, charter school or school district shall be identified for Comprehensive Support and Improvement (CSI), Targeted Support and Improvement (TSI), or identified as a Target District in accordance with the criteria set forth in subdivision (f) of the regulation.

- Subdivision (f) specifies the differentiated accountability methodology by which schools will be identified as either CSI (which will be identified every three years beginning with the 2018-2019 school year using 2017-2018 school year results) or TSI (which will be identified annually beginning with the 2018-2019 school year), and the methodology for identifying Target Districts. This section describes how six indicators (composite performance, student growth, combined composite performance and growth, English language proficiency, academic progress, and chronic absenteeism) are used in the methodology for identification of elementary and middle schools. This section also details how seven indicators (composite performance; graduation rate; combined composite performance and graduation rate; English language proficiency; academic progress; chronic absenteeism; and college, career, and civic readiness) are used in the methodology for identifying high schools. This subdivision also explains how each of these indicators is computed, how these computations are converted into a Level 1-4 for each accountability group for which a school or district is accountable, and how these levels assigned to the accountability groups are used to determine whether a school will be identified as in Good Standing, TSI, or CSI, and whether a district will be identified as a District in Good Standing or a Target District. This subdivision also contains provisions regarding the identification of high schools for CSI based on graduation rates below 67% beginning with 2017-18 school year results. In addition, this subdivision contains provisions regarding the identification of TSI schools for additional support as required by ESSA if an accountability group for which a school is identi-

fied performs at a level that would have caused the school to be identified as CSI if this had been the performance of the "all students" group.

- Subdivision (g) provides that preliminarily identified CSI and TSI schools and Target Districts shall be given the opportunity to provide the Commissioner with any additional information concerning extenuating or extraordinary circumstances faced by the school or district that should be cause for the Commissioner to not identify the school as CSI or TSI or the district as a Target District.

- Subdivision (h) establishes the public notification requirements upon receipt of a designation of CSI or TSI school or a Target District.

- Subdivision (i) specifies the interventions that must occur in schools identified as CSI or TSI, as well as districts identified as Target Districts. This section describes the requirements for identified schools as they relate to parental involvement, participatory budgeting, school comprehensive education plans, and school choice. This subdivision also describes the increased support and oversight that schools that fail to improve will receive. This subdivision also outlines the interventions for schools that, beginning with 2017-18 and 2018-19 school year results, has a Weighted Average Achievement Level of 1 or 2 and that fails for two consecutive years to meet the 95% participation rate requirement for annual state assessments for the same accountability group for the same accountability measure and are not showing improvement in the participation rate for that accountability group. This subdivision also specifies the support that districts must provide to a school that is not CSI or TSI but has performed at Level 1 for an accountability group for an accountability measure.

- Subdivision (j) establishes the criteria for a school's or a district's removal from an accountability designation.

- Subdivision (k) provides the criteria for the identification of schools for public school registration review. Under this subdivision, the Commissioner may place under preliminary registration review any school identified for receivership; any school that is identified as CSI for three consecutive years; and any school that has been identified as a poor learning environment. Also, under this subdivision, a school under registration review shall also be identified as a CSI school, and subject to all the requirements of that designation.

- Subdivision (l) specifies the process by which the Commissioner will place a school under registration review; and the required actions of the district and the school related to the designation. This subdivision also describes the requirements for receivership schools that have also been identified for registration review.

- Subdivision (m) specifies the criteria and process for removal of schools from registration review, school phase-out or closure.

The proposed amendments to Part 120 update provisions in the existing regulations pertaining to the sunset of No Child Left Behind requirements regarding highly qualified teachers and provide for the continuation under ESSA of provisions pertaining to persistently dangerous schools and unsafe school choice and updates to public school choice provisions.

**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-19-18-00006-P, Issue of May 9, 2018. The emergency rule will expire June 7, 2019.

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

**Summary of Regulatory Impact Statement (Full text is posted at the following State website: <http://www.counsel.nysed.gov/rulesandregs>):**

1. STATUTORY AUTHORITY:

Ed.L. § 101 continues existence of Education Department, with Board of Regents as its head, and authorizes Regents to appoint Commissioner of Education as Department's Chief Administrative Officer, which is charged with general management and supervision of all public schools and educational work of State.

Ed.L. § 112(1) authorizes Commissioner to require schools and school districts to facilitate the prompt enrollment of children who are released or conditionally released from residential facilities.

Ed.L. § 207 empowers Regents and Commissioner to adopt rules and regulations to carry out State education laws and functions and duties conferred on the Department.

Ed.L. § 210 authorizes Regents to register domestic and foreign institutions in terms of State standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries and presented for entrance to schools, colleges and professions in the State.

Ed.L. § 215 authorizes Commissioner to require schools and school districts to submit reports containing such information as Commissioner shall prescribe.

Ed.L. § 305(1) and (2) provide 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.

Ed.L. § 305(20) provides Commissioner shall have such further powers and duties as charged by the Regents.

Ed.L. § 309 charges Commissioner with general supervision of boards of education and their management and conduct of all departments of instruction.

Ed.L. § 3713(1) and (2) authorize State and school districts to accept federal law making appropriations for educational purposes and authorize Commissioner to cooperate with federal agencies to implement such law.

The Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802).

## 2. LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above statutory authority and is necessary to implement New York's approved ESSA plan and to comply with the provisions of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802).

## 3. NEEDS AND BENEFITS:

On December 10, 2015, ESSA was signed into law by President Obama. This bipartisan measure reauthorized the 50-year-old ESEA, which provides federal funds to improve elementary and secondary education in the nation's public schools and requires states and school districts, as a condition of funding, to take a variety of actions to ensure all children, regardless of race, income, background, or where they live, receive the education they need to prepare them for success in postsecondary education, careers, and citizenship. New York State receives approximately \$1.6 billion annually in funding through ESSA.

After an extensive, 18-month long public engagement process, the Department, with Board approval, submitted New York State's ESSA plan to the USDE for review on September 17, 2018. On January 17, 2018, the USDE approved the State's plan. In April 2018, the Department provided the Board of Regents with a description of the draft regulatory terms and the Board directed the Department to finalize the draft regulatory terms for publication in the State Register.

The rule will ensure a seamless transition to the revised accountability plan as authorized under the approved ESSA plan, and provide school districts with the opportunity to demonstrate improvements by creating improvement plans that address the needs and resource issues found in identified schools.

For the complete Regulatory Impact Statement please visit the following website: <http://www.counsel.nysed.gov/rulesandregs>

## 4. COSTS:

**Cost to the State:** The proposed rule does not generally impose any new costs beyond those consistent with the provisions of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802).

**Costs to local government:** The rule does not generally impose any new costs beyond those consistent with the provisions of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802).

Based upon the requirements described in the rule to implement certain activities based upon a school or district's accountability status, there may be some associated costs. These activities, include, but are not necessarily limited to, annual notifications of accountability status; participation in comprehensive needs assessments; conduct of parent, staff and student surveys; and development and implementation of improvement plans. For school districts with schools receiving under Titles I, IIA or III, these funds may be used to pay the associated costs. CSI schools that fail to show progress on their Annual Achievement Progression targets for two consecutive years will be required to enter into a partnership with a BOCES, Regional Bilingual Education Resource Network, Teacher Center or other Regional Technical Assistance Center, or other technical assistance provider as determined by the Commissioner to support the implementation of the Comprehensive Education Plan. Depending on the nature of such partnership, and whether such partnership already exists, a school district may incur costs to implement this provision of the regulations.

In some instances, school districts newly identified as Target Districts with schools that are designated as CSI or TSI that do not receive Title I funding may incur costs. These costs will generally be limited to the cost of site visits and implementation of any elements of District Comprehensive Education Plans and Comprehensive Education Plans that involve activities that are in addition to the district's or the school's regular educational program and that the district chooses not to fund through reallocation of existing resources. However, it is anticipated that non-Title I

schools will be eligible to receive federal 1003 School Improvement Grants that can be used to fund these activities.

Districts that have schools that fail to meet the 95% participation rate requirements must develop a participation rate improvement plan, which in some cases beginning in the 2021-22 school year shall include partnering with a BOCES or other technical assistance provider to conduct a participation rate audit and for schools that fail to meet certain conditions, to update such participation rate improvement plan. Because these partnerships will likely vary significantly in cost based on the number of schools for which a plan is required no estimate can be made at this time regarding required costs. Similarly districts that have schools that will be closed or phased out as a consequence of these regulations may incur costs in developing and implementing a closure or phase out plan.

In other instances, school districts and their schools will be designated as in Good Standing, when under the present accountability system these school districts and schools might otherwise have been designated as Priority, Focus or Local Assistance Plan schools. In these cases, school districts may incur cost savings as they will no longer be required to participate in site visits or in the other previously required interventions for districts and schools with such designations. In addition, a number of previous requirements for schools identified as Priority or Focus have been reduced or eliminated, thereby providing districts with increased flexibility in use of funds. For example, the current requirement for Title I Schools that are designated as Priority and Focus Schools to offer public school choice has been replaced by a substantially more limited public school choice program for a subset of Comprehensive Support and Improvement Schools.

Because of the number of school districts and schools involved, and the fact that the allowable services and activities to be provided will vary greatly from district-to-district, as well as school-to-school, depending on the school and district designation, the district's choices, and the needs presented in each school, a complete cost statement cannot be provided. No additional costs have been identified with respect to the implementation of the updated accountability system, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

Cost to private regulated parties: None.

Cost to regulating agency for implementation and continued administration of this rule: None.

## 5. LOCAL GOVERNMENT MANDATES:

The rule is necessary to assist school districts to be able to meet the provisions of New York's approved ESSA plan. The proposed regulation will require districts with schools identified as CSI or TSI to make significant changes to the educational programs. See the response to Question #3, Needs and Benefits.

## 6. PAPERWORK:

The proposed rule generally contains paperwork requirements consistent with those in existing regulations and does not generally impose any new paperwork requirements beyond those consistent with the above statutory authority and the provisions of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802). For further information please see the above response to Question #3, Needs and Benefits.

## 7. DUPLICATION:

The rule does not duplicate existing State or federal regulations.

## 8. ALTERNATIVES:

After an extensive, 18-month long public engagement process, the Department, with Board approval, submitted New York State's ESSA plan to the USDE for review on September 17, 2018 which was approved on January 17, 2018. The proposed rule is necessary conform Commissioner's Regulations to New York's approved ESSA plan.

## 9. FEDERAL STANDARDS:

The rule is necessary to conform regulations to New York's approved ESSA plan and the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. § 6301 et seq. (Public Law 114-95, 129 STAT. 1802).

## 10. COMPLIANCE SCHEDULE:

It is anticipated that parties will be able to timely implement the rule's requirements beginning with its effective date.

## *Regulatory Flexibility Analysis*

A Notice of Proposed Rulemaking was published in the State Register on May 9, 2018. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on July 18, 2018. A second Notice of Emergency Adoption and Revised Rule Making was published in the State Register on October 3, 2018. A Notice of Emergency Adoption was published in the State Register on November 21, 2018. A Notice of Revised Rule Making was published in the State Register on December 26, 2018 and a Notice of Emergency Adoption was published in the State

Register on January 2, 2019. However, no revisions are required to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments published on October 3, 2018.

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

A Notice of Proposed Rulemaking was published in the State Register on May 9, 2018. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on July 18, 2018. A second Notice of Emergency Adoption and Revised Rule Making was published in the State Register on October 3, 2018. A Notice of Emergency Adoption was published in the State Register on November 21, 2018. A Notice of Revised Rule Making was published in the State Register on December 26, 2018 and a Notice of Emergency Adoption was published in the State Register on January 2, 2019. However, no revisions are required to the previously published Rural Area Flexibility Analysis published on October 3, 2018.

#### **Job Impact Statement**

A Notice of Proposed Rulemaking was published in the State Register on May 9, 2018. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on July 18, 2018. A second Notice of Emergency Adoption and Revised Rule Making was published in the State Register on October 3, 2018. A Notice of Emergency Adoption was published in the State Register on November 21, 2018. A Notice of Revised Rule Making was published in the State Register on December 26, 2018 and a Notice of Emergency Adoption was published in the State Register on January 2, 2019. However, no revisions are required to the previously published Job Impact Statement published on October 3, 2018.

#### **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**

### **Extension of the Educational Technology Specialist Content Specialty Test Safety Net**

**I.D. No.** EDU-17-19-00005-EP

**Filing No.** 320

**Filing Date:** 2019-04-09

**Effective Date:** 2019-04-09

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

**Proposed Action:** Amendment of section 80-1.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207, 305, 3001, 3003, 3004 and 3009

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

**Specific reasons underlying the finding of necessity:** The Department is proposing to extend the safety net for candidates seeking certification as Educational Technology Specialists until six months after the revised Educational Technology Specialist content specialty test is redeveloped and operational. The safety net will hold candidates harmless during the redevelopment of the Educational Technology Specialist CST. The safety net gives teacher candidates who do not pass the revised test the option of taking the same test again or the predecessor test.

Because the Board of Regents meets at scheduled intervals, the earliest the proposed amendment could be presented for regular (non-emergency) adoption, after publication in the State Register and expiration of the 60-day public comment period provided for in the State Administrative Procedure Act (SAPA) Sections 202(1) and (5), is the July 2019 Regents meeting. Furthermore, pursuant to SAPA Section 203(1), the earliest effective date of the proposed amendment, if adopted at the July Regents meeting, is July 31, 2019, the date a Notice of Adoption would be published in the State Register. However, because the current safety net expires on June 30, 2019, emergency action is necessary now for the preservation of the general welfare in order to ensure that the safety net becomes effective immediately so candidates can be held harmless during the redevelopment of the Educational Technology Specialist content specialty test.

**Subject:** Extension of the Educational Technology Specialist Content Specialty Test Safety Net.

**Purpose:** Safety net enables candidates to take either the revised Educational Technology Specialist CST or the predecessor CST.

**Text of emergency/proposed rule:** Paragraph (2) of subdivision (c) of section 80-1.5 of the Regulations of the Commissioner of Education shall be amended to read as follows:

(iii) For revised content specialty tests that became operational on or after October 18, 2016 or for the revised Educational Technology Specialist content specialty test, a candidate may take and receive a satisfactory passing score on either the revised content specialty test or the predecessor content specialty test until [June 30, 2019] *six months after the revised Educational Technology Specialist content specialty test is redeveloped and operational.*

**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 July 7, 2019.

**Text of rule and any required statements and analyses may be obtained from:** Kirti Goswami, NYS Education Department, Office of Counsel, 89 Washington Avenue, Room 112, Albany, NY 12234, (518) 474-6400, email: legal@nysed.gov

**Data, views or arguments may be submitted to:** Petra Maxwell, NYS Education Department, Office of Higher Education, 89 Washington Avenue, Room 975 EBA, Albany, NY 12234, (518) 474-2238, email: regcomments@nysed.gov

**Public comment will be received until:** 60 days after publication of this notice.

#### **Regulatory Impact Statement**

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

Education Law 101 (not subdivided) charges the Department with the general management and supervision of all public schools and all 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 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 3003 authorizes the Commissioner to issue a certificate as superintendent of schools to exceptionally qualified persons who do not meet all of the graduate course and teaching requirements.

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

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

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

The purpose of the proposed amendment to Section 80-1.5 of the Regulations of the Commissioner of Education is to reinstate the Educational Technology Specialist content specialty test (CST) safety net for candidates seeking Educational Technology Specialist certification.

There is a safety net in place for the Educational Technology Specialist content specialty test (CST) that allows candidates to take either the redeveloped CST or the predecessor CST. After this safety net expires on June 30, 2019, candidates will be required to take only the redeveloped CST.

By extending the expiration date to six months after the revised Educational Technology Specialist CST is redeveloped and operational, the safety net enables candidates to be held harmless during the redevelopment of the revised Educational Technology Specialist CST. The safety net gives candidates who do not pass the revised test the option of taking the same test again or the predecessor test.

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

Upon a review of the redeveloped Educational Technology Specialist CST, there has been a significant decrease in the pass rate. As a result, the Department believes it needs to review the examination to determine if revisions are needed and is proposing to reinstate the safety net until six months after the revised Educational Technology Specialist content specialty test is redeveloped and operational while the Department works with the field to make any necessary changes. For the safety net, candidates may take either the redeveloped CST or the predecessor CST. The safety net enables candidates to be held harmless while any necessary revisions are made to the redeveloped Educational Technology Specialist CST.

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

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

b. Costs to local government: The amendments do not impose any costs on local government.

c. Costs to private regulated parties: The amendment do 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:**

The proposed amendment does not impose any additional paperwork requirements.

**7. DUPLICATION:**

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

**8. ALTERNATIVES:**

Because the State believes that uniform certification standards are required across the State, no alternatives were considered.

**9. FEDERAL STANDARDS:**

There are no applicable Federal standards.

**10. COMPLIANCE SCHEDULE:**

It is anticipated that the proposed amendment will be permanently adopted by the Board of Regents at its July 2019 meeting. If adopted at the July 2019 meeting, the proposed amendment will become effective on July 31, 2019.

**Regulatory Flexibility Analysis**

The purpose of the proposed amendment to Section 80-1.5 of the Regulations of the Commissioner of Education is to reinstate the Educational Technology Specialist content specialty test (CST) safety net for candidates seeking Educational Technology Specialist certification until six months after the revised Educational Technology Specialist content specialty test is redeveloped and operational while the Department works with the field to make any necessary changes. The amendment does not impose any new recordkeeping or other compliance requirements, and will not have an adverse economic impact on small businesses or local governments. Because it is evident from the nature of the proposed amendment that it does not affect small businesses or local governments, 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.

**Rural Area Flexibility Analysis**

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

This proposed amendment applies to all individuals in New York State who pursue a Educational Technology Specialist certificate in the classroom teaching service, including those located in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

The purpose of the proposed amendment to Section 80-1.5 of the Regulations of the Commissioner of Education is to reinstate the Educational Technology Specialist content specialty test (CST) safety net for candidates seeking Educational Technology Specialist certification.

There is a safety net in place for the Educational Technology Specialist content specialty test (CST) that allows candidates to take either the redeveloped CST or the predecessor CST. After this safety net expires on June 30, 2019, candidates will be required to take only the redeveloped CST.

Upon a review of the redeveloped Educational Technology Specialist CST, there has been a significant decrease in the pass rate. As a result, the Department believes it needs to review the examination to determine if revisions are needed and is proposing to reinstate the safety net until six months after the revised Educational Technology Specialist content specialty test is redeveloped and operational while the Department works with the field to make any necessary changes. For the safety net, candidates may take either the redeveloped CST or the predecessor CST. The safety net enables candidates to be held harmless while any necessary revisions are made to the redeveloped Educational Technology Specialist CST. The safety net gives candidates who do not pass the revised test the option of taking the same test again or the predecessor test.

**3. COSTS:**

The proposed amendment does not impose any costs on teacher certification candidates and/or the New York State school districts/BOCES who wish to hire them.

**4. MINIMIZING ADVERSE IMPACT:**

The Department believes that uniform standards for certification will be established across the State. Therefore, no alternatives were considered for those located in rural areas of the State.

**5. RURAL AREA PARTICIPATION:**

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

**Job Impact Statement**

The purpose of the proposed amendment to section 80-1.5 of the Regulations of the Commissioner of Education is to reinstate the Educational

Technology Specialist content specialty test (CST) safety net for candidates seeking Educational Technology Specialist certification until six months after the revised Educational Technology Specialist content specialty test is redeveloped and operational while the Department works with the field to make any necessary changes. Because it is evident from the nature of the proposed amendment that it will have no impact on the number of jobs or employment opportunities in New York State, no further steps were needed to ascertain that fact and none were taken.

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

**Assessments and Student Official Transcripts and Permanent Records**

**I.D. No.** EDU-05-19-00017-ERP

**Filing No.** 325

**Filing Date:** 2019-04-09

**Effective Date:** 2019-04-15

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

**Action Taken:** amendment of section 104.3 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided), 209(not subdivided), 210(not subdivided), 215(not subdivided), 305(1), (2), (20), (45), (46), (47), 308(not subdivided), 309(not subdivided), 3204(3); L. 2014, ch. 56, subpart B, part AA as amended by L. 2018, ch. 59, part CCC, section 35

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

**Specific reasons underlying the finding of necessity:** The proposed amendment is necessary to timely implement the provisions of Education Law § 305(45) and (46) as added by Part AA, Subpart B of Chapter 56 of the Laws of 2014 as amended by Section 35 of Part CCC of Chapter 59 of the Laws of 2018 and Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C) which removed the sunset date for these provisions in the statute, making the provisions permanent.

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 for revised rulemakings provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), would be the July 2019 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the July 2019 meeting, would be July 31, 2019, the date a Notice of Adoption would be published in the State Register.

Therefore, emergency action is necessary at the April 2019 Regents meeting for the preservation of the general welfare to ensure that the emergency action taken at the January 2019 meeting remains continuously in effect, as revised to timely implement the provisions of section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C) 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 July Regents meeting, which is the first scheduled meeting after expiration of the 45-day public comment period prescribed for revised rulemakings in the SAPA for State agency rule makings.

**Subject:** Assessments and Student Official Transcripts and Permanent Records.

**Purpose:** To timely implement the provisions of section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C).

**Text of emergency/revised rule:** Section 104.3 of the Regulations of the Commissioner of Education is amended as follows:

[During the period commencing on April 1, 2014 and expiring on December 31, 2018]:

(a) [no] No school district or board of cooperative educational services may place or include on a student's official transcript or maintain in a student's permanent record any individual student score on a State administered standardized English language arts or mathematics assessment for grades three through eight, provided that nothing herein shall be construed to interfere with required State or federal reporting or to excuse a school district from maintaining or transferring records of such test scores separately from a student's permanent record, including for purposes of required State or federal reporting; and

(b) any test results on a State administered standardized English

language arts or mathematics assessment for grades three through eight sent to parents or persons in parental relation to a student shall include a clear and conspicuous notice that such results will not be included on the student's official transcript or in the student's permanent record and are being provided to the student and parents for diagnostic purposes.

**This notice is intended** to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on January 30, 2019, I.D. No. EDU-05-19-00017-EP. The emergency rule will expire June 7, 2019.

**Emergency rule compared with proposed rule:** Substantial revisions were made in section 104.3.

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

**Data, views or arguments may be submitted to:** Steven Katz, Education Department, 89 Washington Avenue, Room 775 EBA, Albany, NY 12234, (518) 474-5902, email: regcomments@nysed.gov

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

#### Revised Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

Education Law section 101 continues existence of Education Department, with Board of Regents as its head, and authorizes Regents to appoint Commissioner of Education as Department's Chief Administrative Officer, which is charged with general management and supervision of all public schools and educational work of State.

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

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 210 authorizes Regents to register domestic and foreign institutions in terms of State standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries and presented for entrance to schools, colleges and professions in the State.

Education Law section 215 authorizes Commissioner to require schools and school districts to submit reports containing such information as Commissioner shall prescribe.

Education Law section 305(1) and (2) provide 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. Section 305(20) provides Commissioner shall have such further powers and duties as charged 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 Commissioner with general supervision of boards of education and their management and conduct of all departments of instruction.

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

Part 35 of Part CCC of Chapter 59 of the Laws of 2018 extended the provisions of Part AA, Subpart B of Chapter 56 of the Laws of 2014 added new subdivisions (45) and (46) to Education Law section 305, which directed the Commissioner to provide that no school district or board of cooperative educational services may place or include on a student's official transcript or maintain in a student's permanent record any individual student score on a State administered standardized English language arts or mathematics assessment for grades three through eight, and that any test results on such assessments sent to parents/persons in parental relation include a clear and conspicuous notice that such results will not be included on the student's official transcript or in the student's permanent record and are being provided for diagnostic purposes. The statute provides that these provisions shall expire and be deemed repealed on December 31, 2019.

Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C) removed the December 31, 2019 sunset date for these provisions in the statute, making the provisions permanent.

##### 2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to conform the Commissioner's Regulations to Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C).

##### 3. NEEDS AND BENEFITS:

Education Law § 305(45) and (46) were added as part of the 2014 Enacted Budget. These sections provide that no school district or board of cooperative educational services (BOCES) may place or include on a student's official transcript or maintain in a student's permanent record any individual student score on a State administered standardized English language arts or mathematics assessment for grades three through eight, and further require that any test results on such assessments sent to parents/persons in parental relation include a clear and conspicuous notice that such results will not be included on the student's official transcript or in the student's permanent record and are being provided for diagnostic purposes. These provisions were set to expire and be deemed repealed on December 31, 2018. In April of 2014, the Board of Regents adopted amendments to the Commissioner's regulations to implement these sections and the regulatory provisions expired on December 31, 2018.

These provisions in the law were extended by Section 35 of Part CCC of Chapter 59 of the Laws of 2018 until December 31, 2019. Therefore, regulatory amendments were adopted by the Board of Regents at its January 2019 meeting to immediately extend these provisions an additional year to comply with the statute. However, Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C) removed the December 31, 2019 sunset date for these provisions in the statute, making the provisions permanent. Therefore, a Revised Rulemaking and Emergency Adoption are necessary to immediately conform the regulations to the statute.

##### 4. COSTS:

Cost to the State: none.

Costs to local government: none.

Cost to private regulated parties: none.

Cost to regulating agency for implementation and continued administration of this rule: none.

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapter 56 of the Laws of 2014, as amended by Chapter 59 of the Laws of 2018 and Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C), and does not impose any additional costs on the State, regulated parties, or the State Education Department, beyond those inherent in the statute.

##### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to conform the Commissioner's Regulations to Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C), and does not impose any additional program, service, duty or responsibility upon local governments beyond those inherent in the statute.

Consistent with the statute, the proposed amendment provides that no school district or board of cooperative educational services (BOCES) may place or include on a student's official transcript or maintain in a student's permanent record any individual student score on a State administered standardized English language arts or mathematics assessment for grades three through eight, and further require that any test results on such assessments sent to parents/persons in parental relation include a clear and conspicuous notice that such results will not be included on the student's official transcript or in the student's permanent record and are being provided for diagnostic purposes.

##### 6. PAPERWORK:

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapter 56 of the Laws of 2014, as amended by Chapter 59 of the Laws of 2018 and Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C), and does not impose any specific recordkeeping, reporting or other paperwork requirements beyond those inherent in the statute.

Consistent with the statute, the proposed amendment provides, that no school district or board of cooperative educational services may place or include on a student's official transcript or maintain in a student's permanent record any individual student score on a State administered standardized English language arts or mathematics assessment for grades three through eight, and that any test results on such assessments sent to parents/persons in parental relation include a clear and conspicuous notice that such results will not be included on the student's official transcript or in the student's permanent record and are being provided to the student and parents/persons in parental relation for diagnostic purposes.

##### 7. DUPLICATION:

The proposed amendment does not duplicate existing State or federal requirements. The proposed amendment is necessary to conform the Commissioner's Regulations to Chapter 56 of the Laws of 2014, as amended by Chapter 59 of the Laws of 2018 and Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C).

**8. ALTERNATIVES:**

The proposed amendment is necessary to conform the Commissioner's Regulations to Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C). There were no significant alternatives and none were considered.

**9. FEDERAL STANDARDS:**

There are no applicable Federal standards.

**10. COMPLIANCE SCHEDULE:**

It is anticipated parties will be able to achieve compliance with the rule by its effective date. The proposed amendment merely conforms the Commissioner's Regulations to Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C).

**Revised Regulatory Flexibility Analysis****(a) Small businesses:**

The proposed amendment will not impose any additional compliance requirements and is necessary to implement and otherwise conform Commissioner's Regulations to Chapter 56 of the Laws of 2014, as amended by Chapter 59 of the Laws of 2018 and Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C), and does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

**1. EFFECT OF RULE:**

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

**2. COMPLIANCE REQUIREMENTS:**

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to conform the Commissioner's Regulations to Chapter 56 of the Laws of 2014, as amended by Chapter 59 of the Laws of 2018 and Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C), and does not impose any additional compliance requirements upon school districts beyond those inherent in the statute.

**3. NEEDS AND BENEFITS:**

Education Law § 305(45) and (46) were added as part of the 2014 Enacted Budget. These sections provide that no school district or board of cooperative educational services (BOCES) may place or include on a student's official transcript or maintain in a student's permanent record any individual student score on a State administered standardized English language arts or mathematics assessment for grades three through eight, and further require that any test results on such assessments sent to parents/persons in parental relation include a clear and conspicuous notice that such results will not be included on the student's official transcript or in the student's permanent record and are being provided for diagnostic purposes. These provisions were set to expire and be deemed repealed on December 31, 2018. In April of 2014, the Board of Regents adopted amendments to the Commissioner's regulations to implement these sections and the regulatory provisions expired on December 31, 2018.

These provisions in the law were extended by Section 35 of Part CCC of Chapter 59 of the Laws of 2018 until December 31, 2019. Therefore, regulatory amendments were adopted by the Board of Regents at its January 2019 meeting to immediately extend these provisions an additional year to comply with the statute. However, Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C) removed the December 31, 2019 sunset date for these provisions in the statute, making the provisions permanent. Therefore, a Revised Rulemaking and Emergency Adoption are necessary to immediately conform the regulations to the statute.

**4. PROFESSIONAL SERVICES:**

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

**5. COMPLIANCE COSTS:**

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapter 56 of the Laws of 2014, as amended by Chapter 59 of the Laws of 2018 and Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C), and does not impose any additional costs on the State, regulated parties, or the State Education Department, beyond those inherent in the statute.

**6. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

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

**7. MINIMIZING ADVERSE IMPACT:**

The proposed amendment is necessary to conform the Commissioner's Regulations to Chapter 56 of the Laws of 2014, as amended by Chapter 59 of the Laws of 2018 and Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C), and does not impose any additional costs on the State, regulated parties, or the State Education Department,

beyond those inherent in the statute. Accordingly, no alternatives were considered.

**8. LOCAL GOVERNMENT PARTICIPATION:**

Comments on the proposed rule have been 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.

**Revised Rural Area Flexibility Analysis****1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:**

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

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

The proposed amendment is necessary to conform the Commissioner's Regulations to Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C), and does not impose any specific record-keeping, reporting or other paperwork requirements beyond those inherent in the statute.

Consistent with the statute, the proposed amendment provides, that no school district or board of cooperative educational services may place or include on a student's official transcript or maintain in a student's permanent record any individual student score on a State administered standardized English language arts or mathematics assessment for grades three through eight, and that any test results on such assessments sent to parents/persons in parental relation include a clear and conspicuous notice that such results will not be included on the student's official transcript or in the student's permanent record and are being provided to the student and parents/persons in parental relation for diagnostic purposes.

**3. COSTS:**

The proposed amendment is necessary to conform the Commissioner's Regulations to Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C), and does not impose any additional costs on the State, regulated parties, or the State Education Department, beyond those inherent in the statute.

**4. MINIMIZING ADVERSE IMPACT:**

The proposed amendment is merely conforms the Commissioner's Regulations to Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C) and does not impose any additional compliance requirements or costs on school districts or charter schools beyond those inherent in the statute. Because the statutory requirement upon which the proposed amendment is based applies to all school districts in the State and to charter schools authorized to issue Regents diplomas, it is not possible to establish differing compliance or reporting requirements or timetables or to exempt schools in rural areas from coverage by the proposed amendment.

**5. RURAL AREA PARTICIPATION:**

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

**Revised Job Impact Statement**

The proposed rule is necessary to implement and otherwise conform Commissioner's Regulations to Section 30 of Part YYY of the 2019-2020 Enacted State Budget (S.1509-C/A.2009-C) which provides that no school district shall make any student promotion or placement decisions based solely or primarily on student performance on the state administered standardized English language arts and mathematics assessments for grades three through eight. However, a school district may consider student performance on such state assessments provided that the school district uses multiple measures in addition to such assessments and that such assessments do not constitute the major factor in such determinations.

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.

**NOTICE OF ADOPTION****To Implement New York State's Every Student Succeeds Act (ESSA) Plan**

**I.D. No.** EDU-19-18-00006-A

**Filing No.** 322

**Filing Date:** 2019-04-09

**Effective Date:** 2019-04-24

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

**Action taken:** Amendment of sections 100.2(m), (ff), 100.18, 100.19, Part 120; addition of section 100.21 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101, 112, 207, 210, 215, 305, 309, 3713; Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802)

**Subject:** To implement New York State's Every Student Succeeds Act (ESSA) plan.

**Purpose:** Implement NY's USDE-approved ESSA plan and to comply with the provisions of the Elementary and Secondary Education Act of 1965.

**Substance of final rule:** The Commissioner of Education proposes to amend sections 100.2(ff), 100.2(m), 100.18, 100.19 and Part 120 of the Regulations of the Commissioner of Education relating to Relating to the implementation of the State's Approved Every Student Succeeds Act (ESSA) Plan. The following is a summary of the proposed rule:

The proposed amendment to subdivision 100.2(ff) relates to the enrollment of youth released or conditionally released from residential facilities. This amendment clarifies the existing requirement that districts designate an employee(s) to be the transition liaison(s) with residential facility personnel, parents, students, and State and other local agencies for the purpose of facilitating a student's effective educational transition into, between, and out of such facilities to ensure that each student receives appropriate educational and appropriate supports, services, and opportunities; and this amendment also provides an overview of the duties of the liaison(s).

The proposed amendment to subdivision 100.2(m) relates to requirements for the New York State report card for schools and districts. This amendment updates the information to be provided in report cards to align with the provisions of ESSA and requires local educational agencies (LEAs) to post the local report cards on their website, where one exists, to satisfy ESSA's local report card requirements. If an LEA does not operate a website, the LEA must provide the information to the public in another manner determined by the LEA.

The proposed amendments to 100.18 clarify that this section, which contains provisions relating to implementation of New York's approved ESEA flexibility waiver, only applies to accountability designations made prior to July 1, 2018, except as otherwise provided in the new section 100.21.

In order to implement the State's approved ESSA plan, the proposed amendments to section 100.19 clarify that Failing Schools means schools that have been identified as Priority Schools and/or Comprehensive Support and Improvement Schools (CSI) for at least three consecutive years. (See Attachment A for criteria for identification of a Comprehensive Support and Improvement School.) These amendments also clarify that beginning with the 2018-19 school year, removal from receivership will be based upon a school's status as a CSI rather than as a Priority School.

The proposed creation of section 100.21 implements the new accountability and support and interventions of the State's approved ESSA plan commencing with the 2018-2019 school year. Such provisions shall include, but not be limited to, the following:

- Subdivision (a) sets forth an applicability clause which says that section 100.21 supersedes paragraphs (p)(1) through (11) and (14) through (16) of section 100.2 and section 100.18, which are the provisions of Commissioner's Regulations that were in place under the No Child Left Behind Act (NCLB) and the Department's Elementary and Secondary Education Act (ESEA) flexibility waiver, and that the new section 100.21 shall apply in lieu of such provisions during the period of the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act, and any revisions and extensions thereof, except as otherwise provided in section 100.21. If a provision of section 100.2(p) or of section 100.18 conflicts with section 100.21, the provisions of section 100.21 shall prevail.

- Subdivision (b) defines various terms, which are divided into general definitions, definitions related to school and district accountability, definitions related to school and district accountability designations, and definitions related to interventions for designated schools and districts to implement the new accountability system in New York State's approved ESSA plan.

- Subdivision (c) outlines the procedures and requirements for registration of public schools, which remain the same as under the previous accountability regulations.

- Subdivision (d) relates to the requirements for the registration of public schools.

- Subdivision (e) provides that, commencing with the 2017-2018 school year results, the Commissioner will annually review the performance of all public schools, charter schools, and school districts in the State. The Commissioner shall determine whether such public school, charter school or school district shall be identified for Comprehensive Support and Improvement (CSI), Targeted Support and Improvement (TSI), or identified

as a Target District in accordance with the criteria set forth in subdivision (f) of the regulation.

- Subdivision (f) specifies the differentiated accountability methodology by which schools will be identified as either CSI (which will be identified every three years beginning with the 2018-2019 school year using 2017-2018 school year results) or TSI (which will be identified annually beginning with the 2018-2019 school year), and the methodology for identifying Target Districts. This section describes how six indicators (composite performance, student growth, combined composite performance and growth, English language proficiency, academic progress, and chronic absenteeism) are used in the methodology for identification of elementary and middle schools. This section also details how seven indicators (composite performance; graduation rate; combined composite performance and graduation rate; English language proficiency; academic progress; chronic absenteeism; and college, career, and civic readiness) are used in the methodology for identifying high schools. This subdivision also explains how each of these indicators is computed, how these computations are converted into a Level 1-4 for each accountability group for which a school or district is accountable, and how these levels assigned to the accountability groups are used to determine whether a school will be identified as in Good Standing, TSI, or CSI, and whether a district will be identified as a District in Good Standing or a Target District. This subdivision also contains provisions regarding the identification of high schools for CSI based on graduation rates below 67% beginning with 2017-18 school year results. In addition, this subdivision contains provisions regarding the identification of TSI schools for additional support as required by ESSA if an accountability group for which a school is identified performs at a level that would have caused the school to be identified as CSI if this had been the performance of the "all students" group.

- Subdivision (g) provides that preliminarily identified CSI and TSI schools and Target Districts shall be given the opportunity to provide the Commissioner with any additional information concerning extenuating or extraordinary circumstances faced by the school or district that should be cause for the Commissioner to not identify the school as CSI or TSI or the district as a Target District.

- Subdivision (h) establishes the public notification requirements upon receipt of a designation of CSI or TSI school or a Target District.

- Subdivision (i) specifies the interventions that must occur in schools identified as CSI or TSI, as well as districts identified as Target Districts. This section describes the requirements for identified schools as they relate to parental involvement, participatory budgeting, school comprehensive education plans, and school choice. This subdivision also describes the increased support and oversight that schools that fail to improve will receive. This subdivision also outlines the interventions for schools that, beginning with 2017-18 and 2018-19 school year results, has a Weighted Average Achievement Level of 1 or 2 and that fails for two consecutive years to meet the 95% participation rate requirement for annual state assessments for the same accountability group for the same accountability measure and are not showing improvement in the participation rate for that accountability group. This subdivision also specifies the support that districts must provide to a school that is not CSI or TSI but has performed at Level 1 for an accountability group for an accountability measure.

- Subdivision (j) establishes the criteria for a school's or a district's removal from an accountability designation.

- Subdivision (k) provides the criteria for the identification of schools for public school registration review. Under this subdivision, the Commissioner may place under preliminary registration review any school identified for receivership; any school that is identified as CSI for three consecutive years; and any school that has been identified as a poor learning environment. Also, under this subdivision, a school under registration review shall also be identified as a CSI school, and subject to all the requirements of that designation.

- Subdivision (l) specifies the process by which the Commissioner will place a school under registration review; and the required actions of the district and the school related to the designation. This subdivision also describes the requirements for receivership schools that have also been identified for registration review.

- Subdivision (m) specifies the criteria and process for removal of schools from registration review, school phase-out or closure.

The proposed amendments to Part 120 update provisions in the existing regulations pertaining to the sunset of No Child Left Behind requirements regarding highly qualified teachers and provide for the continuation under ESSA of provisions pertaining to persistently dangerous schools and unsafe school choice and updates to public school choice provisions.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 100.21(f)(2)(i) and (i)(5)(i).

**Revised rule making(s) were previously published in the State Register** on December 26, 2018 and October 3, 2018.

**Text of rule and any required statements and analyses may be obtained from:** Kirti Goswami, New York State Education Department, Office of Counsel, 89 Washington Avenue, Room 112, Albany, NY 12234, (518) 473-2183, email: legal@nysed.gov

**Revised Regulatory Impact Statement**

A Notice of Proposed Rulemaking was published in the State Register on May 9, 2018. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on July 18, 2018. A second Notice of Emergency Adoption and Revised Rule Making was published in the State Register on October 3, 2018. A Notice of Emergency Adoption was published in the State Register on November 21, 2018. A Notice of Revised Rule Making was published in the State Register on December 26, 2018 and a Notice of Emergency Adoption was published in the State Register on January 2, 2019. However, no revisions are required to the previously published Regulatory Impact Statement published on February 27, 2019.

**Revised Regulatory Flexibility Analysis**

A Notice of Proposed Rulemaking was published in the State Register on May 9, 2018. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on July 18, 2018. A second Notice of Emergency Adoption and Revised Rule Making was published in the State Register on October 3, 2018. A Notice of Emergency Adoption was published in the State Register on November 21, 2018. A Notice of Revised Rule Making was published in the State Register on December 26, 2018 and a Notice of Emergency Adoption was published in the State Register on January 2, 2019. However, no revisions are required to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments published on October 3, 2018.

**Revised Rural Area Flexibility Analysis**

A Notice of Proposed Rulemaking was published in the State Register on May 9, 2018. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on July 18, 2018. A second Notice of Emergency Adoption and Revised Rule Making was published in the State Register on October 3, 2018. A Notice of Emergency Adoption was published in the State Register on November 21, 2018. A Notice of Revised Rule Making was published in the State Register on December 26, 2018 and a Notice of Emergency Adoption was published in the State Register on January 2, 2019. However, no revisions are required to the previously published Rural Area Flexibility Analysis published on October 3, 2018.

**Revised Job Impact Statement**

A Notice of Proposed Rulemaking was published in the State Register on May 9, 2018. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on July 18, 2018. A second Notice of Emergency Adoption and Revised Rule Making was published in the State Register on October 3, 2018. A Notice of Emergency Adoption was published in the State Register on November 21, 2018. A Notice of Revised Rule Making was published in the State Register on December 26, 2018 and a Notice of Emergency Adoption was published in the State Register on January 2, 2019. However, no revisions are required to the previously published Job Impact Statement published on October 3, 2018.

**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 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****Students with Disabilities**

**I.D. No.** EDU-40-18-00009-A

**Filing No.** 323

**Filing Date:** 2019-04-09

**Effective Date:** 2019-04-24

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

**Action taken:** Amendment of sections 100.2, 200.1, 200.2, 200.3, 200.4, 200.5 and 200.15 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101, 207, 305(1), (2), (20), 3204, 4402, 4403(3), 4410(13); L. 2017, ch. 422, 428, 429; L. 2018, ch. 32

**Subject:** Students with Disabilities.

**Purpose:** To conform the Commissioner's regulations to chapters 422, 428 and 429 of the Laws of 2017.

*Text or summary was published* in the October 3, 2018 issue of the Register, I.D. No. EDU-40-18-00009-P.

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

*Text of rule and any required statements and analyses may be obtained from:* Kirti Goswami, New York State Education Department, Office of Counsel, 89 Washington Avenue, Room 112, Albany, NY 12234, (518) 473-2183, 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 no later than the 3rd year after the year in which this rule is being adopted.

**Assessment of Public Comment**

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the State Register on October 3, 2018 the State Education Department (SED) received the following comments on the proposed amendment.

**1. COMMENT:**

Commenter supports requiring school districts to permit students awarded a Skills and Achievement Commencement Credential (SACC) or Career Development and Occupational Studies Commencement Credential (CDOS) to participate in the graduation ceremony and all related activities class, and to provide notice of such policy to students and parents/guardians. However, the commenter sought an additional requirement that any such policy also include notice to parents of students with disabilities that a student's right to free appropriate public education (FAPE) ends only at the end of the school year in which they turn 21 or after receipt of a Regents or local diploma.

**DEPARTMENT RESPONSE:**

To the extent that comments are supportive, no response is necessary. However, to the extent that commenter seeks an amendment to require additional notice to a parent, the Department does not believe such requirement is necessary. Commissioner's regulation § 200.5(a)(5)(iii) already requires that, prior to a student's exit with an SACC or CDOS Credential, prior written notice must be provided to the student's parent indicating that the student continues to be eligible for FAPE until the end of the school year in which the student turns age 21 or until the receipt of a Regents or local high school diploma. However, nothing prohibits a district from including in its annual written notice of the graduation policy that any student under twenty-one years of age who has not received a high school diploma continues to be entitled to a free appropriate public education.

**2. COMMENT:**

Several commenters opposed requiring school districts to be mandatory preschool evaluators. Commenters suggested amendments to Ch. 429 of the Laws of 2017 or that the regulations be revised to clarify that districts may become evaluators of preschool children with disabilities but are not required to do so. Many comments raised concerns with lack of school district resources to perform preschool evaluation, echoing statements that school districts may not have the capacity or the inclination to take on this responsibility.

**DEPARTMENT RESPONSE:**

Pursuant to Education Law § 4410, each Board of Education (BOE) has the responsibility to identify each preschool child suspected of having a disability who resides within the school district. Evaluation and eligibility determinations must be made within 60 school days of receipt of the parent's consent to evaluate. The legislative intent of Ch.429 of the Laws of 2017 was to eliminate additional paperwork for school districts by establishing that all school districts are deemed approved evaluators of preschool students suspected of having a disability and does not expressly require school districts to perform preschool evaluations. Rather it establishes that school districts are approved to perform preschool evaluations without any additional authorization from the New York State Education Department. If a school district has staff with appropriate New York State licensure and/or certification to conduct evaluations of preschool students, then school districts are one option, along with other approved Multidisciplinary Evaluation programs, that may be selected by the parent.

In order to perform the preschool evaluation, a school district may include itself on the list of approved Multidisciplinary Evaluation programs that its CPSE provides to the parent. If the school district is selected by the parent, as with any approved evaluator, the school district may accept or decline to perform the evaluation depending on the availability of its staff with the appropriate licensure and/or certification.

While Ch.429 of the Laws of 2017 does not expressly require districts to conduct preschool evaluations, districts remain subject to the federal and State statutory and regulatory requirements of ensuring timely evaluations of preschool students. In order to meet its responsibilities, a school district may be required to conduct the evaluation of preschool students residing in their district. Therefore, no revisions are necessary.

**3. COMMENT:**

Many commenters expressed concern that districts do not have the resources or proper materials to provide evaluations for preschoolers and that requiring districts to provide such evaluations would divert resources from school-age students. Specifically, one commenter raised concerns related to existing collective bargaining agreements and the impact on school-aged providers/evaluators.

**DEPARTMENT RESPONSE:**

Presently, all preschool evaluations must meet the requirements of § 200.4(b) and § 200.16(c) of the Commissioner's regulations and must be conducted by staff with appropriate New York State licensure and/or certification. If selected by the parent, as with any approved evaluator, the school district may accept or decline to conduct the evaluation depending on the availability of its staff with the appropriate licensure and/or certification or the ability to meet the evaluation standards of § 200.4(b) and § 200.16(c). Provided that just as the provision of services for school-age students is a responsibility of the school district, so is the timely evaluation of a preschool student. Therefore, no revisions are necessary.

**4. COMMENT:**

Commenter sought clarification on the impact of school districts as approved preschool evaluators on existing contracted services through BOCES and/or independent contracts for school-age evaluation components such as occupational and physical therapy.

**DEPARTMENT RESPONSE:**

The proposed rulemaking is necessary to implement the provisions of Ch. 429 of the Laws of 2017 which provides that school districts are deemed approved evaluators of preschool students with disabilities. The manner in which school districts provide such evaluations is outside the scope of this rulemaking, and therefore no revisions are necessary. However, the Department may issue additional guidance for school districts who wish to provide such evaluations.

**5. COMMENT:**

Commenter expressed concerns that school districts do not have staff with the appropriate early childhood experience.

**DEPARTMENT RESPONSE:**

While the Department understands the concerns related to resources, the proposed rulemaking is necessary to implement the provisions of Ch. 429 of the Laws of 2017 which provides that school districts are deemed approved evaluators of preschool students with disabilities. Whether or not and the manner in which school districts provide such evaluations is outside the scope of this rulemaking, and therefore no revisions are necessary. Additionally, the proposed rulemaking requires any such evaluators of preschool students with disabilities to have the appropriate New York State licensure and/or certification.

**6. COMMENT:**

Commenter was concerned that school districts would not meet required quality standards when performing preschool evaluations.

**DEPARTMENT RESPONSE:**

The proposed rulemaking is necessary to implement the provisions of Ch. 429 of the Laws of 2017 which provides that school districts are deemed approved evaluators of preschool students with disabilities and does not change the evaluation requirements applicable to all evaluators pursuant to § 200.4(b) and § 200.16(c) of the Commissioner's regulations. The comment is outside of the scope of the proposed regulation and no revisions are necessary.

**7. COMMENT:**

Commenter indicated that more evaluators are needed to avoid extended wait times and expressed support for any efforts to ensure timely evaluations of preschool children.

**DEPARTMENT RESPONSE:**

The comment is outside the scope of the proposed rulemaking. However, Commissioner's regulation § 200.16(c)(2) presently requires that the initial individual evaluation must be completed within 60 days of receipt of parental consent to evaluate.

**8. COMMENT:**

Several commenters asked if school districts are required to contract with a municipality in order to receive reimbursements for evaluations, noting that this will take time to complete.

**DEPARTMENT RESPONSE:**

This comment is outside the scope of the proposed rulemaking. School districts who choose to perform preschool evaluations remain subject to the existing provisions of section Education Law § 4410 which requires municipal contracts for the purposes of receiving New York State and county reimbursement for preschool evaluations.

**9. COMMENT:**

Commenter asked if school districts are responsible to provide services to preschool students with disabilities or only evaluations.

**DEPARTMENT RESPONSE:**

Consistent with Chapter 429 of the Laws of 2017, the proposed regulation only relates to school districts as approved evaluators. However, Education Law § 4410 governs the responsibilities of school districts in relation to the provision of a free appropriate public education.

**10. COMMENT:**

Several commenters asked how school districts would be reimbursed for the expense of providing preschool evaluations and raised concerns about preschool evaluations becoming an unfunded mandate. Commenters noted that reimbursement rates do not cover the actual costs of complex evaluations and the costs of such evaluations have not fallen within the approved local budgets which are subject to the property tax cap. Commenters recommended that reimbursement rates be revised to be consistent with similar types of medical evaluations to reflect actual and trending costs in the region of the school district. Commenters recommend that parity be maintained with a single billing and reimbursement system for all evaluators with single rate of reimbursement.

**DEPARTMENT RESPONSE:**

This comment is outside the scope of the proposed rulemaking. The provisions of Education Law § 4410 relating to reimbursement remain the same. Additionally, reimbursement rates for all preschool evaluations are recommended by the Department and approved by the Division of the Budget. They are published annually: [http://www.oms.nysed.gov/rsu/Rates\\_Methodology/Rates/NonRSURates/home.html#PreschoolEval](http://www.oms.nysed.gov/rsu/Rates_Methodology/Rates/NonRSURates/home.html#PreschoolEval)

**11. COMMENT:**

How will the timeliness and provision of preschool evaluations be enforced?

**DEPARTMENT RESPONSE:**

Chapter 429 of the Laws of 2017 pertains to school districts as approved evaluators only. As a result, the comment is outside the scope of the proposed rulemaking and no revisions are necessary. However, the existing regulations provide that all preschool evaluators must meet quality standards as outlined in § 200.4(b) and § 200.16(c).

**12. COMMENT:**

Commenter noted that the proposed regulations do not differentiate between the separate authorizations for preschool evaluators (i.e., approved programs with an evaluation component and a public/private agency independent evaluators) under Education Law § 4410(9) and § 4410(9-a) and requested that this distinction be preserved. Commenter was also concerned that a cross reference to section 200.7(a) relating to "private school approval" does not properly reflect evaluators who might be approved without a corresponding program approval.

**DEPARTMENT RESPONSE:**

Consistent with Chapter 429 of the Laws of 2017, the proposed regulation merely deems school districts as approved evaluators of preschool students and does not implicate the process by which other programs or individuals may be approved to provide such evaluations. SED recognizes the two separate subdivisions contained within Education Law § 4410 which authorize preschool evaluators; however, SED's existing approval process for approved programs with an evaluation component and evaluators approved for the Multidisciplinary Evaluation program only is the same under the law. Education Law § 4410(9-a) states that "[t]he Commissioner shall approve evaluators pursuant to this subdivision consistent with the approval process for the multi-disciplinary evaluation component of programs approved pursuant to subdivision nine of this section consistent with regulations adopted pursuant to such subdivision." Therefore, the comment is outside the scope of the rulemaking and no revisions are necessary.

Additionally, the cross citation in the proposed rulemaking to § 200.7 references SED's general program standards for the approval of education programs, including preschool programs for students with disabilities being educated in private agencies (both approved programs with an evaluation component and evaluators approved for the Multidisciplinary Evaluation program only). As the proposed regulation does not change SED's existing approval process for private Multidisciplinary Evaluation programs that are part of an approved program evaluation component or those that are standalone, no revisions are necessary.

## NOTICE OF ADOPTION

### Student Teaching Requirements for Teacher Certification and the Registration of Teacher Preparation Programs

**I.D. No.** EDU-52-18-00004-A

**Filing No.** 321

**Filing Date:** 2019-04-09

**Effective Date:** 2019-04-24

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

**Action taken:** Amendment of sections 52.21 and 80-3.7 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207, 305, 3001 and 3004

**Subject:** Student Teaching Requirements for Teacher Certification and the Registration of Teacher Preparation Programs.

**Purpose:** To amend the student teaching requirements for teacher certification and registered teacher education programs.

**Text or summary was published in** the December 26, 2018 issue of the Register, I.D. No. EDU-52-18-00004-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, NYS Education Department, Office of Counsel, 89 Washington Avenue, Room 112, 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 2022, 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 the Notice of Proposed Rulemaking in the State Register on December 26, 2018, the State Education Department (the "Department") received the following comments on the proposed amendments.

1. Regarding the proposed amendment to require teacher preparation programs and their partner schools and districts to establish, maintain and review memoranda of understanding (MOUs) or similar collaborative agreements, the Department received the following comments.

(a) COMMENT: One Commenter expressed support for the proposed regulation change.

DEPARTMENT RESPONSE: No Department response is necessary because the comment is supportive of the proposed amendment.

(b) COMMENT: Commenters objected to the proposed amendment stating that the requirement will place a strain on colleges and universities, particularly smaller schools, because of the additional legal and administrative work required to draft, implement and monitor the MOUs. It was further suggested that the requirement to negotiate and enter into contracts will delay a candidate's placement process.

DEPARTMENT RESPONSE: The proposed amendment requires that an agreement be entered into so that all parties – preparation programs and partner schools – are clear about their respective obligations. This is to protect not only the parties, but also the candidates. The agreements can be as detailed or broadly written as the parties see fit. The Department believes that there are programs and schools that already have existing agreements and, therefore, this requirement should not be overly burdensome.

(c) COMMENT: One Commenter stated that the proposed amendment requiring MOUs should clearly articulate the responsibilities of the school and the institutions of higher education (IHEs).

DEPARTMENT RESPONSE: Details about the specific responsibilities to be included in the MOUs or similar collaborative agreements were not included in the regulations. The Department believes that such details are more appropriately developed at the local level to provide flexibility to such schools/programs so they can be tailored to meet their local needs.

2. Regarding the requirement that the student teaching experience be at least 14 weeks, full time, and in alignment with the daily schedule and annual school calendar; and that candidates pursuing more than one certificate title, may complete two placements, each at least 7 weeks; and that such student teachers enrolled full-time in a student teaching experience will be eligible for financial aid, the Department received the following comments.

(a) COMMENT: Commenters expressed support for the proposed amendment increasing the required practicum for student teachers from 40 days to 14 weeks and permitting student teachers to retain their full-time student status, enabling them to apply for financial aid.

DEPARTMENT RESPONSE: No Department response is necessary because the comment is supportive of the proposed amendment.

(b) COMMENT: Commenters stated that the extended student teaching requirement will be too costly for candidates. Some of the commenters further argued that the requirement will disproportionately impact candidates of color and those from immigrant families and/or will negatively impact candidates with working-class backgrounds. Another commenter stated the proposed amendment will be difficult to meet when some candidates, particularly mid-career candidates, have to work part-time to support their families. Commenters further stated that the proposal will result in increased tuition expenses on top of the existing fees that they are already paying, as well as introduce further barriers to the teaching profession.

DEPARTMENT RESPONSE: The Department believes that the 14-week student teaching requirement is essential, both to prepare candidates for their first year of teaching and to help ensure that candidates will receive the best possible educational experience. While the Department recognizes that a longer student teaching placement may be more difficult for candidates who hold part-time jobs, and may impose additional

transportation costs, they would not necessarily be paying additional tuition or fees. Since 2002, the State University of New York teacher preparation programs have required the student teaching experience to be at least 75 days in length, which is equivalent to the full-semester student teaching experience in the proposed amendment and illustrates the ability for candidates and IHEs to manage potential costs. The proposed amendments require IHEs to be credited with at least the number of semester hours required to obtain full-time enrollment status, thereby making them eligible for financial aid. The Department expects that IHEs will work with their candidates on securing financial aid and arranging transportation, if needed.

(c) COMMENT: Commenters support the goal of improving the quality and quantity of hours dedicated to clinical experiences. However, the proposal to require candidates to complete student teaching experiences in two grade levels (and three in the case of Early Childhood candidates) would limit the amount of time candidates spend in each school. Short term placements will not allow the candidate to gain a full understanding of the curriculum being taught in each grade.

DEPARTMENT RESPONSE: While the proposal maintains the existing requirement that candidates obtain student teaching experiences in multiple developmental levels in programs leading to certification in certain subject areas, extending the student teaching experience to at least 14 weeks gives candidates more time in each placement, allowing them to have a richer set of experiences at each location and each developmental level.

(d) COMMENT: Commenters stated that the Department should consider requiring a full-year teaching experience which will allow candidates to develop critical relationships with the host school community. Commenters also urged the Department to consider other possible options to the 14-week full time student teaching requirement, including allowing schools to offer a full-year immersive program, but not necessarily with full-time hours. Commenters recommended that the Department consider a residency model similar to the one in practice in Louisiana, which allows anyone with a B.A. and not yet certified, to take two examinations, get accepted by a teaching preparation program, and receive a Practitioner License 1, allowing them to teach full-time while completing the program requirements.

DEPARTMENT RESPONSE: The proposed increase in the length of the student teaching experience from at least 40 days to at least 14 weeks will result in some programs needing to make changes while other programs will not need to make changes. A full-year student teaching experience or full-time residency would require nearly all programs to make significant changes and possibly reconceptualize their programs. Programs are welcome to offer a full-year student teaching experience, but the Department does not expect programs to make the leap from 40 days to a full-year for the student teaching experience or a full-time residency at this time. Several New York State IHEs offer Transitional B and C programs whereby candidates employed full-time in a school district under a Transitional B or C certificate can simultaneously complete coursework and satisfy their student teaching requirement for the Initial certificate.

(e) COMMENT: Commenters stated that the timetable of the requirement is flawed. The requirement of 70 days of student teaching in one semester, preceded by 100 hours of clinical experience, would push the student teaching experience to the spring semester – when the school calendar is misaligned with most university calendars. Candidates will struggle to meet the required number of days and their school experience would be potentially focused more on preparing for the assessments than on practicing diverse student teaching strategies.

DEPARTMENT RESPONSE: The student teaching experience would not necessarily need to be pushed to the spring semester as a result of the proposed amendment. Each IHE can structure their programs—including the timing of the student teaching and clinical experiences—as they see fit. In fact, candidates can begin their 100-clock hour clinical experience as early as freshman year.

(f) COMMENT: One Commenter expressed concern that the proposal will require candidates to complete a 14-week placement in one location. As proposed, this requirement will deprive the student teacher of experiences in demographically diverse schools. Additionally, there are supervising teachers that don't necessarily provide the best experience for student teachers. By being locked into a single placement, the student teacher may not get exposure to a range of quality teaching experiences.

DEPARTMENT RESPONSE: The proposed amendment maintains the existing requirement that programs leading to certification in certain subject areas will require multiple student teaching placements depending on the program requirements for the particular subject area. Such requirements are outlined more fully in Section 52.21 of the Commissioner's Regulations. Through the combination of the 100 hours of field experience and 14 weeks of student teaching, programs can provide teacher candidates with experiences in a variety of communities with diverse student populations and different teachers. MOUs and similar collaborative agreements

are one way to improve the matching process between candidates and their supervising teachers. Moreover, if a student teaching placement is not working out or meeting expectations, then the IHE and the partner educational setting can arrange for reassignment to a different placement.

(g) COMMENT: Commenter objects to the proposed 14-week practicum requirement and stated that Trade and Technical teachers are required to have a minimum of two years of full-time paid work experience in the trade being offered, thereby limiting their ability to complete the 14-week full-time placement. Commenter stated that the Department seems to have shifted its emphasis from a competency-based teacher education approach to an approach that is governed by clock hours and somewhat burdensome regulations.

DEPARTMENT RESPONSE: Candidates pursuing career and technical education certification by completing a New York State approved program certification need two years of occupational work experience for initial certification. However, candidates can pursue career and technical education certification through other pathways that do not require less than two years of occupational work experience. In addition, candidates pursuing career and technical education certification have the option of pursuing a Transitional A certificate prior to the Initial certificate. This option gives candidates up to three years to be employed full time in a school district and simultaneously satisfy the student teaching requirement for the initial certificate.

(h) COMMENT: One Commenter suggested that the Department consider doing a pilot study on the efficacy of various student teaching program models before mandating the 14-week, full time requirement. Any program considered should include sufficient financial support for the candidates.

DEPARTMENT RESPONSE: The Department would welcome studies regarding programs' student teaching experiences. Since 2002, the State University of New York teacher preparation programs have required the student teaching experience to be at least 75 days in length, which is equivalent to the full-semester student teaching experience in the proposed amendment. The proposed requirement is informed by the recommendations from the Clinical Practice Work Group and national educator and teacher educator organizations as well as trends in other states for candidates to engage in high quality clinical experiences, including student teaching.

(i) COMMENT: Commenter works in a teacher preparation program and fully supports the spirit of the proposed amendment. The program in which commenter works requires a full-year, but not "full-time", student teaching experience. A narrow interpretation of the proposed "full-time" student teaching requirement would require changes to the program, including the candidates paying for additional credits. Commenter believes the inflexible mandate will likely limit the number and diversity of new teachers at a time when enrollment in teacher education is dropping rapidly in New York and might make it impossible for candidates to complete the program. This full-year program provides candidates with the valuable knowledge of what opening the school year looks like and allows candidates to continue taking classes or work flexible schedules. In addition, commenter noted that the proposed "time-limited approval for an alternate model" without any guidelines about what might be approved, or how much time might be granted, or the research evidence necessary to "adequately demonstrate the success of such model" makes it difficult to make a case for existing models of rich clinical experience with confidence that such models will truly be welcome or approved.

Commenter would prefer regulation amendments that allow more time for teacher educators to work with the Commissioner on defining more clearly the goals of a clinical experience and measures for the success of a given teacher preparation program. Commenter would like to see some pilots approved by the Commissioner demonstrating the benefits of a 14-week full-time semester-long experience. Commenter takes issue with the regulatory impact statement published in the NYS Register, saying that it misrepresents the past 18 years of teacher education and clinical practice in New York State, the current state of clinical practice requirements in the United States, and the financial impact of the proposed regulations. Commenter estimated the cost of full-time student teachers donating their time and mentor teachers and college faculty participating in professional development, as specified in the proposed amendment. Commenter asks where the funding will be for the professional development. Commenter states that clinical practice requirements have been eliminated altogether as a license requirement in Arizona and Louisiana and New Jersey provide routes to classroom teaching that eliminate all, or nearly all, clinical practice. Commenter stated that the CUNY, SUNY and private institution staff will be required to spend hundreds of hours re-writing and re-registering every non-compliant teacher education program in the state. The one-time cost of this additional work can easily run into tens of millions of dollars, not to mention the fact that faculty will not be able to spend as much time with student teachers or their mentors.

DEPARTMENT RESPONSE: The Department will review how to

interpret "full-time" for the student teaching experience. In addition, the Department will consider developing goals and measures of success for clinical experiences. The Department would welcome studies regarding programs' student teaching experiences. The provision of a "time-limited approval for an alternate model" of student teaching currently exists in regulations. The Department has successfully worked with IHEs on their proposed alternate models and the demonstration of the success of such models, and fully intends to continue doing so.

The regulatory impact statement published in the NYS Register stated that the current field experience and student teaching requirements have been in effect since January 2000. Although there have been many changes in teacher preparation programs and certification requirements since January 2000, the only substantive change in clinical experiences since this date is providing the option of a single 40-day student teaching placement for programs in certain subject areas. See Department response to #4c below regarding potential financial impact of the proposed amendment. Student teachers' time during the student teaching experience would not be included in a financial impact calculation; student teachers are not serving as teachers of record in their classroom, and student teaching is considered part of their professional education, just as coursework is. Under the individual evaluation pathway, candidates' experience as paid substitutes would be counted toward the student teaching requirement. The reference to Arizona licensure requirements and the Louisiana and New Jersey routes to classroom teaching is inapplicable to the proposed amendments. The proposed amendments focus on changes to the student teaching experience in teacher preparation programs and do not impact New York's alternative teacher programs. The proposed amendments include changes to the individual evaluation pathway to certification to ensure that it is aligned with the proposed student teaching requirement in New York State registered programs. Consistent with the recommendations of the Clinical Practice Work Group, the Department supports continuing to require Initial certificate applicants to have student teaching or other teaching experience prior to entering a classroom. Under the proposed amendment to the regulations, the first cohort of candidates in traditional four-year programs that would complete a full semester or longer of the student teaching experience is the cohort graduating in the 2025-2026 school year. Candidates entering a two-year master's degree program leading to an Initial certificate would need to complete the student teaching experience by the 2023-2024 school year. The long implementation timeline will give IHEs several years to revise their teacher educator programs, if needed, to incorporate the longer student teaching experience into their programs. The extent of revisions needed—and thus, the investment of IHEs' staff time to develop and implement those changes—will vary by program. There are not any fees associated with submitting program registration paperwork to the Department.

3. Regarding the proposal to exempt certain experienced teachers from the 100 clock-hour field experience requirement and the full-semester student teaching experience and requiring that they instead complete at least 50 clock hours of student teaching, the Department received the following comments.

(a) COMMENT: Commenters expressed support for the proposed regulation change.

DEPARTMENT RESPONSE: No Department response is necessary because the comment is supportive of the proposed amendment.

(b) COMMENT: Commenter supports the exemption for experienced educators, permitting them to complete only 50 hours of student teaching experience. However, the Commenter does not support the Department's decision to maintain the current requirement of 100 clock hours of field experiences, with 15 hours devoted to understanding the needs of students with disabilities. Commenter states that 100 hours is insufficient to prepare student teachers for their first years of teaching and recommends that the Department consider requiring them to complete 150 hours of field work, with 25 hours devoted to understanding the needs of students with disabilities and 25 hours devoted to understanding the needs of students who are English Language Learners. In addition, the Commenter stated that field work should include training in analyzing student data to track student progress over time; instruction in small group training for students needing special accommodations; and attendance at IEP meetings, teacher team meetings and staff development meetings with faculty, which will expose pre-service teachers to the responsibilities of teaching, inside and outside the classroom.

DEPARTMENT RESPONSE: No Department response needed because the comments related to increasing the number of hours of field experiences is not related to the proposed amendments.

4. Regarding the Department's proposal requiring school-based and university-based teacher educators who work with teacher candidates during clinical experiences, to have at least 3 years of full-time teaching or related experience in any grade, P-12, and participate in professional learning activities, the Department received the following comments.

(a) COMMENT: Commenter supports the proposal requiring that

school-based and university-based teacher educators have at least three years of full-time teaching experience before conducting clinical supervision. However, Commenter recommends that such experience should be within the last five years, so teacher educators have a good understanding of modern teaching practices and current teacher evaluation tools.

**DEPARTMENT RESPONSE:** The Department is not placing a limitation on when teacher educators should complete their three years of full-time teaching experience. By not having this restriction, schools and IHEs will have the flexibility to hire school-based and university-based teacher educators with strong backgrounds, who may have taken an alternative path professionally that would make their experience fall outside the past five years.

(b) **COMMENT:** Commenters recommended that the Department include a compensation plan for cooperating teachers who welcome pre-service and student teachers into their classrooms. One of the two Commenters further recommends that they be given 15 CTLE hours per pre-service teacher, and 25 CTLE hours per student teacher who successfully completes their required field hours or student teaching hours in their classroom.

**DEPARTMENT RESPONSE:** These comments are outside the scope of the proposed amendment and therefore, no response is necessary.

(c) **COMMENT:** Commenters objected to the recommended changes requiring three years of full-time teaching experience in a P-12 classroom, as follows.

Commenters stated that the proposed amendment will have a significant financial impact on the faculty, students and cooperating schools. One Commenter suggested that the Department consider that most teacher educators are part-time contingent faculty that neither have the time or resources to enroll in additional full-time teaching or other related experience. Commenters recommended that aid be given to faculty for the cost of obtaining the required training, and to school districts for the expense of hiring substitute teachers or adjuncts while faculty are away getting the required training.

Commenters also recommend that the Department create a grandfathering clause for current, experienced university-based educators with clinical supervision experience. One Commenter noted that many faculty members are highly experienced teachers but have moved into higher education teaching. Therefore, to require them now to gain three years of full-time, P-12 experience is not practical. In addition, the Commenter stated that the expertise of the professional needed in each of the two sectors (P-12 and higher education) is completely different.

One of the Commenters noted that the “related experience” language is unclear. This Commenter stated further, that there is no research indicating that college supervisors who have three years of full-time experience are more effective in coaching and mentoring than those with less than three years of experience.

**DEPARTMENT RESPONSE:** Commenters stated that the proposed amendment will have a significant financial impact on the faculty, students and cooperating schools. Programs may have additional expenses to hire part-time university-based teacher educators to supervise student teachers for a longer period of time and transportation costs for university-based teacher educators, if covered. Programs may also have expenses related to full-time faculty workload assignments, such as supervising student teachers and participating in professional learning, and expenses related to school-based teacher educator remuneration and other compensation. While the Department recognizes that a longer student teaching placement may be more difficult for candidates who hold part-time jobs, and may impose additional transportation costs, they would not necessarily be paying additional tuition or fees. It is not clear what the costs would be for cooperating schools that accept student teachers for a longer period of time.

Although the Department is not aware of research specifically indicating that university-based teacher educators who have three years of full-time teaching experience in an educational setting are more effective in mentoring than those with less than three years of experience, the teaching requirement helps to ensure that they have the P-12 teaching expertise needed to mentor candidates who will be future teachers. The first cohort of candidates in traditional four-year programs that would complete a full-semester or longer student teaching experience is the cohort graduating in the 2025-2026 school year. Candidates entering a two-year master’s degree program leading to an Initial certificate would need to complete the student teaching experience by the 2023-2024 school year. The long implementation timeline would give IHEs several years to identify and hire qualified university-based teacher educators, if needed. The Department will consider whether future regulatory amendments are needed for university-based teacher educators with clinical supervision experience who would work with student teachers that may be impacted by the regulatory amendment.

With respect to the comment about the perceived lack of clarity of the

“related experience” language, the Department purposefully included this language so that programs could have the flexibility to hire university-based teacher educators who have three years of full-time experience related to teaching that would be appropriate for mentoring student teachers.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Registration Requirements for School Counselor Programs and Certification Requirements for School Counselors

**I.D. No.** EDU-17-19-00006-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 52.21 and Part 80 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101, 207, 210, 215, 305, 3001, 3003, 3006 and 3009

**Subject:** Registration requirements for school counselor programs and certification requirements for school counselors.

**Purpose:** To amend requirements for registered school counselor programs and the certification requirements for school counselors.

**Text of proposed rule:** 1. Subdivision (a) of section 52.21 of the Regulations of the Commissioner of Education, shall be amended, to read as follows:

(a) Programs leading to certification in pupil personnel service shall meet the requirements of this subdivision, except that programs leading to initial and/or professional certification in school counseling shall meet the requirements of subdivision (d) of this section by September 1, [2020] 2021. Programs leading to certification in educational leadership service shall meet the requirements of subdivision (c) of this section by September 1, 2004. Prior to September 1, 2004, programs leading to certification in educational leadership service shall meet the requirements of this subdivision or subdivision (c) of this section.

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

2. Subdivision (d) of section 52.21 of the Regulations of the Commissioner of Education, shall be amended, to read as follows:

(d) Programs leading to certification as a school counselor. The requirements of this subdivision shall be met by September 1, [2020] 2021 for programs leading to initial certification pursuant to paragraph (2) of this subdivision and/or professional certification in school counseling pursuant to paragraph (3) of this subdivision.

- (1) . . .

(2) Standards for programs leading to initial certification as a school counselor. In addition to meeting the applicable provisions of this Part, programs leading to initial certification as a school counselor shall be programs leading to a master’s degree or higher, which shall include a minimum of 48 semester hours of graduate study, including [but not limited to] the [six] *eight* core content areas described in subparagraph (i) of this paragraph and shall have a minimum college-supervised practicum of 100 hours and a college-supervised internship of 600 hours as described in subparagraph (ii) of this paragraph.

(i) [Six] *Eight* core content areas. The program shall include a requirement that the candidate complete study that prepares candidates with knowledge, understanding, and skills in [at least] the following [six] *eight* core content areas *and subareas* of school counseling [and the subareas for these core content areas, as further defined by the Commissioner in guidance]:

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

(e) Child growth, development and student learning, including using knowledge of child development, individual differences, learning barriers, and pedagogy to contribute to and support student learning; [and]

- (f) . . .

(g) *Best practices for the profession and in school counseling programming, including assessing, developing, implementing, leading, and evaluating a data-driven school counseling program that is comprehensive, utilizes best practices and advances the mission of the school; and*

(h) *Research and program development, including the use of research and evaluation in advancing the school counseling program, its components and the profession.*

(ii) . . .

(3) Standards for programs leading to professional certification as a school counselor. Programs leading to professional certification as a school counselor shall require a candidate to complete either:

(i) a registered program leading to a master's degree, with a minimum of 60 semester hours of graduate study, which shall meet the program registration requirements for a school counselor program leading to the initial certificate as described in paragraph (2) of this subdivision. [including but not limited to, 48 semester hours of graduate study, the 100 clock hours of practicum and the 600 clock hour internship, and also require the candidate to complete a minimum of 12 semester hours of additional graduate study in at least the following two core content areas and the subareas for these core content areas, as further defined by the Commissioner in guidance: best practices for the profession and in school counseling programming, including assessing, developing, implementing, leading, and evaluating a data-driven school counseling program that is comprehensive, utilizes best practices, and advances the mission of the school; and research and program development, including the use of research and evaluation in advancing the school counseling program, its components and the profession]; or

(ii) a registered program leading to an advanced certificate with a minimum of 12 semester hours of graduate study in *any of the eight core content areas of school counseling as described in paragraph (2)(i) of this subdivision*. [at least the following two core content areas and the subareas for these content areas, as further defined by the Commissioner in guidance: best practices for the profession and in school counseling programming and research and program development, as described in subparagraph (i) of this paragraph]. Only individuals who have completed a registered school counselor program leading to initial certification as a school counselor or its equivalent, and who hold their initial certification as a school counselor, or individuals who have met the requirements for initial certification as a school counselor, shall be admitted to a school counseling program that leads to an advanced certificate.

(4) . . .

(5) Accreditation. School counseling programs registered for the first time on or after September 1, [2020] *2021* leading to initial and/or professional certification under this subdivision shall be accredited by an acceptable professional education accrediting association, meaning an organization which is determined by the Department to have equivalent standards to the State's registration standards, that is approved by the department and is recognized by the United States Department of Education or the Council for Higher Education Accreditation, within seven years of the date of their initial registration, and shall be continuously accredited thereafter by an acceptable professional education accrediting association.

3. The title of Subpart 80-2 of the Regulations of the Commissioner of Education is amended, to read as follows:

#### SUBPART 80-2

REQUIREMENTS FOR CERTIFICATES IN THE CLASSROOM TEACHING SERVICE APPLIED AND QUALIFIED FOR ON OR BEFORE FEBRUARY 1, 2004, THE ADMINISTRATIVE AND SUPERVISORY SERVICE APPLIED FOR ON OR BEFORE SEPTEMBER 1, 2006, AND THE PUPIL PERSONNEL SERVICE (EXCEPT FOR CERTIFICATES FOR SCHOOL COUNSELING APPLIED AND QUALIFIED FOR ON OR AFTER [SEPTEMBER 2, 2022] *FEBRUARY 2, 2023*).

4. Section 80-2.1 of the Regulations of the Commissioner of Education shall be amended, to read as follows:

§ 80-2.1 Application of this Subpart and definitions.

(a) Application of this Subpart.

(1) Provisional certificates.

(i) . . .

(ii) . . .

(iii) Candidates who apply and qualify for the provisional certificate in the title school counselor prior to [September 2, 2022] *February 2, 2023* shall be subject to the requirements of this Subpart. Candidates who do not meet these requirements shall be subject to the requirements of Subpart 80-3 of this Part, unless otherwise specifically prescribed in this Part.

(2) Permanent certificates.

(i) . . .

(ii) . . .

(iii) . . .

(iv) . . .

(v) Candidates with an expired provisional certificate in the title school counselor who apply for a permanent certificate in the title school counselor prior to [September 2, 2022] *February 2, 2023* shall be subject to the requirements of this Subpart, provided that they have been issued a provisional certificate in this title and have met all requirements for the

permanent certificate while under a provisional certificate that was in effect. Candidates with expired provisional certificates who apply for permanent certificates in the title school counselor on or after [September 2, 2022] *February 2, 2023* or who do not meet these conditions shall be subject to the requirements of Subpart 80-3 of this Part, unless otherwise specifically prescribed in this Part.

5. The title of Subpart 80-3 of the Regulations of the Commissioner of Education is amended, to read as follows:

#### SUBPART 80-3

REQUIREMENTS FOR CERTIFICATES IN THE CLASSROOM TEACHING SERVICE APPLIED AND QUALIFIED FOR ON OR AFTER FEBRUARY 1, 2004, THE EDUCATIONAL LEADERSHIP SERVICE APPLIED FOR ON OR AFTER SEPTEMBER 2, 2007, AND AS A SCHOOL COUNSELOR APPLIED AND QUALIFIED FOR ON OR AFTER [SEPTEMBER 2, 2022] *FEBRUARY 2, 2023*.

6. Section 80-3.1 of the Regulations of the Commissioner of Education is amended, to read as follows:

(a) Application of this Subpart.

(1) Candidates who apply on or after February 2, 2004 for certificates valid for classroom teaching service, and on or after September 2, 2007 for certificates valid for the educational leadership service, and on or after [September 2, 2022] *February 2, 2023* for certificates valid for school counselors, shall be subject to the requirements of this Subpart, unless otherwise specifically prescribed in this Part, and except as prescribed in paragraph (2) of this subdivision.

7. Subparagraph (ii) of paragraph (2) of subdivision (a) of section 80-3.11 of the Regulations of the Commissioner of Education is amended, to read as follows:

(ii) Examination. Candidates applying for certification on or after [September 2, 2022] *February 2, 2023* shall submit evidence of having achieved a satisfactory level of performance on the New York State examination for school counselors or other equivalent examination as approved by the Commissioner, if available.

8. Paragraph (3) of subdivision (a) of section 80-3.12 of the Regulations of the Commissioner of Education is amended, to read as follows:

(3) The candidate shall complete 48 semester hours of graduate coursework that includes study in each of the following [six] *eight* core content areas:

(i) . . .

(ii) . . .

(iii) . . .

(iv) . . .

(v) Child growth, development and student learning; [and]

(vi) . . .

(vii) *Best practices for the profession and in-school counseling programming; and*

(viii) *Research and program development to advance the school counseling program, its components and the profession.*

9. Paragraph (2) of subdivision (b) of section 80-3.12 of the Regulations of the Commissioner of Education shall be amended, to read as follows:

(2) In addition to that required for the initial certificate as described in subdivision (a) of this section, the candidate shall complete at least 12 semester hours of graduate coursework that includes study in [at least each of the following core content areas] *any of the eight core content areas described in paragraph (3) of subdivision (a) of this section*.

[(i) Best practices for the profession and in school counseling programming; and

(ii) Research and program evaluation].

10. Paragraph (3) of subdivision (b) of section 80-3.12 of the Regulations of the Commissioner of Education shall be amended, to read as follows:

(3) Experience. The candidate shall have successfully completed three years of school counseling experience in New York State public or non-public schools K-12, or its equivalent. The candidate who completes this requirement in total or part through experience in New York public schools shall be required to participate in a mentored program in the first [year of] *180 school days* of employment.

11. Paragraph (5) of subdivision (a) of section 80-5.23 of the Regulations of the Commissioner of Education shall be amended, to read as follows:

(5) Examination requirement. Any candidate applying for professional certification as a school counselor through endorsement of a certificate of another state or territory pursuant to the provisions of this section on or after [September 2, 2022] *February 2, 2023*, shall achieve a satisfac-

tory level of performance on the New York State school counselor examination or other equivalent examination as approved by the Commissioner, if available.

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

**Data, views or arguments may be submitted to:** Petra Maxwell, NYS Education Department, Office of Higher Education, 89 Washington Avenue, Room 975 EBA, Albany, NY 12234, (518) 474-2238, email: regcomments@nysed.gov

**Public comment will be received until:** 60 days after publication of this notice.

### Regulatory Impact Statement

#### 1. STATUTORY AUTHORITY:

Education Law 101 (not subdivided) charges the Department with the general management and supervision of all public schools and all 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 214 extends the Regents' general rule-making authority to include all secondary and higher educational institutions, as may be admitted to or incorporated by the university.

Education Law 215 authorizes the Regents and/or the Commissioner to visit, examine and inspect any institution in the university and any school or institution under the educational supervision of the state.

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 308 authorizes the Commissioner to institute such proceedings and processes as may be necessary to enforce and implement any law pertaining to the school system of the state or any part thereof or to any school district or city.

Education Law 3001 establishes the qualifications of teachers in the classroom.

Education Law 3003 authorizes the Commissioner to provide for the issuance of a certificate as superintendent of schools to exceptionally qualified persons who do not meet all of the graduate course or teaching requirements.

Education Law 3006 authorizes the Commissioner of education to issue all such other certificates as the Regents shall prescribe.

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

#### 2. LEGISLATIVE OBJECTIVES:

The purpose of the proposed amendments to Sections 52.21, 80-2.1, 80-3.1, 80-3.11, 80-3.12 and 80-5.23, and the titles to Subparts 80-2 and 80-3 is to require that all programs leading to initial certification in school counseling include a minimum of 48 semester hours of graduate study in all eight core content areas. In addition, the Department recommends that 12-credit programs leading to professional certification and 60-credit programs leading to initial and professional programs include 12 semester hours in any of the eight core content areas. The Department also proposes removing the phrase "subareas [of the eight core content areas] as further defined in guidance" from the Regulations because the eight core elements listed in the Regulations already include a description of the subareas.

Regarding implementation dates, the Department is proposing extending:

- the implementation date for registered programs to comply with Commissioner's Regulations for programs leading to initial and professional certification in school counseling from September 1, 2020 to September 1, 2021 to allow for additional time to meet these revised regulations;

- the effective date by which programs registered on or after that date must meet accreditation requirements from September 1, 2020 to September 1, 2021 to correspond with the one-year implementation extension; and

- the date by which candidates can apply and qualify for the Provisional School Counselor certificate and by which candidates with an expired Provisional School Counselor certificate can apply for a Permanent School Counselor certificate from September 2, 2022 to February 2, 2023; and

- the date by which candidates applying for certification in school counseling must meet the new Initial or Professional certificate requirements from September 2, 2022 to February 2, 2023, unless they hold a valid Provisional certificate and meet all requirements for the Permanent certificate while under a valid Provisional certificate.

#### 3. NEEDS AND BENEFITS:

The Department is proposing to amend Sections 52.21, 80-2.1, 80-3.1, 80-3.11, 80-3.12 and 80-5.23, and the titles to Subparts 80-2 and 80-3 in response to the recommendations of the School Counselor Workgroup (Workgroup), convened in 2017 to assist Department staff in developing a guidance document for re-registering existing and new school counseling programs. Workgroup members asked the Department for an extension of time to implement the new regulations so they could have more time to develop and move the new school counseling programs through their IHEs' approval processes in time to submit them to the Department for registration.

In addition, the Workgroup posited that requiring only six of the eight school counseling core elements in the 48 semester-hour initial certification programs would not sufficiently prepare their candidates to work as new school counselors in P-12 schools. They proposed to the Department that 48-semester hour programs leading to initial certification include all eight core content areas, and 60-semester hour programs leading to initial and professional certification in school counseling include a minimum of 48-semester hours of graduate study in all eight core content areas. In addition, the Department is proposing that 12-credit programs leading to professional certification include 12 semester hours of graduate study.

Finally, regarding the revised implementation dates, the Department proposes to extend the date of program registration for one year, from September 1, 2020 until September 1, 2021, to give programs more time to implement the required changes and extending the date that the initial and professional certificates becomes available, from September 2, 2022 to February 2, 2023, so that these certificates are available for candidates who graduate from the newly registered programs.

#### 4. COSTS:

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

b. Costs to local government: The amendments do not impose any costs on local government.

c. Costs to private regulated parties: The proposed amendment imposes minimal additional costs on educator preparation providers, teacher certification candidates, and/or the New York State school districts/BOCES who wish to hire them. The Department expects that the proposed amendments to the regulations, requiring that all programs leading to initial certification in school counseling include a minimum of 48 semester hours of graduate study in all eight core content areas; and the recommendation that 12-credit programs leading to professional certification and 60-credit programs leading to initial and professional programs include 12 semester hours in any of the eight core content areas, will be embedded within the existing school counseling program.

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:

The proposed amendment does not impose any additional paperwork requirements.

#### 7. DUPLICATION:

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

#### 8. ALTERNATIVES:

Because the State believes that uniform certification standards are required across the State, no alternatives were considered.

#### 9. FEDERAL STANDARDS:

There are no applicable Federal standards.

#### 10. COMPLIANCE SCHEDULE:

If adopted by the Board of Regents at its July 2019 meeting, the proposed amendment will become effective on July 31, 2019.

### Regulatory Flexibility Analysis

#### 1. EFFECT OF RULE:

The proposed amendment applies to each of the 695 public school districts in this State and institutions of higher education with school counselor preparation programs, which employ fewer than 100 employees.

#### 2. COMPLIANCE REQUIREMENTS:

The proposed amendments are necessary to implement the recommendations of the School Counselor Workgroup (Workgroup) that was formed to assist staff in developing a guidance document for re-registering existing programs and registering new school counseling programs. The Workgroup posited that requiring only six of the eight school counseling core content areas in the 48-semester hour initial certification programs would not sufficiently prepare their candidates to work as new school counselors in P-12 schools. They proposed to the Department that 48-semester hour programs leading to initial certification include all eight core content areas, and 60-semester hour programs leading to initial and professional certification in school counseling include a minimum of 48-semester hours of graduate study in all eight core content areas. In addi-

tion, the Department is proposing that 12-credit programs leading to professional certification include 12 semester hours of graduate study.

In mid-2018, the Department's Office of School Support Services issued comprehensive guidance on the new Commissioner's Regulations Section 100.2(j) pertaining to school counseling in P-12 schools. The guidance noted, "It is important to utilize standards for all three domains of the school counseling program: career/college readiness, academic skills development and social/emotional development." This guidance reinforces the Workgroup's recommendation that all eight core content areas be included in 48-credit initial certification programs.

The Workgroup further recommended a two-year extension for implementing the new regulations – from September 1, 2020 to September 1, 2022 – so they could have more time to develop and move the new school counseling programs through their IHEs' approval processes and to submit them to the Department for registration.

### 3. NEEDS AND BENEFITS:

Technical amendments to the definitions, terms and school counseling program requirements set forth in § 80-2.1, § 80-3.1, § 80-3.11, § 80-3.12, and § 80-5.23, and the titles to Subparts 80-2 and 80-3 are necessary to require all 48-semester hour programs leading to initial certification in school counseling and 60-semester hour programs leading to initial and professional certification in school counseling include a minimum of 48-semester hours of graduate study in all eight core content areas. In addition, the Department is proposing that 12-credit programs leading to professional certification include 12 semester hours of graduate study in any of the eight core content areas. The Department also proposes removing the phrase "subareas as further defined in guidance" from the Regulations because the eight core content areas listed in the Regulations already include a description of the subareas. Finally, the proposal includes revising the Initial and Professional certificate coursework requirements through the individual evaluation certification pathway to align with the changes in the program registration requirements.

Regarding implementation dates, the Department is proposing extending:

- the implementation date for registered programs to comply with Commissioner's Regulations for programs leading to initial and professional certification in school counseling from September 1, 2020 to September 1, 2021 to allow for additional time to meet these revised regulations;
- the effective date by which programs registered on or after that date must meet accreditation requirements from September 1, 2020 to September 1, 2021 to correspond with the one-year implementation extension;
- the date by which candidates can apply and qualify for the Provisional School Counselor certificate and by which candidates with an expired Provisional School Counselor certificate can apply for a Permanent School Counselor certificate from September 2, 2022 to February 2, 2023; and
- the date by which candidates applying for certification in school counseling must meet the new Initial or Professional certificate requirements from September 2, 2022 to February 2, 2023, unless they hold a valid Provisional certificate and meet all requirements for the Permanent certificate while under a valid Provisional certificate.

Candidates who hold a valid Provisional certificate and meet all requirements for the Permanent certificate while under a valid Provisional certificate will continue to be able to apply for a Permanent School Counselor certificate unless the Department determines to no longer make the Permanent School Counselor certificate available at a future date.

### 4. PROFESSIONAL SERVICES:

The proposed amendment imposes no additional professional service requirements on local governments or small businesses.

### 5. COMPLIANCE COSTS:

In general, the proposed rules do not impose any costs on local governments and small businesses, beyond those currently imposed by regulation.

### 6. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rules do not impose any additional costs or technological requirements on local governments or small businesses.

### 7. MINIMIZING ADVERSE IMPACT:

The proposed amendments are necessary to implement the recommendation of the Workgroup and the Department's Office of School Support Services pursuant to its comprehensive guidance on the new Commissioner's Regulations Section 100.2(j) pertaining to school counseling in P-12 schools. Accordingly, no alternatives were considered.

### 8. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule have been 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 and the Workgroup.

### Rural Area Flexibility Analysis

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

This proposed amendment applies to educator preparation providers (EPPs) and certain candidates for teacher certification in New York State,

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

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

The purpose of the proposed amendments to Sections 52.21, 80-2.1, 80-3.1, 80-3.11, 80-3.12 and 80-5.23, and the titles to Subparts 80-2 and 80-3 is to require that 48-semester hour programs leading to initial certification include all eight core content areas, and 60-semester hour programs leading to initial and professional certification in school counseling include a minimum of 48-semester hours of graduate study in all eight core content areas. In addition, the Department is proposing that 12-credit programs leading to professional certification include 12 semester hours of graduate study. The Department also proposes removing the phrase "subareas [of the eight core content areas] as further defined in guidance" from the Regulations because the eight core content areas listed in the Regulations already include a description of the subareas.

Regarding implementation dates, the Department is proposing extending:

- the implementation date for registered programs to comply with Commissioner's Regulations for programs leading to initial and professional certification in school counseling from September 1, 2020 to September 1, 2021 to allow for additional time to meet these revised regulations;
- the effective date by which programs registered on or after that date must meet accreditation requirements from September 1, 2020 to September 1, 2021 to correspond with the one-year implementation extension;
- the date by which candidates can apply and qualify for the Provisional School Counselor certificate and by which candidates with an expired Provisional School Counselor certificate can apply for a Permanent School Counselor certificate from September 2, 2022 to February 2, 2023; and
- the date by which candidates applying for certification in school counseling must meet the new Initial or Professional certificate requirements from September 2, 2022 to February 2, 2023, unless they hold a valid Provisional certificate and meet all requirements for the Permanent certificate while under a valid Provisional certificate.

Candidates who hold a valid Provisional certificate and meet all requirements for the Permanent certificate while under a valid Provisional certificate will continue to be able to apply for a Permanent School Counselor certificate unless the Department determines to no longer make the Permanent School Counselor certificate available at a future date.

### 3. COSTS:

The proposed amendment imposes minimal additional costs on educator preparation providers, teacher certification candidates, and/or the New York State school districts/BOCES who wish to hire them. The Department expects that the proposed amendments to the regulations, requiring that all programs leading to initial certification in school counseling include a minimum of 48 semester hours of graduate study in all eight core content areas; and the recommendation that 12-credit programs leading to professional certification and 60-credit programs leading to initial and professional programs include 12 semester hours in any of the eight core content areas, will be embedded within the existing school counseling program.

### 4. MINIMIZING ADVERSE IMPACT:

The Department believes that uniform standards for initial certification in school counseling must be established across the State. Therefore, no alternatives were considered for those located in rural areas of the State.

### 5. RURAL AREA PARTICIPATION:

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

### Job Impact Statement

The purpose of the proposed amendments to Sections 52.21(a) and (d), 80-2.1, 80-3.1, 80-3.11, 80-3.12 and 80-5.23, and the titles to Subparts 80-2 and 80-3 of the Regulations of the Commissioner of Education is to require that all programs leading to initial certification in school counseling include a minimum of 48 semester hours of graduate study in all eight core content areas. In addition, the Department recommends that 12-credit programs leading to professional certification and 60-credit programs leading to initial and professional programs include 12 semester hours in any of the eight core content areas.

Because it is evident from the nature of the proposed amendments 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.

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

**Extension of the EdTPA Safety Net for Candidates Who Receive a Failing Score on the Library Specialist EdTPA**

**I.D. No.** EDU-17-19-00007-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 80-1.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207, 305, 3001, 3003, 3004 and 3009

**Subject:** Extension of the edTPA Safety Net for Candidates Who Receive a Failing Score on the Library Specialist edTPA.

**Purpose:** The safety net enables candidates to be held harmless during the handbook revision process.

**Text of proposed rule:** Clauses (a) and (b) of subparagraph (iii) of paragraph (1) of subdivision (c) of section 80-1.5 of the Regulations of the Commissioner of Education shall be amended to read as follows:

(a) receive a satisfactory score on the written assessment of teaching skills after receipt of his/her score on the Library Specialist teacher performance assessment and prior to [September 30, 2019] *December 31, 2021*; or

(b) pass the written assessment of teaching skills on or before April 30, 2014 (before the new certification examination requirements became effective), provided the candidate has taken and failed the Library Specialist teacher performance assessment prior to [September 30, 2019] *December 31, 2021*.

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

**Data, views or arguments may be submitted to:** Petra Maxwell, Education Department, Office of Higher Education, 89 Washington Avenue, Room 975 EBA, Albany, NY 12234, (518) 474-2238, email: petra.maxwell@nysed.gov

**Public comment will be received until:** 60 days after publication of this notice.

**Regulatory Impact Statement**

**1. STATUTORY AUTHORITY:**

Education Law 101 (not subdivided) charges the Department with the general management and supervision of all public schools and all 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 3009 prohibits school district money from being used to pay the salary of an unqualified teacher.

**2. LEGISLATIVE OBJECTIVES:**

The purpose of the proposed amendment to Section 80-1.5 of the Regulations of the Commissioner of Education is to extend the edTPA safety net for candidates who receive a failing score on the Library Specialist edTPA. The edTPA is a requirement for certification in the classroom teaching service for most candidates in New York State. This national teacher performance assessment evaluates candidates' ability to plan, implement, and assess lessons. The Stanford Center for Assessment, Learning, and Equity (SCALE) developed the edTPA handbooks that describe the tasks to be performed and updates the handbooks annually in response to candidate performance data and feedback from educator preparation programs across the country.

Candidates who receive a failing score on the Library Specialist edTPA may take advantage of the safety net through September 30, 2019. The Department is proposing to extend the safety net expiration date until December 31, 2021.

The proposed safety net expiration date allows candidates to be held

harmless during the continued use of the current Library Specialist edTPA while school library preparation programs transition to the updated Library Specialist edTPA. Candidates would be able to take the ATS-W if they do not earn a passing score on the current Library Specialist edTPA and during the first few months of the implementation of the updated Library Specialist edTPA. By December 31, 2021, candidates and school library preparation programs will be familiar with the updated Library Specialist edTPA handbook.

**3. NEEDS AND BENEFITS:**

The Department is proposing to extend the safety net expiration date for candidates who receive a failing score on the Library Specialist edTPA from September 30, 2019 to December 31, 2021 while SCALE revises the edTPA Library Specialist handbook. By extending the expiration date, the proposed safety net expiration date allows candidates to be held harmless during the continued use of the current Library Specialist edTPA while school library preparation programs transition to the updated Library Specialist edTPA. Candidates would be able to take the ATS-W if they do not earn a passing score on the current Library Specialist edTPA and during the first few months of the implementation of the updated Library Specialist edTPA.

**4. COSTS:**

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

b. Costs to local government: The amendments do not impose any costs on local government.

c. Costs to private regulated parties: The amendment do 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:**

The proposed amendment does not impose any additional paperwork requirements.

**7. DUPLICATION:**

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

**8. ALTERNATIVES:**

Because the State believes that uniform certification standards are required across the State, no alternatives were considered.

**9. FEDERAL STANDARDS:**

There are no applicable Federal standards.

**10. COMPLIANCE SCHEDULE:**

If adopted as an emergency action by the Board of Regents at its July 2019 meeting, the proposed amendment will become effective on July 31, 2019.

**Regulatory Flexibility Analysis**

This proposed amendment applies to all individuals in New York State who pursue a Library Media Specialist certificate in the classroom teaching service. Because it is evident from the nature of the proposed amendment that it does not affect small businesses or local governments, 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.

**Rural Area Flexibility Analysis**

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

This proposed amendment applies to all individuals in New York State who pursue a Library Media Specialist certificate in the classroom teaching service, including those located in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

The purpose of the proposed amendment to Section 80-1.5 of the Regulations of the Commissioner of Education is to extend the edTPA safety net for candidates who receive a failing score on the Library Specialist edTPA. The edTPA is a requirement for certification in the classroom teaching service for most candidates in New York State. This national teacher performance assessment evaluates candidates' ability to plan, implement, and assess lessons. The Stanford Center for Assessment, Learning, and Equity (SCALE) developed the edTPA handbooks that describe the tasks to be performed and updates the handbooks annually in response to candidate performance data and feedback from educator preparation programs across the country.

Candidates who do not pass the edTPA may take advantage of the safety net through September 30, 2019. For the safety net, teacher candidates must have passed the Assessment of Teaching Skills – Written (ATS-W) after receiving their failing edTPA score on or before April 30, 2014.

The Department is proposing to extend the safety net expiration date for candidates who receive a failing score on the Library Specialist edTPA from September 30, 2019 to December 31, 2021 while SCALE revises the edTPA Library Specialist handbook. By extending the expiration date, the safety net will be available to candidates who use the current edTPA Library Specialist handbook and give them time to take the ATS-W if they do not earn a passing score. The safety net enables candidates to be held harmless during the handbook revision process.

3. COSTS:

The proposed amendment does not impose any costs on teacher certification candidates and/or the New York State school districts/BOCES who wish to hire them.

4. MINIMIZING ADVERSE IMPACT:

The Department believes that uniform standards for certification must be established across the State. Therefore, no alternatives were considered for those located in rural areas of the State.

5. RURAL AREA PARTICIPATION:

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

**Job Impact Statement**

This proposed amendment applies to all individuals in New York State who pursue a Library Media Specialist certificate in the classroom teaching service. Because it is evident from the nature of the proposed amendment that it will have no impact on the number of jobs or employment opportunities in New York State, no further steps were needed to ascertain that fact and none were taken.

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

**To Require Study in Language Acquisition and Literacy Development of English Language Learners in Certain Teacher Preparation**

**I.D. No.** EDU-17-19-00008-P

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

**Proposed Action:** Amendment of section 52.21 and Part 80 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101, 207, 208, 315, 305, 2117, 2854(1)(b), 3001, 3004, 3009 and 3204

**Subject:** To require study in language acquisition and literacy development of English language learners in certain teacher preparation.

**Purpose:** To ensure that newly certified teachers enter the workforce fully prepared to serve our ELL population.

**Text of proposed rule:** 1. Item (iv) of subclause (1) of clause (c) of subparagraph (ii) of paragraph (2) of subdivision (b) of section 52.21 of the Regulations of the Commissioner of Education shall be amended, a new item (v) shall be added to subclause (1), and the former items (v) through (xiii) of subclause (1) of clause (c) of subparagraph (ii) of paragraph (2) of subdivision (b) of section 52.21 of the Regulations of the Commissioner shall be numbered (vi) through (xiv) as follows:

(iv) prior to September 1, 2022, language acquisition and literacy development by native English speakers and students who are English language learners—and skill in developing the listening, speaking, reading, and writing skills of all students, including at least six semester hours of such study for teachers of early childhood education, childhood education, middle childhood education, and adolescence education; teachers of students with disabilities, students who are deaf or hard-of-hearing, students who are blind or visually impaired, and students with speech and language disabilities; teachers of English to speakers of other languages; and library media specialists. This six semester hour requirement may be waived upon a showing of good cause satisfactory to the commissioner, including but not limited to a showing that the program provides adequate instruction in language acquisition and literacy development through other means;

(v) on or after September 1, 2022, language acquisition and literacy development by native English speakers and students who are English language learners—and skill in developing the listening, speaking, reading, and writing skills of all students, including at least three semester hours of study in language acquisition and literacy development of English language learners and at least three semester hours of study in language acquisition and literacy development for all students for teachers of early childhood education, childhood education, middle childhood education, and adolescence education; teachers of students with disabilities, students who are deaf or hard-of-hearing, students who are blind

or visually impaired, and students with speech and language disabilities; teachers of English to speakers of other languages; and library media specialists. These three semester hour requirements may be waived upon a showing of good cause satisfactory to the commissioner, including but not limited to a showing that the program provides adequate instruction in language acquisition and literacy development through other means.

2. Clause (b) of subparagraph (i) of paragraph (3) of subdivision (a) of section 80-3.7 of the Regulations of the Commissioner of Education shall be amended and a new clause (c) shall be added to subparagraph (i) as follows:

(b) Pedagogical core. Within the pedagogical core prescribed in subparagraph (2)(v) of this subdivision, [the candidate shall] candidates who apply on or before September 1, 2026 must complete six semester hours of coursework that is appropriate to the student developmental level of the certificate title. The candidate shall also complete three additional semester hours in teaching literacy skills.

(c) Pedagogical core. Within the pedagogical core prescribed in subparagraph (2)(v) of this subdivision, candidates who apply after September 1, 2026, must complete six semester hours of coursework that is appropriate to the student developmental level of the certificate sought. The candidate shall also complete three additional semester hours in language acquisition and literacy development of English language learners.

3. Clause (b) of subparagraph (ii) of paragraph (3) of subdivision (a) of section 80-3.7 of the Regulations of the Commissioner of Education shall be amended, a new clause (c) shall be added to subparagraph (ii), and the former item (c) of subparagraph (ii) of paragraph (3) of subdivision (a) of section 80-3.7 of the Regulations of the Commissioner of Education shall be numbered (d) as follows:

(b) Pedagogical core. Within the pedagogical core prescribed in subparagraph (2)(v) of this subdivision, [the candidate shall] candidates who apply on or before September 1, 2026 must complete six semester hours of coursework that is appropriate to the student developmental level of the certificate title. The candidate shall also complete three additional semester hours in teaching literacy skills.

(c) Pedagogical core. Within the pedagogical core prescribed in subparagraph (2)(v) of this subdivision, candidates who apply after September 1, 2026, must complete six semester hours of coursework that is appropriate to the student developmental level of the certificate sought. The candidate shall also complete three additional semester hours in language acquisition and literacy development of English language learners.

4. Clause (b) of subparagraph (iii) of paragraph (3) of subdivision (a) of section 80-3.7 of the Regulations of the Commissioner of Education shall be amended and a new clause (c) shall be added to subparagraph (iii) as follows:

(b) Pedagogical core. Within the pedagogical core prescribed in subparagraph (2)(v) of this subdivision, [the candidate shall] candidates who apply on or before September 1, 2026 must complete a total of six semester hours of coursework that includes study in methods of second-language teaching at the elementary and secondary levels. The candidate shall also complete three additional semester hours in teaching literacy skills.

(c) Pedagogical core. Within the pedagogical core prescribed in subparagraph (2)(v) of this subdivision, candidates who apply after September 1, 2026, must complete a total of six semester hours of coursework that includes study in methods of second-language teaching at the elementary and secondary levels. The candidate shall also complete three additional semester hours in language acquisition and literacy development of English language learners.

5. Clause (b) of subparagraph (v) of paragraph (3) of subdivision (a) of section 80-3.7 of the Regulations of the Commissioner of Education shall be amended, a new clause (c) shall be added to subparagraph (v), and the former clause (c) of subparagraph (v) of paragraph (3) of subdivision (a) of section 80-3.7 of the Regulations of the Commissioner of Education shall be renumbered clause (d) as follows:

(b) Pedagogical core. Within the pedagogical core prescribed in subparagraph (2)(v) of this subdivision, [the candidate shall] candidates who apply on or before September 1, 2026 must complete six semester hours of coursework appropriate to the student developmental level of the certificate. In addition to such prescribed pedagogical core, the candidate shall complete three semester hours in teaching literacy skills and 12 semester hours of coursework that includes study in each of the following subjects:

- (1) . . .
- (2) . . .
- (3) . . .

(c) Pedagogical core. Within the pedagogical core prescribed in subparagraph (2)(v) of this subdivision, candidates who apply after September 1, 2026, must complete six semester hours of coursework ap-

appropriate to the student developmental level of the certificate sought. In addition to such prescribed pedagogical core, the candidate shall complete three semester hours in language acquisition and literacy development of English language learners and 12 semester hours of coursework that includes study in each of the following subjects:

- (1) foundations of special education;
- (2) assessment, diagnosis, and evaluation of students with disabilities including collaboration with caregivers and others, to promote academic achievement and independence; and
- (3) curriculum, instruction and managing learning environments for students with disabilities, including instructional and assistive technology.

6. Clause (b) of subparagraph (vi) of paragraph (3) of subdivision (a) of section 80-3.7 of the Regulations of the Commissioner of Education shall be amended, a new clause (c) shall be added to subparagraph (vi), and the former clause (c) of subparagraph (vi) of paragraph (3) of subdivision (a) of section 80-3.7 of the Regulations of the Commissioner of Education shall be renumbered clause (d) as follows:

(b) Pedagogical core. Within the pedagogical core prescribed in subparagraph (2)(v) of this subdivision, [the candidate shall] candidates who apply on or before September 1, 2026 must complete six semester hours of coursework appropriate to the developmental level of the certificate. In addition to such prescribed pedagogical core, the candidate shall complete three semester hours in teaching literacy skills and 12 semester hours of coursework that includes study in each of the following subjects:

(c) Pedagogical core. Within the pedagogical core prescribed in subparagraph (2)(v) of this subdivision, candidates who apply after September 1, 2026, must complete six semester hours of coursework appropriate to the student developmental level of the certificate sought. In addition to such prescribed pedagogical core, the candidate shall complete three semester hours in language acquisition and literacy development of English language learners and 12 semester hours of coursework that includes study in each of the following subjects:

7. Clause (b) of subparagraph (viii) of paragraph (3) of subdivision (a) of section 80-3.7 of the Regulations of the Commissioner of Education shall be amended, a new clause (c) shall be added to subparagraph (viii), and the former clause (c) of subparagraph (viii) of paragraph (3) of subdivision (a) of section 80-3.7 of the Regulations of the Commissioner of Education shall be numbered clause (d) as follows:

(b) Pedagogical core. Within the pedagogical core prescribed in subparagraph (2)(v) of this subdivision, [the candidate shall] candidates who apply on or before September 1, 2026 must complete six semester hours of coursework appropriate to the student developmental level of the certificate sought. In addition to such prescribed pedagogical core, the candidate shall complete three semester hours in teaching literacy skills and 12 semester hours of coursework that includes study in each of the following subjects:

(c) Pedagogical core. Within the pedagogical core prescribed in subparagraph (2)(v) of this subdivision, candidates who apply after September 1, 2026, must complete six semester hours of coursework appropriate to the student developmental level of the certificate sought. In addition to such prescribed pedagogical core, the candidate shall complete three semester hours in language acquisition and literacy development of English language learners and 12 semester hours of coursework that includes study in each of the following subjects:

8. Clause (b) of subparagraph (ix) of paragraph (3) of subdivision (a) of section 80-3.7 of the Regulations of the Commissioner of Education shall be amended, a new clause (c) shall be added to subparagraph (ix), and the former clause (c) of subparagraph (ix) of paragraph (3) of subdivision (a) of section 80-3.7 of the Regulations of the Commissioner of Education shall be numbered clause (d) as follows:

(b) Pedagogical core. In addition to the pedagogical core prescribed in subparagraph (2)(v) of this subdivision, [the candidate shall] candidates who apply on or before September 1, 2026 must complete three semester hours in teaching literacy skills language acquisition and literacy development of English language learners and 12 semester hours of coursework that includes study in each of the following subjects:

(c) Pedagogical core. Within the pedagogical core prescribed in subparagraph (2)(v) of this subdivision, candidates who apply after September 1, 2026, must complete three semester hours in language acquisition and literacy development of English language learners and 12 semester hours of coursework that includes study in each of the following subjects:

9. Clause (b) of subparagraph (x) of paragraph (3) of subdivision (a) of section 80-3.7 of the Regulations of the Commissioner of Education shall be amended, a new clause (c) shall be added to subparagraph (x), and the former clause (c) of subparagraph (x) of paragraph (3) of subdivision (a) of section 80-3.7 of the Regulations of the Commissioner of Education shall be numbered clause (d) as follows:

(b) Pedagogical core. In addition to the pedagogical core prescribed in subparagraph (2)(v) of this subdivision, [the candidate shall] candidates who apply on or before September 1, 2026 must complete three semester hours in teaching literacy skills language acquisition and literacy development of English language learners and 12 semester hours of coursework that includes study in each of the following subjects:

(c) Pedagogical core. Within the pedagogical core prescribed in subparagraph (2)(v) of this subdivision, candidates who apply after September 1, 2026, must complete three semester hours in language acquisition and literacy development of English language learners and 12 semester hours of coursework that includes study in each of the following subjects:

10. Subclause (1) of clause (b) of subparagraph (xi) of paragraph (3) of subdivision (a) of section 80-3.7 of the Regulations of the Commissioner of Education shall be amended and a new subclause (2) shall be added to subparagraph (iii) as follows:

(1) In addition to the pedagogical core coursework prescribed in clause (2)(v)(a) of this subdivision, [the candidate shall] candidates who apply on or before September 1, 2026 must complete three semester hours in teaching literacy skills and six semester hours that includes study in each of the following subjects:

(2) In addition to the pedagogical core coursework prescribed in clause (2)(v)(a) of this subdivision, candidates who apply after September 1, 2026, must complete three semester hours in language acquisition and literacy development of English language learners and six semester hours that includes study in each of the following subjects:

11. Item (iv) of subclause (1) of clause (b) of subparagraph (xii) of paragraph (3) of subdivision (a) of section 80-3.7 of the Regulations of the Commissioner of Education shall be amended, a new item (v) shall be added to subclause (1), and the former item (v) of subclause (1) of clause (b) of subparagraph (xii) of paragraph (3) of subdivision (a) of section 80-3.7 of the Regulations of the Commissioner of Education shall be renumbered item (vi) as follows:

(iv) for candidates who apply on or before September 1, 2024, increasing the literacy skills of all students, six semester hours; [and]

(v) candidates who apply after September 1, 2026, increasing the literacy skills of all students, three semester hours, and language acquisition and literacy development of English language learners, three semester hours, and;

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

**Data, views or arguments may be submitted to:** Petra Maxwell, NYS Education Department, Office of Higher Education, 89 Washington Avenue, Room 975 EBA, Albany, NY 12234, (518) 474-2238, email: petra.maxwell@nysed.gov

**Public comment will be received until:** 60 days after publication of this notice.

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

Education Law 101 (not subdivided) charges the Department with the general management and supervision of all public schools and all 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 208 (not subdivided) authorizes the Regents to establish examinations to attainments in learning and may confer degrees on those who satisfactorily meet the prescribed requirements.

Education Law 215 authorizes the Regents and/or the Commissioner to visit, examine and inspect any institution in the university and any school or institution under the educational supervision of the state.

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 2117 establishes that school authorities of each school district shall submit a full report to the Commissioner of Education about any matter relating to their schools, as required by the Commissioner.

Education Law 2854(1)(b) establishes that charter schools must meet the same health and safety, civil rights, and student assessment requirements applicable to other schools, except as otherwise provided.

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

Education Law 3204 provides that a minor child who enrolls in a public school or other school, and, by reason of foreign birth or ancestry has limited English proficiency, shall receive, for a period not to exceed six years from the date of enrollment, instruction that will enable him or her to develop academically while achieving competence in the English language.

## 2. LEGISLATIVE OBJECTIVES:

The purpose of the proposed amendment to § 52.21 and § 80-3.7 of the Commissioner's Regulations to require teacher preparation programs in certain subject areas to provide at least three semester hours of study in language acquisition and literacy development of ELLs, and at least three semester hours of study in language acquisition and literacy development of all students. The total required semester hours on language acquisition and literacy development would remain the same at six semester hours in § 52.21. However, this revision ensures that at least three of the currently required six semester hours in language acquisition and literacy development are dedicated to the language acquisition and literacy development of ELLs.

A three-semester hour course in language acquisition and literacy development of ELLs would address topics such as ELL instructional needs, co-teaching strategies, and integrating language and content instruction for ELLs. The Office of Bilingual Education & English as a New Language provides educator resources on its website for Multilingual Learners/English Language Learners (MLLs/ELLs), including tools and best practices that could be used by teacher preparation programs in the development of their course.

## 3. NEEDS AND BENEFITS:

The New York State Next Generation P-12 Learning Standards for English Language Arts and Mathematics demand the ongoing preparation of prospective educators who enter the workforce able to provide rigorous instruction to foster the advanced literacy skills of ELLs. The Department has released a series of briefs on advanced literacy to aid educators in implementing the Next Generation Learning Standards.

The teacher preparation programs affected by the proposed amendments will better prepare teachers of early childhood education, childhood education, middle childhood education, and adolescence education; teachers of students with disabilities, students who are deaf or hard-of-hearing, students who are blind or visually impaired, and students with speech and language disabilities; teachers of English to speakers of other languages; and library media specialists. The revision would apply to these registered programs with candidates who first enroll in the fall 2022 semester and thereafter. Therefore, the first cohort of candidates in a traditional four-year program that will complete a three-semester hour course in language acquisition and literacy development of ELLs will graduate in spring 2026. This timeline provides teacher preparation programs with sufficient time to make revisions, if needed, to align their program requirements with the proposed amendment.

## 4. COSTS:

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

b. Costs to local government: The amendments do not impose any costs on local government.

c. Costs to private regulated parties: The amendment do 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:

The proposed amendment does not impose any additional paperwork requirements.

## 7. DUPLICATION:

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

## 8. ALTERNATIVES:

Because the State believes that uniform certification standards are required across the State, no alternatives were considered.

## 9. FEDERAL STANDARDS:

There are no applicable Federal standards.

## 10. COMPLIANCE SCHEDULE:

Following the 60-day public comment period required under the State Administrative Procedure Act, it is anticipated that the proposed amendment will be presented to the Board of Regents for adoption at its September 2019 meeting. If adopted at the September 2019 meeting, the proposed amendment will become effective on September 25, 2019.

## Regulatory Flexibility Analysis

### 1. EFFECT OF RULE:

The proposed amendment applies to institutions of higher education with teacher preparation programs; who have fewer than 100 employees.

## 2. COMPLIANCE REQUIREMENTS:

Technical amendments to the definitions, terms and compliance requirements set forth in § 52.21 and § 80-3.7 are necessary to require teacher preparation programs in certain subject areas to provide at least three semester hours of study in language acquisition and literacy development of ELLs and at least three semester hours of study in language acquisition and literacy development of all students. The total required semester hours on language acquisition and literacy development would remain the same at six semester hours in § 52.21. However, this amendment ensures that at least three of the currently required six semester hours in language acquisition and literacy development are dedicated to the language acquisition and literacy development of ELLs.

Furthermore, the New York State Next Generation P-12 Learning Standards for English Language Arts and Mathematics demand the ongoing preparation of prospective educators who enter the workforce able to provide rigorous instruction to foster the advanced literacy skills of ELLs. The Department has released a series of briefs on advanced literacy to aid educators in implementing the Next Generation Learning Standards.

The teacher preparation programs affected by this revision prepare teachers of early childhood education, childhood education, middle childhood education, and adolescence education; teachers of students with disabilities, students who are deaf or hard-of-hearing, students who are blind or visually impaired, and students with speech and language disabilities; teachers of English to speakers of other languages; and library media specialists. The revision would apply to these registered programs with candidates who first enroll in the fall 2022 semester and thereafter. Therefore, the first cohort of candidates in a traditional four-year program that will complete a three-semester hour course in language acquisition and literacy development of ELLs will graduate in spring 2026. This timeline provides teacher preparation programs with sufficient time to make revisions, if needed, to align their program requirements with the proposed amendment.

Since the coursework requirements for the individual evaluation pathway for certification are based on the educational study requirements for New York State approved teacher preparation programs, the Department is also proposing to change the pathway requirements for the certificate titles in the subject areas listed above from six semester hours in teaching literacy skills to three semester hours of study in language acquisition and literacy development of ELLs and three semester hours of teaching literacy skills. This revision would be effective for candidates who apply through individual evaluation pathway for certification after September 1, 2026 to match the implementation timeline for the proposed revisions in the teacher preparation programs.

## 3. NEEDS AND BENEFITS:

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to implement the provisions of the New York State Next Generation P-12 Learning Standards for English Language Arts and Mathematics that require ongoing preparation of prospective educators who enter the workforce so they are able to provide rigorous instruction to foster the advanced literacy skills of ELLs. The Department has released a series of briefs on advanced literacy to aid educators in implementing the Next Generation Learning Standards.

## 4. PROFESSIONAL SERVICES:

The proposed amendment imposes no additional professional service requirements on institutions of higher education.

## 5. COMPLIANCE COSTS:

In general, the proposed rule does not impose any costs beyond those currently required by regulation; as the three required semester hours of language acquisition and literacy development should be incorporated into the already existing six semester hour requirement for language acquisition and literacy development.

## 6. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

## 7. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement the New York State Next Generation P-12 Learning Standards for English Language Arts and Mathematics, which demand the ongoing preparation of prospective educators who enter the workforce so they are able to provide rigorous instruction to foster the advanced literacy skills of ELLs. The Department has released a series of briefs on advanced literacy to aid educators in implementing the Next Generation Learning Standards.

The revision would apply to these registered programs with candidates who first enroll in the fall 2022 semester and thereafter. Therefore, the first cohort of candidates in a traditional four-year program that will complete a three-semester hour course in language acquisition and literacy development of ELLs will graduate in spring 2026. This timeline provides teacher preparation programs with sufficient time to make revisions, if needed, to align their program requirements with the proposed amendment.

Since the coursework requirements for the individual evaluation

pathway for certification are based on the educational study requirements for New York State approved teacher preparation programs, the proposed amendment to change the pathway requirements for the certificate titles in the subject areas listed above from six semester hours in teaching literacy skills to three semester hours of study in language acquisition and literacy development of ELLs and three semester hours of teaching literacy skills is necessary to conform with the proposed amendment to § 52.21. This revision would be effective for candidates who apply through individual evaluation pathway for certification after September 1, 2026 to match the implementation timeline for the proposed revisions in the teacher preparation programs. Accordingly, no alternatives were considered.

#### 8. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

The Department will submit the regulation for public comment.

#### *Rural Area Flexibility Analysis*

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

This proposed amendment applies to all individuals in New York State who are teachers and teaching candidates of English Language Learners (ELLs), including those located in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

The Department proposes to amend § 52.21 and § 80-3.7 of the Commissioner's Regulations to require teacher preparation programs in certain subject areas to provide at least three semester hours of study in language acquisition and literacy development of ELLs, and at least three semester hours of study in language acquisition and literacy development of all students. The total required semester hours on language acquisition and literacy development would remain the same at six semester hours in § 52.21. However, this revision ensures that at least three of the currently required six semester hours in language acquisition and literacy development are dedicated to the language acquisition and literacy development of ELLs.

A three-semester hour course in language acquisition and literacy development of ELLs would address topics such as ELL instructional needs, co-teaching strategies, and integrating language and content instruction for ELLs. The Office of Bilingual Education & English as a New Language provides educator resources on its website for Multilingual Learners/English Language Learners (MLLs/ELLs), including tools and best practices that could be used by teacher preparation programs in the development of their course.

Furthermore, the New York State Next Generation P-12 Learning Standards for English Language Arts and Mathematics demand the ongoing preparation of prospective educators who enter the workforce able to provide rigorous instruction to foster the advanced literacy skills of ELLs. The Department has released a series of briefs on advanced literacy to aid educators in implementing the Next Generation Learning Standards.

The teacher preparation programs affected by this revision prepare teachers of early childhood education, childhood education, middle childhood education, and adolescence education; teachers of students with disabilities, students who are deaf or hard-of-hearing, students who are blind or visually impaired, and students with speech and language disabilities; teachers of English to speakers of other languages; and library media specialists. The revision would apply to these registered programs commencing on September 1, 2022. Therefore, the first cohort of candidates in a traditional four-year program that will complete a three-semester hour course in language acquisition and literacy development of ELLs will graduate in spring 2026. This timeline provides teacher preparation programs with sufficient time to make revisions, if needed, to align their program requirements with the proposed amendment.

Since the coursework requirements for the individual evaluation pathway for certification are based on the educational study requirements for New York State approved teacher preparation programs, the Department is also proposing to change the pathway requirements for the certificate titles in the subject areas listed above from six semester hours in teaching literacy skills to three semester hours of study in language acquisition and literacy development of ELLs and three semester hours of teaching literacy skills. This revision would be effective for candidates who apply through individual evaluation pathway for certification after September 1, 2026 to match the implementation timeline for the proposed revisions in the teacher preparation programs.

##### 3. COSTS:

The proposed amendment does not impose any costs on teacher certification candidates and/or the New York State school districts/BOCES who wish to hire them. In addition, no additional costs are imposed on teacher preparation programs since the three semester hours of language acquisition for ELLs is part of the currently required six semester hours on language acquisition.

##### 4. MINIMIZING ADVERSE IMPACT:

The Department believes that uniform standards for certification must be established across the State. Therefore, no alternatives were considered for those located in rural areas of the State.

##### 5. RURAL AREA PARTICIPATION:

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

#### **Job Impact Statement**

The purpose of the proposed amendment to § 52.21 and § 80-3.7 of the Commissioner's Regulations to require teacher preparation programs in certain subject areas to provide at least three semester hours of study in language acquisition and literacy development of ELLs. The total required semester hours on language acquisition and literacy development would remain the same at six semester hours in § 52.21, three of which would be focused on language acquisition and literacy development of ELL's.

Because it is evident from the nature of the proposed amendment that it will have no impact on the number of jobs or employment opportunities in New York State, no further steps were needed to ascertain that fact and none were taken.

## Department of Environmental Conservation

### NOTICE OF ADOPTION

#### Low Emission Vehicle Greenhouse Gas Standards

**I.D. No.** ENV-02-19-00007-A

**Filing No.** 314

**Filing Date:** 2019-04-05

**Effective Date:** 30 days after filing

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

**Action taken:** Amendment of Parts 200 and 218 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 19-1101, 19-1103, 19-1105, 71-2103, 71-2105; and Federal Clean Air Act (42 USC 7507), section 177

**Subject:** Low emission vehicle greenhouse gas standards.

**Purpose:** Clarification of the deemed to comply provision.

**Text or summary was published** in the January 9, 2019 issue of the Register, I.D. No. ENV-02-19-00007-EP.

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

**Text of rule and any required statements and analyses may be obtained from:** Jeff Marshall, P. E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233, (518) 402-8292, email: air.regs@dec.ny.gov

**Additional matter required by statute:** Pursuant to Article 8 of the State Environmental Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration, and a Coastal Assessment Form have been prepared and are on file.

#### **Summary of Revised Regulatory Impact Statement**

##### 1. Statutory authority

The statutory authority for this amendment is the Environmental Conservation Law (ECL) Sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 19-1101, 19-1103, 19-1105, 71-2103, 71-2105 and Section 177 of the federal Clean Air Act (42 USC 7507).

##### 2. Legislative objectives

Articles 1 and 3 of the ECL set out the overall state policy goal of reducing air pollution and providing clean, healthy air for the citizens of New York. In addition to the general powers and duties of the Department and Commissioner to prevent and control air pollution found in Articles 1 and 3 of the ECL, Article 19 of the ECL was specifically adopted for the purpose of safeguarding the air resources of New York from pollution. The Department is "expressly authorized to promulgate extensive regulations limiting exhaust emissions from motor vehicles including adoption of California certification standards." (See *MVMA v. Jorling*, 152 Misc.2d 405 (N.Y. Sup. September 3, 1991).) This authority also specifically includes promulgating rules and regulations for preventing, controlling or prohibiting air pollution in such areas of the State as shall or may be affected by air pollution, and provisions establishing areas of the State and

prescribing for such areas (1) the degree of air pollution or air contamination that may be permitted therein, and (2) the extent to which air contaminants may be emitted to the air by any air contamination source. In addition, this authority also includes the preparation of a general comprehensive plan for the control or abatement of existing air pollution and for the control or prevention of any new air pollution recognizing various requirements for different areas of the State.

The Department is amending existing greenhouse gas (GHG) standards which were originally adopted November 8, 2005 and revised periodically. This adopted revision clarifies that the deemed-to-comply (DTC) provision for model years 2021-2025 only applies to those federal standards which were last amended as part of the October 16, 2015 rulemaking. This regulation package will further the goals of reducing air pollution from motor vehicles by requiring cleaner California certified vehicles and engines be sold in New York. This is not a mandate on local governments pursuant to Executive Order 17.

### 3. Needs and benefits

New York has made considerable progress in improving its air quality; however, several areas of the State still do not meet federal health based national ambient air quality standards (NAAQS) for ozone and have been categorized as non-attainment areas<sup>1</sup>. The Department is also tasked with mitigating the effects of global warming. The Department has the obligation to regulate and mitigate criteria pollutant and greenhouse gas (GHG) emissions from mobile sources to safeguard the health of State residents and protect the State's environment.

On-road mobile sources in New York emit a substantial portion of ozone precursors. In 2014, on-road light-duty vehicles emitted approximately 65,600 tons of volatile organic compounds (VOC) and 72,600 tons of nitrogen oxides (NOx) annually<sup>2</sup>. In 2014, the transportation sector accounted for approximately 34 percent of all GHG emissions in New York State<sup>3</sup>. It is essential that the Department continue to adopt stringent mobile source emissions standards to protect human health and the environment.

Increased concentrations of ground-level ozone that is directly related to increased GHG emissions, can promote respiratory illness in children and the elderly, and exacerbate pre-existing respiratory illnesses. Ground-level ozone can also impair lung function in otherwise healthy people. This can result in significant hospitalization costs and mortality rates, both of which are higher in New York State than the national average. In 2011, the total cost of asthma related hospitalization in New York State was approximately \$660 million<sup>4</sup>. Approximately 258 State residents per year died from asthma during the 2009 to 2011 timeframe<sup>5</sup>.

Global warming may have adverse impacts on human health and the environment. These impacts include increased heat illnesses and mortality, respiratory illnesses from increased formation of ground-level ozone and the introduction or spread of vector-borne illnesses. Global warming may adversely impact New York State's shoreline, drinking water sources, agriculture, forests and wildlife diversity.

New York first adopted the California low emission vehicle program in Part 218 in 1990, and has updated Part 218 frequently to maintain identical standards for a given weight class as required under Section 177 of the Act. The Department initially adopted California GHG standards November 8, 2005. The GHG standards were revised June 6, 2010 to allow vehicle manufacturers the voluntary enforcement option to demonstrate compliance based on pooled vehicle sales rather than state-by-state vehicle sales.

DEC adopted the next GHG revision on November 2, 2010; it incorporated a DTC provision for model years 2012-2016. The DTC provision gives vehicle manufacturers the voluntary enforcement option of demonstrating compliance using less stringent federal GHG standards in lieu of existing California standards. DEC adopted updated California GHG standards for model years 2017-2025 on November 9, 2012 as part of the Advanced Clean Cars (ACC) standards. DEC adopted the latest GHG revision on October 16, 2015, which incorporated an extension of the DTC provision for model years 2017-2025<sup>6</sup>.

Recently proposed revised federal GHG standards, and other actions, have necessitated a review of the DTC provision by California, New York, and other Section 177 states. The proposed federal GHG standards rollback the existing standards for model years 2021-2025. This results in federal standards that are significantly less stringent than California's standards adopted in 2012 as part of the ACC program.

The Department is amending Part 218 to incorporate California's latest clarifications to the GHG program. The adopted revisions clarify that the version of the federal program to which the DTC applies is the program included in federal regulations for model years 2021-2025 that were last amended on October 25, 2016. If U.S. EPA reduces the stringency of the federal standards as proposed, vehicle manufacturers will no longer be allowed to use the enforcement option of demonstrating compliance with less stringent federal GHG standards in lieu of California standards for 2021 and subsequent model years. All new 2021 and subsequent model

year passenger cars, light-duty trucks, and medium-duty passenger vehicles up to 10,000 pounds gross vehicle weight rating (GVWR) delivered for sale in New York will be required to be certified to California GHG standards.

DEC estimated GHG emissions benefits of approximately 14 million metric tons in 2035 resulting from the California ACC standards adopted in 2012. While existing federal GHG standards for model years 2017-2025 are less stringent than comparable California standards, applying the reductions nationally would provide a nationwide benefit. The 2015 rulemaking estimated compliance using federal standards would result in approximately 4.5 percent less CO<sub>2</sub> equivalent emission reductions in 2025 than would otherwise be achieved under California standards. California, New York, and other Section 177 states determined that the slight decrease in stringency was offset by the additional GHG reductions that would be achieved by nationwide implementation of federal GHG standards.

### 4. Costs

#### Potential Impact on Consumers.

The adopted amendments are not expected to result in additional costs for New York State consumers as California's current model year 2021-2025 standards would remain the same.

#### Potential Impact on Manufacturers.

If the U.S. EPA weakens federal GHG standards, beginning with model year 2021, vehicle manufacturers will be required to demonstrate compliance in California, New York, and other Section 177 states utilizing vehicles certified to California standards. They will be required to demonstrate compliance in remaining states utilizing vehicles certified to federal standards. This is identical to the situation that existed prior to adoption of the DTC provision in 2010. The California standards are duly enacted and enforceable under California's Section 209 waiver which was initially granted for these standards in 2009 before the negotiation and agreement that led to the 2012 adoption of the DTC provision<sup>7</sup>, and subsequently in New York and other states that have adopted California standards under Section 177. However, this will provide a health and environmental benefit to New York.

#### Potential Impact on Business Competitiveness.

The adopted amendments apply equally to all vehicle manufacturers and affiliated businesses delivering new vehicles for sale in New York. There is currently no automotive manufacturing in New York involving the final assembly of vehicles. Affiliated businesses, such as dealerships and engineering and design facilities, are generally local businesses that compete within the State and are subject to minimal competition from out-of-state businesses. New York dealerships will be able to sell California certified vehicles to states bordering New York, as is currently the case. New York residents will not be able to buy noncompliant vehicles out of state since vehicles must be California certified to be registered in New York. This is currently the case with the existing LEV program and will not change with the proposed revisions. Surrounding states have adopted, or will adopt, identical requirements. The adopted regulation is not expected to impose a competitive disadvantage on New York State businesses.

#### Potential Impact on Employment.

The adopted amendments are not expected to cause a noticeable change in New York employment. The adopted changes are a clarification of the existing DTC provision.

#### Potential Impact on Business Creation, Elimination or Expansion.

The adopted regulations are not expected to have any impact on business creation, elimination, or expansion. The adopted changes are a clarification of the existing DTC provision. Failure to adopt this rulemaking, however, will harm New York State businesses that are part of the supply chain for lower emission vehicles, if there are any such businesses.

#### Potential Costs to Local and State Agencies.

The adopted amendments are not expected to result in any additional costs for local and state agencies. No additional paperwork or staffing requirements are expected.

#### 5. Local government mandates

The adopted amendments do not impose a local government mandate. No additional paperwork or staffing requirements are expected. This is not a mandate on local governments pursuant to Executive Order 17. Local governments have no additional compliance obligations as compared to other subject entities.

#### 6. Paperwork

The adopted revision will not result in any significant paperwork requirements for New York vehicle suppliers, dealers, or government. Implementation of the adopted GHG regulation is not expected to be burdensome in terms of paperwork to vehicle owners/operators.

#### 7. Duplication

There are no relevant state or federal rules or other legal requirements that will duplicate, overlap or conflict with this.

#### 8. Alternatives

New York could choose not to adopt the revisions to California's GHG program and revert to federal motor vehicle standards. The proposed federal rulemaking would freeze GHG standards at model year 2020 levels for model years 2021-2026. These proposed federal standards will be significantly less stringent than the previously adopted California GHG standards.

The option to revert to less stringent, and protective, federal motor vehicle emission standards was considered and ultimately rejected. The proposed federal standards are less protective of human health and the environment and will make it much harder, if not impossible, for New York to meet its GHG reduction goals reflected in Executive Order 166 and to meet and maintain its air quality goals under the National Ambient Air Quality Standards. Executive Order Number 166 calls for reducing New York's GHG emissions 40 percent by 2030 and 80 percent by 2050 from 1990 levels<sup>8</sup>.

#### 9. Federal standards

As mentioned above, the proposed federal standards are significantly less stringent than California's current standards. The reduced stringency, and resulting degradation to emissions reductions, makes the continued implementation of DTC standards unviable in New York State as it impedes the State's ability to attain and maintain its air quality goals. If the federal government finalizes its rulemaking, New York will require all new vehicles delivered for sale in New York to meet California's GHG standards commencing with the 2021 model year to safeguard the health of New York residents and the environment.

#### 10. Compliance schedule

The adopted GHG regulation revisions will take effect 30 days after filing for 2021 and subsequent model year passenger cars, light-duty trucks, and medium-duty passenger vehicles.

<sup>1</sup> U.S. Environmental Protection Agency. Nonattainment Areas for Criteria Pollutants (Green Book). September 30, 2017. <https://www3.epa.gov/airquality/greenbook/hbstateb.html>

<sup>2</sup> U.S. Environmental Protection Agency. National Emissions Inventory. <https://www.epa.gov/air-emissions-inventories/2014-nei-data>

<sup>3</sup> New York State Energy Research and Development Authority (NYSERDA). New York State Greenhouse Gas Inventory:1990-2014. December 2016, Revised February 2017. Pg S-3. <https://www.nyserda.ny.gov/About/Publications/EA-Reports-and-Studies/Energy-Statistics>

<sup>4</sup> New York State Department of Health. New York State Asthma Surveillance Summary Report. October 2013. Pg 16. [http://www.health.ny.gov/statistics/ny\\_asthma/](http://www.health.ny.gov/statistics/ny_asthma/)

<sup>5</sup> New York State Department of Health. New York State Asthma Surveillance Summary Report. October 2013. Pg 12. [http://www.health.ny.gov/statistics/ny\\_asthma/](http://www.health.ny.gov/statistics/ny_asthma/)

<sup>6</sup> 6 NYCRR Part 218-8.3(d)

<sup>7</sup> <https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations>

<sup>8</sup> <https://www.governor.ny.gov/news/no-166-redoubling-new-yorks-fight-against-economic-and-environmental-threats-posed-climate>

### **Revised Regulatory Flexibility Analysis**

#### 1. Effect of rule:

The New York State Department of Environmental Conservation (Department) is amending 6 NYCRR Section 200.9 and 6 NYCRR Part 218 to incorporate California's latest revisions to its low emission vehicle (LEV) III greenhouse gas (GHG) program that clarify the deemed to comply provision for model years 2021-2025 into New York's existing LEV III program. These changes were adopted by California on December 12, 2018. These changes apply to vehicles purchased by consumers, businesses, and government agencies in New York and may impact businesses involved in manufacturing, selling, leasing, or purchasing passenger cars or trucks.

State and local governments are also consumers of vehicles that will be regulated under the adopted amendments. Therefore, local governments who own or operate vehicles in New York State are subject to the same requirements as owners of private vehicles in New York State; i.e., they must purchase California certified vehicles. This rulemaking is not a local government mandate pursuant to Executive Order 17.

The adopted changes are a clarification of the current LEV III standards. The new motor vehicle emissions program has been in effect in New York State since model year 1993 for passenger cars and light-duty trucks, except for the 1995 model year, and the Department is unaware of any significant adverse impact to small businesses or local governments because of previous revisions. Section 177 of the federal Clean Air Act requires New York to maintain standards identical to California's to maintain the LEV program.

#### 2. Compliance requirements:

There are no specific requirements in the adopted regulation which apply exclusively to small businesses or local governments. Reporting, recordkeeping and compliance requirements are effective statewide. Automobile dealers (some of which may be small businesses) selling new cars are required to sell, or offer for sale, only California certified vehicles. These adopted amendments will not result in any additional reporting requirements to dealerships other than the current requirements to maintain records demonstrating that vehicles are California certified. This documentation is the same documentation already required by the New York State Department of Motor Vehicles for vehicle registration. If local governments are buying new fleet vehicles they should make sure that the vehicles are California certified. This has been the case for more than two decades in New York.

#### 3. Professional services:

There are no professional services needed by small business or local government to comply with the adopted rule.

#### 4. Compliance costs:

New York State currently maintains personnel and equipment to administer the LEV program. It is expected that these personnel will be retained to administer the adopted revisions to this program. Therefore, no additional costs will be incurred by the State of New York for the administration of this program.

#### 5. Minimizing adverse impact:

The adopted amendments are not expected to have any impact on automobile dealers. Dealerships will be required to ensure that the vehicles they sell are California certified. Starting with the 1993 model year, most manufacturers have included provisions in their ordering mechanisms to ensure that only California certified vehicles are shipped to New York dealers. Implementation of the adopted amendments is not expected to be burdensome in terms of additional reporting requirements for dealers.

There will be no adverse impact on local governments who own or operate vehicles in the state because they are subject to the same requirements as those imposed on owners of private vehicles. In other words, state and local governments will be required to purchase California certified vehicles. This rulemaking is not a local government mandate pursuant to Executive Order 17.

This regulation contains exemptions for emergency vehicles, and military tactical vehicles and equipment.

#### 6. Small business and local government participation:

The Department held a public hearing in Albany, NY on March 11, 2019. Small businesses and local governments had the opportunity to attend these public hearings. Additionally, there was a public comment period in which interested parties could submit written comments.

#### 7. Economic and technological feasibility:

The adopted amendments are not expected to have any adverse impacts on automobile dealers. Dealerships will be required to ensure that the vehicles they sell are California certified. Starting with the 1993 model year, most manufacturers have included provisions in their ordering mechanisms to ensure that only California certified vehicles are shipped to New York dealers. Implementation of the adopted regulations is not expected to be burdensome in terms of additional reporting requirements for dealers. As stated previously, there would be no change in the competitive relationship with out-of-state businesses.

The deemed to comply provision currently allows vehicle manufacturers to demonstrate compliance utilizing federal greenhouse gas standards in lieu of California's more stringent standards. The adopted amendments clarify the deemed to comply provision to address the U.S. Environmental Protection Agency's (EPA) proposed freeze and roll back of existing greenhouse gas standards for model years 2021-2025. The adopted revisions to Part 218 apply to all 2021 through 2025 model year passenger cars, light-duty trucks, and medium-duty vehicles up to 14,000 pounds gross vehicle weight rating (GVWR).

#### 8. Cure period:

In accordance with NYS State Administrative Procedures Act (SAPA) Section 202-b, this rulemaking does not include a cure period because the Department is undertaking this rulemaking to comply with changes California has made to its vehicle emissions program to maintain identity with Section 177 of the Clean Air Act.

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

#### 1. Types and estimated numbers of rural areas:

The New York State Department of Environmental Conservation (Department) is amending 6 NYCRR Section 200.9 and 6 NYCRR Part 218 to incorporate California's latest revisions to its low emission vehicle (LEV) III greenhouse gas (GHG) program that clarify the deemed to comply provision for model years 2021-2025 into New York's existing LEV III program. These changes were adopted by California on December 12, 2018.

There are no requirements in the adopted regulation which apply only to rural areas. These changes apply to manufacturers' requirements for the

manufacture and sale of vehicles sold in New York. The changes to these regulations may impact businesses involved in manufacturing, selling, purchasing, or repairing passenger cars or trucks.

The adopted changes are an addition to the current LEV III standards. The new motor vehicle emissions program has been in effect in New York State since model year 1993 for passenger cars and light-duty trucks, except for the 1995 model year, and the Department is unaware of any significant adverse impact to small businesses or local governments because of previous revisions. The beneficial emission reductions from the program accrue to all areas of the state.

2. Reporting, recordkeeping and other compliance requirements; and professional services:

There are no specific requirements in the adopted regulations which apply exclusively to rural areas. Reporting, recordkeeping and compliance requirements apply primarily to vehicle manufacturers, and to a lesser degree to automobile dealerships. Manufacturers reporting requirements mirror the California requirements, and are thus not expected to be burdensome. Dealerships do not have reporting requirements, but must maintain records to demonstrate that vehicles are California certified. This documentation is the same as documentation already required by the New York State Department of Motor Vehicles for vehicle registration. This has been the case for more than two decades in New York.

Professional services are not anticipated to be necessary to comply with the adopted rules.

3. Costs:

The adopted amendments are not expected to have any impact on consumers.

4. Minimizing adverse impact:

The adopted changes will not adversely impact rural areas.

5. Rural area participation:

The Department held a public hearing in Albany, NY on March 11, 2019. Additionally, there was a public comment period in which interested parties could submit written comments.

#### **Revised Job Impact Statement**

1. Nature of impact:

The New York State Department of Environmental Conservation (Department) is amending 6 NYCRR Section 200.9 and 6 NYCRR Part 218 to incorporate California's latest revisions to its low emission vehicle (LEV) III greenhouse gas (GHG) program that clarify the deemed to comply provision for model years 2021-2025 into New York's existing LEV III program. These changes were adopted by California on December 12, 2018.

The adopted amendments to the regulations are not expected to adversely impact jobs and employment opportunities in New York State. New York State has had a LEV program in effect since model year 1993 for passenger cars and light-duty trucks, except for model year 1995, and the Department is unaware of any significant adverse impact to jobs and employment opportunities because of previous revisions.

2. Categories and numbers affected:

The adopted changes to this regulation will not adversely impact businesses involved in manufacturing, selling or purchasing passenger cars or trucks. No final assembly of automobiles occurs in New York State. Dealerships will be able to sell California certified vehicles to buyers from states bordering New York. Since vehicles must be California certified to be registered in New York, New York residents will not be able to buy non-complying vehicles out-of-state, but may be able to buy complying vehicles out-of-state. These businesses compete within the state and generally are not subject to competition from out-of-state businesses. Therefore, the adopted regulation is not expected to impose a competitive disadvantage on affiliated businesses, and there would be no change from the current relationship with out-of-state businesses.

3. Regions of adverse impact:

None.

4. Minimizing adverse impact:

The adopted regulations are not expected to have adverse impacts on automobile dealers. Dealerships will be required to ensure that the vehicles they sell are California certified. Starting with the 1993 model year, most manufacturers have included provisions in their ordering mechanisms to ensure that only California certified vehicles are shipped to New York dealers. The implementation of the adopted regulations is not expected to be burdensome in terms of additional reporting requirements for dealers. There would be no change in the competitive relationship with out-of-state businesses.

The deemed to comply provision currently allows vehicle manufacturers to demonstrate compliance utilizing federal greenhouse gas standards in lieu of California's more stringent standards. The adopted amendments clarify the deemed to comply provision to address the U.S. Environmental Protection Agency's (EPA) proposed freeze and roll back of existing greenhouse gas standards for model years 2021-2025. If EPA does not freeze, or roll back, existing standards then there will be no change to the

current standards in Part 218. The adopted revisions to Part 218 apply to all 2021 through 2025 model year passenger cars, light-duty trucks, and medium-duty vehicles up to 14,000 pounds gross vehicle weight rating (GVWR).

5. Self-employment opportunities:

None that the Department is aware of at this time.

#### **Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2022, which is no later than the 3rd year after the year in which this rule is being adopted.

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

General Comments

Comment 1: The City strongly supports DEC's proposed amendments, which conform New York State's emission standards to California's emission standards following recent revisions to the California standards. Commenter 2.

Comment 2: Tesla Supports New York State's amendments to incorporate fully California's latest GHG regulatory "deemed to comply" revisions. Commenter 3.

Comment 3: Tesla supports a continued regulatory environment in New York State that will facilitate the state's ability to attain its goal of deploying 800,000 zero emission vehicles ("ZEV") by 2025. Commenter 3.

Response to Comments 1-3: The Department thanks you for your support.

EPA Waiver/Section 177

Comment 4: New York cannot adopt these amendments at this time, because the regulations have not yet received a waiver from the United States Environmental Protection Agency (EPA). Commenter 1.

Comment 5: Under Section 177 of the Clean Air Act, New York may adopt a California motor vehicle emission standard (or an amendment to that standard) if "such standards are identical to the California standards for which a waiver has been granted for such model year." While California's 2018 "deemed-to-comply" rulemaking has been finalized by the state, the EPA has not granted a waiver for those amendments. Past EPA waiver decisions have made it clear that where an amendment to a California regulation increases the underlying stringency of the California program – as the revocation of the deemed to comply provision does – California must obtain a new waiver. In light of the foregoing, any action by the state to adopt California requirements at this time would violate Section 177 of the Clean Air Act. Commenter 1.

Comment 6: Section 177 of the Clean Air Act requires the NYSDEC to defer taking action on the deemed-to-comply provision until after the EPA approves California's request for waiver to implement these amended regulations. Commenter 1.

Response to Comments 4-6: The Department strongly disagrees with these comments, and notes that they are factually and legally inaccurate. California's December 12, 2018 clarification of the deemed to comply provision is within the scope of waivers previously granted by EPA, which remain in effect. In 2011, EPA determined California's deemed to comply provision was within the scope of the waiver for the LEV III program for model years 2012-2016. (76 Fed. Reg. 34,693 (June 14, 2011).) California requested, and EPA granted, a waiver for the LEV III program in 2012 (published in 2013) for subsequent model years. A deemed to comply provision was also included in this waiver request, and EPA determined the program was entitled to a waiver even without this provision. (See 78 Fed. Reg. 2,112, 2,138 (Jan. 9, 2013).) Consequently, there is no basis to assert that these amendments are outside the scope of the existing waiver.

The Commenter is technically incorrect in stating that the clarification "increases the underlying stringency" of the California program. The California greenhouse gas standards are duly adopted, enforceable, and predate the existing federal standards. The deemed to comply provision was adopted to harmonize California and federal greenhouse gas standards to allow the creation of a single national program. Deemed to comply allowed vehicle manufacturers to demonstrate compliance with less stringent federal standards in lieu of the existing California standards. In return, vehicle manufacturers agreed to make vehicles certified to these standards available in all fifty states, resulting in greater greenhouse gas emission reductions nationwide.

The proposed federal standards are drastically less stringent than even the existing federal standards and are not even remotely comparable to the stringency of existing California standards. The proposed federal standards represent a significant material change and necessitate a clarification of the deemed to comply provision to maintain the stringency of the existing regulations. (See California Air Resources Board, Reso. 12-35 (Nov. 15, 2012), p. 5, available at: <http://arb.ca.gov/board/res/2012/res12-35.pdf>.) If the federal government completes its proposed roll back and freeze of existing federal greenhouse gas standards, those standards will no longer be deemed to comply with existing California greenhouse gas standards. Therefore, vehicle manufacturers will be required to comply

with the California greenhouse gas standards in California, New York, and other Section 177 states.

In addition, this very issue has been previously litigated and resolved in federal court. In *MVMA v DEC*, 17 F.3d 521 (1994), the United States Court of Appeals for the Second Circuit clearly and unequivocally held that New York may adopt California's program, prior to a federal waiver. Accordingly, for the sake of argument, if California is required to seek a new waiver for its clarification, New York's adoption would remain valid.

Comment 7: Programs like these are bolstered by New York's ability to adopt California standards under Section 177 of the Clean Air Act, and the effectiveness and viability of those programs depends on the current standards remaining in effect. The recent federal roll back seeks to undermine States' abilities to set these standards and the City supports New York State's effort through the current rulemaking to ensure the more stringent standards remain. Commenter 2

Comment 8: Through amending its vehicle emission regulations, New York State is acting in a manner that is consistent with the cooperative federalism structure of the Clean Air Act and ensures the effectiveness of Clean Air Act regulations moving forward. Section 209 of the Clean Air Act gives California the ability to adopt its own, more stringent emission control standards for motor vehicles and section 177 gives New York State the authority to adopt these standards. The current rulemaking takes an important and necessary step towards preserving that authority which serves as an essential part of New York City's plans to protect public health and the environment. Commenter 2.

Response to Comments 7-8: The Department agrees with these comments.

#### Federal Rulemaking/National Program

Comment 9: With a pending final rulemaking from the federal government on light-duty vehicle fuel economy and GHG emission standards, it is still our hope that the national program ultimately sets meaningful and continued increases in vehicle efficiency standards, while also meeting the needs of America's drivers, thereby negating the need for separate state regulations. Commenter 1.

Comment 10: New York should defer its adoption of the California deemed-to-comply amendments until after the federal rulemaking is complete, so we can determine whether the national program provides meaningful annual increases in fuel economy and greater reductions in GHG emissions across the nation than via individual state standards. Commenter 1

Response to Comments 9-10: The Department disagrees with these comments. This rulemaking is merely a clarification of the deemed to comply provision. The existing California greenhouse gas standards have not changed. As the Commenter clearly states, the federal rulemaking is merely "pending" and therefore not final. The Department will review changes to the federal standards should they be completed and will consider the appropriate course of action at that time.

Moreover, the commenter's assertion that a national program does not currently exist is incorrect and misleading. The existing greenhouse gas standards are a national program. This is the result of California's deemed to comply provision and the agreement among the federal government, California, and vehicle manufacturers (including members of Commenter's organization) to harmonize federal greenhouse gas standards with existing California standards for model years 2017-2025. As discussed previously, California, New York, and the other Section 177 states agreed to less stringent federal greenhouse gas standards based on vehicle manufacturers agreeing to make vehicles certified to those standards available in all fifty states. Vehicle manufacturers agreed to the existing national program, in part, as a prerequisite to obtaining federal bailout funds to stave off bankruptcy of several large manufacturers, which would have had a catastrophic ripple effect throughout the automotive industry and greater nationwide economy.

The statements regarding "separate state standards" and "individual state standards" are similarly misleading. As stated above, the current greenhouse gas program is a national greenhouse gas program. Should the federal government complete its rollback proposal and the resulting federal standards are no longer deemed to comply with California standards, the country will then be left with two standards, which are in fact envisioned and permitted by the Clean Air Act. "Congress consciously chose to permit California to blaze its own trail with a minimum of federal oversight." *Ford Motor Co v EPA*, 606 F.2d 1293 (DC Circuit 1979). In short, there will be a more stringent, technologically rigorous, yet achievable and cost-effective California standard and a weaker, less protective federal standard. This was the situation prior to the 2012 deemed to comply agreement. Contrary to the implication of these comments, there will not be a "patchwork" of individual state standards as has been frequently-- and erroneously -- asserted by the automotive industry and other critics of the states' rights to protect public health and welfare.

Finally, the Department disagrees with Commenter's assertion that the so-called "national program" resulting from the proposed federal green-

house gas revisions will lead to "meaningful" increases in fuel economy and greater reductions in greenhouse gas emissions. Based on the federal government's limited, and deeply flawed, data and analysis made publicly available to date, the proposed revisions to federal standards will clearly result in drastically increased fuel consumption and vehicle emissions as compared to existing greenhouse gas and corporate average fuel economy standards. "Meaningful" emission reductions have been achieved by the automotive industry under the existing standards. In fact, the automotive industry has achieved record increases in fuel economy at the same time as achieving reductions in greenhouse gases in eleven of the past thirteen years and enjoyed record sales in that time. It is projected that 2018 model year vehicles will set new records for both increased fuel economy and greenhouse gas reductions<sup>1</sup>. Accordingly, there is no factual basis, or need, for the proposed rollback of federal standards given the demonstrated effectiveness of current standards.

Comment 11: The proposed revisions will ensure that appropriate and necessary regulations remain in place and effective in the face of EPA's current efforts to roll back existing passenger vehicle and light truck greenhouse gas emission limitations and fuel efficiency standards for vehicle (sic) for model years 2021-2026. Commenter 2.

Comment 12: Amending New York State regulations to appropriately incorporate California's updated emission standards will aid NYC's efforts to meet its emission reduction goals by preventing vehicle manufacturers from complying with less stringent federal standards in New York instead of the more stringent California standards. California's more stringent standards were adopted by New York State in 1990 and play an integral role in protecting public health and the environment. New York's adoption of California standards will become crucial should the federal government be successful in rolling back the 2021-2026 emission and efficiency standards for passenger cars and light trucks. Commenter 2.

Comment 13: Tesla disagrees with the recent EPA "Reconsideration of the Mid-Term Evaluation of Light-Duty Vehicle Greenhouse Gas Emissions Standards for Model Years (MY) 2021-2025" (Final April 2018 MTE) finding that the MY 2022-25 EPA GHG Light-Duty Vehicle Standards may be too stringent." Further, Tesla believes the current MY 2017-2025 EPA Greenhouse Gas (GHG) Emissions and NHTSA Corporate Average Fuel Economy (CAFE) light-duty vehicle standards (herein referred to as the LDV Standards) are a bare minimum, can easily be met with only small increases in the efficiency of fossil fuel engines, and should be strengthened. Commenter 3.

Comment 14: As California clarified through its final decision on September 28, 2018, "Deemed to Comply" only applies to the existing EPA GHG LDV Standards and does not incorporate any subsequent diminution in the stringency of these existing LDV standards that may occur as a result of the Final April 2018 MTE determination and the subsequent EPA "Safer Affordable Fuel Efficient (SAFE) Vehicles Proposed Rule for Model Years 2021-2026 proposal." Commenter 3.

Response to Comments 11-14: The Department agrees with these comments.

#### List of Commenters

1. Julia M. Rege, Senior Director, Environment & Energy, Association of Global Automakers
2. Robert L. Martin, Environmental Law Division, New York City Law Department
3. Joseph Mendelson, Senior Counsel, Policy and Business Development, Tesla

<sup>1</sup> United States Environmental Protection Agency. The 2018 EPA Automotive Trends Report: Greenhouse Gas Emissions, Fuel Economy, and Technology since 1975. EPA-420-R-19-002. March 2019. Pg 5.

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## New York State Gaming Commission

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

#### Pick-Six Jackpot Wager for Thoroughbred Racing

I.D. No. SGC-17-19-00009-P

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

**Proposed Action:** Amendment of sections 4011.25, 4011.26; renumbering

of section 4011.27 to section 4011.28; and addition of new section 4011.27 to Title 9 NYCRR.

**Statutory authority:** Racing Pari-Mutuel Wagering and Breeding Law, sections 103(2), 104(1) and (19)

**Subject:** Pick-six jackpot wager for Thoroughbred racing.

**Purpose:** To improve Thoroughbred pari-mutuel wagering and generate reasonable revenue for the support of government.

**Substance of proposed rule (Full text is posted at the following State website: <https://www.gaming.ny.gov/proposedrules.php>):** Section 4011.25. Pick-five pools. A style change is made.

Section 4011.26. Pick-six pools. A style change is made.

Section 4011.27. Grand Slam. This section is renumbered as § 4011.28.

Section 4011.27, Pick-six jackpot pools, is added by the proposal. Subdivision (a) defines the wager and requires written approval from the commission concerning scheduling of pick-six jackpot contests, the designation of the method used, the bet minimum, the takeout rate, the definition that will be relied upon for determining the existence of a unique winning ticket, the major-minor pool split and the amount of any cap to be set on the carryover. The subdivision also states that changes to an approved pick-six jackpot format will require prior approval from the commission. Subdivision (b) states the pick-six jackpot wager is separate from other types of wagers. Subdivision (c) prohibits the re-sale of pick-six jackpot tickets. Subdivision (d) requires the clear designation of which races are part of pick-six jackpot wagering. Subdivision (e) requires a distinguishing design for pick-six jackpot tickets. Subdivision (f) provides that should a programmed starter be scratched or declared a nonstarter in any pick-six jackpot race before the start of the first pick-six jackpot race, affected bettors may select another betting interest or cancel the wager before the start of the first pick-six jackpot race, or a designated horse will be substituted for the scratched or nonstarting horse.

Subdivision (g) describes the play of the pick-six jackpot wager. If the winner of the designated six races is selected in only one wager, then the net pool and any carryover are distributed to the holder of that unique winning ticket. If none of the winning horses are selected by any bettor, then the net pool is refunded and any carryover is again carried over. Otherwise, the major share of the net pool is distributed as a single price pool to bettors selecting the greatest number of winning horses in the pick-six jackpot races, and the minor share is carried over to the next pick-six jackpot pool. Subdivision (h) sets forth the effect of race cancellations. If one or two races are cancelled or declared no race, non-betting or no contest after the first pick-six jackpot race has been made official, then the net pool is distributed as a single price pool to bettors selecting the greatest number of winning horses in the pick-six jackpot races. If such an event occurs before the first race is made official, or if three or more such events occur, then the pool is declared off and the gross pool is refunded. Subdivision (i) is concerned with surface transfers in one or more designated races in the pick-six jackpot pool. Subdivision (j) concerns dead heats. Subdivision (k) concerns carryovers from prior pick-six jackpot pools, advertised guaranteed amounts and advertised added amounts. Subdivision (l) concerns intermediate distributions of accumulated carryovers when no bettor has a unique winning ticket of all six races. Subdivision (m) concerns final distributions of all accumulated carryovers during the final week of a race meeting. Subdivision (n) concerns the suspension of pick-six jackpot wagering, with the prior approval of the commission. Subdivision (o) is reserved. Subdivision (p) concerns distribution occurrences not encompassed within the explicit provisions of this section. Subdivision (q) requires the public posting of winning combinations. Subdivision (r) prohibits the transfer of pick-six jackpot wagers. Subdivision (s) restricts the disclosure of wagering information prior to the completion of the fifth designated race. Subdivision (t) is concerned with reductions in guaranteed distributions. Subdivision (u) concerns the interfacing of off-track wagers. Subdivision (v) requires that carryover monies be held in trust by track operators. Subdivision (w) concerns seed money and insurance allocation. Subdivision (x) requires the track to make copies of this section available to the public free of charge in the public betting area of the track.

Section 4011.28. Additional authorized wagers. This section is renumbered as § 4011.29.

**Text of proposed rule and any required statements and analyses may be obtained from:** Kristen M. Buckley, New York State Gaming Commission, 1 Broadway Center, PO Box 7500, Schenectady, New York 12301, (518) 388-3332, email: [gamingrules@gaming.ny.gov](mailto:gamingrules@gaming.ny.gov)

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

**Public comment will be received until:** 60 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: The New York State Gaming Commission ("Commission") is authorized to promulgate these rules pursuant to Rac-

ing Pari-Mutuel Wagering and Breeding Law ("Racing Law") Sections 103(2) and 104 (1, 19). Under Section 103(2), the Commission is responsible for supervising, regulating and administering all horse racing and pari-mutuel wagering activities in the State. Subdivision (1) of Section 104 confers upon the Commission general jurisdiction over all such gaming activities within the State and over the corporations, associations and persons engaged in such activities. Subdivision (19) of Section 104 authorizes the Commission to promulgate any rules and regulations that it deems necessary to carry out its responsibilities.

2. Legislative objectives: To improve Thoroughbred pari-mutuel wagering and generate reasonable revenue for the support of government.

3. Needs and benefits: This rule making proposes to add a pick-six jackpot wager to the Thoroughbred wagers offered by New York racetracks and wagering facilities.

The current rules offer a variety of wagers, including a pick-six wager that distributes the net pool to bettors who select the most winning horses in six designated races. 9 NYCRR §§ 4011.26, 4011.2 to 4011.28.

The proposal would add a type of pick-six wager that has proven popular in other jurisdictions, to increase the track operator's wagering handle and derive more revenue for the support of government. The new wager is known as the pick-six jackpot. It requires the winning bettor to hold the only ticket that has selected the winning horse in a designated six consecutive races. The number of possible winning tickets is displayed to the betting public as the designated races are run. This generates excitement as the holders of pick-six jackpot tickets that have won the races that have been run, and the crowd at the racetrack or viewing elsewhere, watch whether the possible winning tickets will dwindle in number to only one.

If there is not a unique winning ticket sold, the major share of the net pool is distributed as a single prize pool to the bettors selecting the greatest number of winning horses in the pick-six jackpot races, and a minor share is carried over to the next pick-six jackpot pool. If no winning horses are selected by any bettor, the net pool (excluding any carryover) is refunded. The proposal has provisions for other eventualities, including surface changes and race cancellations.

The New York Racing Association, Inc. (NYRA), which operates three leading Thoroughbred racetracks in New York, believes this wager may generate more bettor interest. Finger Lakes racetrack has no objection to the amendment as formulated by the Division of Horse Racing and Pari-Mutuel Wagering. This change may enhance interest in pari-mutuel wagering on Thoroughbred races in New York.

The proposal would also renumber two current rules, 9 NYCRR §§ 4011.27 and 4011.28, to make the new pick-six jackpot wager rule fit in sequence with existing wagering rules, and make a style change to two wagering rules, §§ 4011.25 and 4011.26.

#### 4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: These amendments will not add any new mandated costs to the existing rules.

(b) Costs to the agency, the State and local governments for the implementation and continuation of the rule: None. The amendments will not add any new costs. There will be no costs to local government because the Commission is the only governmental entity authorized to regulate pari-mutuel harness racing.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: N/A.

5. Local government mandates: None. The Commission is the only governmental entity authorized to regulate pari-mutuel Thoroughbred racing activities.

6. Paperwork: There will be no additional paperwork.

7. Duplication: No relevant rules or other legal requirements of the State and/or Federal government exist that duplicate, overlap or conflict with this rule.

8. Alternatives: The Commission considered and rejected not adding this wager to the current rules. The proposed rule changes were drafted in consultation with wagering officials at NYRA and are supported by NYRA.

9. Federal standards: There are no minimum standards of the Federal government for this or a similar subject area.

10. Compliance schedule: The Commission believes that regulated persons will be able to achieve compliance with the rule upon adoption of this rule.

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

A regulatory flexibility analysis for small business and local governments, a rural area flexibility analysis and a job impact statement are not required for this rulemaking proposal because it will not adversely affect small businesses, local governments, rural areas or jobs.

The proposed amendment is a revision to the Commission's Thoroughbred racing rules to enhance interest in wagering by allowing racetracks to offer a pick-six jackpot wager, in which the entire pool is won only if a

unique ticket has selected the winning horse in designated, six consecutive races.

This rule will not impose an adverse economic impact or reporting, record keeping, or other compliance requirements on small businesses in rural or urban areas or on employment opportunities. No local government activities are involved.

## Department of Health

### EMERGENCY RULE MAKING

#### Medical Use of Marihuana

**I.D. No.** HLT-31-18-00005-E

**Filing No.** 311

**Filing Date:** 2019-04-05

**Effective Date:** 2019-04-05

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

**Action taken:** Amendment of section 1004.2 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 3369-a

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

**Specific reasons underlying the finding of necessity:** In New York State, the number of overdose deaths involving opioids has increased from over 1,000 deaths in 2010, to over 3,000 deaths in 2016. The opioid epidemic is an unprecedented crisis and practitioners should have as many treatment options available to them as possible.

Medical marihuana has been demonstrated to be an effective treatment option for pain, thereby reducing the chance of dependence and the risk of fatal overdose as compared to opioid-based medications. Studies of some states with medical marihuana programs have found notable associations of reductions in opioid deaths and opioid prescribing with the availability of cannabis products. States with medical marihuana programs have also been found to have less opioid overdose deaths than other states by as much as 25 percent. Studies of opioid prescribing in some states with medical marihuana programs have noted a 5.88 percent lower rate of opioid prescribing.

The regulations are necessary to immediately conform the regulations to recent amendments to Section 3360(7) of the PHL that added post-traumatic stress disorder, pain that degrades health and functional capability where the use of medical marihuana is an alternative to opioid use, and substance use disorder, as serious conditions for which patients may be certified to use medical marihuana. In doing so, the regulations will help prevent patients from relying on prescription opioids for severe pain that is not expected to last more than three months. In addition, adding opioid use disorder as a clinically associated condition will allow individuals with substance use disorder, but who don't suffer from severe or chronic pain, to use medical marihuana as a part of their treatment program.

**Subject:** Medical Use of Marihuana.

**Purpose:** To add additional serious conditions for which patients may be certified to use medical marihuana.

**Text of emergency rule:** Pursuant to the authority vested in the Commissioner of Health by section 3369-a of the Public Health Law (PHL), Section 1004.2 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby amended, to be effective upon filing with the Secretary of State, to read as follows:

Section 1004.2 Practitioner issuance of certification.

(a) Requirements for Patient Certification. A practitioner who is registered pursuant to 1004.1 of this part may issue a certification for the use of an approved medical marihuana product by a qualifying patient subject to completion of subdivision (e) of this section. Such certification shall contain:

\* \* \*

(8) the patient's diagnosis, limited solely to the specific severe debilitating or life-threatening condition(s) listed below;

\* \* \*

(xi) any severe debilitating pain that the practitioner determines degrades health and functional capability; where the patient has contraindications, has experienced intolerable side effects, or has experienced fail-

ure of one or more previously tried therapeutic options; and where there is documented medical evidence of such pain having lasted three months or more beyond onset, or the practitioner reasonably anticipates such pain to last three months or more beyond onset; [or]

(xii) *post-traumatic stress disorder*;

(xiii) *pain that degrades health and functional capability where the use of medical marihuana is an alternative to opioid use, provided that the precise underlying condition is expressly stated on the patient's certification*; or

(xiv) *substance use disorder*; or

([xii],xv) any other condition added by the commissioner.

(9) The condition or symptom that is clinically associated with, or is a complication of the severe debilitating or life-threatening condition listed in paragraph (8) of this subdivision. Clinically associated conditions, symptoms or complications, as defined in subdivision seven of section thirty-three hundred sixty of the public health law are limited solely to:

(i) Cachexia or wasting syndrome;

(ii) severe or chronic pain resulting in substantial limitation of function;

(iii) severe nausea;

(iv) seizures;

(v) severe or persistent muscle spasms; [or]

(vi) *post-traumatic stress disorder*;

(vii) *opioid use disorder*; or

([vi]viii) such other conditions, symptoms or complications as added by the commissioner.

(10) a statement that by training or experience, the practitioner is qualified to treat the serious condition, which encompasses the severe debilitating or life-threatening condition listed pursuant to paragraph (8) of this subdivision and the clinically associated condition, symptom or complication listed pursuant to paragraph (9) of this subdivision;

(i) *for purposes of this subdivision, a practitioner must hold a federal Drug Addiction Treatment Act of 2000 (DATA 2000) waiver to be qualified to treat patients with substance use disorder or opioid use disorder.*

**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. HLT-31-18-00005-P, Issue of August 1, 2018. The emergency rule will expire June 3, 2019.

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of Program Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqa@health.ny.gov

#### Regulatory Impact Statement

Statutory Authority:

The Commissioner of Health is authorized pursuant to Section 3369-a of the Public Health Law (PHL) to promulgate rules and regulations necessary to effectuate the provisions of Title V-A of Article 33 of the PHL. The Commissioner of Health is also authorized pursuant to Section 3360(7) of the PHL to add serious conditions under which patients may qualify for the use of medical marihuana.

Legislative Objectives:

The legislative objective of Title V-A is to comprehensively regulate the manufacture, sale and use of medical marihuana, by striking a balance between potentially relieving the pain and suffering of those individuals with serious conditions, as defined in Section 3360(7) of the PHL, and protecting the public against risks to its health and safety.

Needs and Benefits:

The regulatory amendments are necessary to conform the regulations to recent amendments to Section 3360(7) of the PHL that added post-traumatic stress disorder, pain that degrades health and functional capability where the use of medical marihuana is an alternative to opioid use, and substance use disorder, as serious conditions for which patients may be certified to use medical marihuana. This regulatory amendment will particularly benefit patients with these conditions as medical marihuana will now be an available treatment option. Requiring practitioners to expressly state the precise underlying condition will help the Department to better understand how medical marihuana can be used as an alternative or adjunctive therapy to prescription opioids.

In addition, adding substance use disorder as a severe debilitating or life-threatening condition and opioid use disorder as a clinically associated condition will allow individuals who are addicted to opioids to use medical marihuana as part of their treatment. This latest emergency regulation removes the requirement that a patient be enrolled in a treatment program certified pursuant to Article 32 of the Mental Hygiene Law. The emergency regulation instead requires practitioners certifying patients for

substance use disorder and opioid use disorder to hold a federal Drug Addiction Treatment Act of 2000 (DATA 2000) waiver.

**Costs:**

**Costs to the Regulated Entity:**

Patients certified by their practitioner for the medical use of marijuana will have to pay a \$50 non-refundable application fee to obtain a registry identification card to register with the Medical Marijuana Program. However, the Department may waive or reduce this fee in cases of financial hardship, and is currently waiving this fee for all patients and caregivers. Patients will also have a cost associated with the fees charged by registered organizations for the purchase of medical marijuana products.

**Costs to Local Government:**

This amendment to the regulation does not require local governments to perform any additional tasks; therefore, it is not anticipated to have an adverse fiscal impact.

**Costs to the Department of Health:**

With the inclusion of these new serious conditions, additional patient registrations will need to be processed by the Department. In addition, there may be an increase in the number of practitioners who register with the program to certify patients who may benefit from the use of medical marijuana for these new serious conditions. This regulatory amendment may result in an increased cost to the Department for additional staffing to provide registration support for patients and practitioners as well as certification support for registered practitioners. However, any resulting cost of additional staffing is greatly outweighed by the benefit of making another treatment option available to practitioners who are treating patients suffering from severe pain or opioid use disorder.

**Local Government Mandates:**

This amendment does not impose any new programs, services, duties or responsibilities on local government.

**Paperwork:**

Registered practitioners who certify patients for the program will be required to maintain a copy of the patient's certification in the patient's medical record.

**Duplication:**

No relevant rules or legal requirements of the Federal and State governments duplicate, overlap or conflict with this rule.

**Alternatives:**

An alternative would be to not amend the regulation to align with Section 3360(7) of the PHL. However, this was not considered a viable alternative, as it would create confusion for registered practitioners and patients seeking to be certified for the medical use of marijuana.

**Federal Standards:**

Federal requirements do not include provisions for a medical marijuana program.

**Compliance Schedule:**

There is no compliance schedule imposed by these amendments, which shall be effective upon filing with the Secretary of State.

**Regulatory Flexibility Analysis**

No regulatory flexibility analysis is required pursuant to section 202-b(3)(a) of the State Administrative Procedure Act. The amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose reporting, record keeping or other compliance requirements on small businesses or local governments.

**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 regulation. The regulatory amendment authorizing the addition of this serious condition does not mandate that a practitioner register with the program. This amendment does not mandate that a registered practitioner issue a certification to a patient who qualifies for this new serious condition. 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 other compliance costs imposed on public or private entities in rural areas as a result of the amendments.

**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 amendment, that it will not have an adverse impact on jobs and employment opportunities.

**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**

**Medical Use of Marijuana**

**I.D. No.** HLT-17-19-00002-EP

**Filing No.** 310

**Filing Date:** 2019-04-04

**Effective Date:** 2019-04-04

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

**Proposed Action:** Amendment of sections 1004.14 and 55-2.15 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 502 and 3369-a

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

**Specific reasons underlying the finding of necessity:** Section 3364(3) of the Public Health Law (PHL) requires each registered organization to contract with an independent laboratory to test medical marijuana produced by the registered organization. These independent laboratories must be approved by the commissioner. Under the current regulations, laboratories must obtain a federally-recognized Drug Enforcement Administration (DEA) registration, in addition to Environmental Laboratory Approval Program (ELAP) approval, to conduct testing on medical marijuana. Currently, the Wadsworth Center is the only laboratory in New York state that meets the regulatory requirements to perform testing on medical marijuana.

The DEA has recently stated that it will only authorize analytical laboratories to receive samples of controlled substances for analysis from other DEA registrants. Due to the fact that organizations that manufacture medical marijuana are not registered with the DEA, the DEA will not approve or register any commercial laboratories as an Analytical Laboratory for purposes of testing marijuana at this time.

The proposed regulations are necessary to immediately allow independent analytical laboratories to apply for ELAP approval to test medical marijuana in New York State. Without removal of this requirement, Wadsworth center will remain the only lab capable of testing medical marijuana products. As more patients qualify to use medical marijuana through the addition of serious conditions, and as more registered organizations become operational and offer additional dosage forms, the capacity to test products in a timely manner will diminish, resulting in delays in access for patients. Denying certified patients access to medical marijuana, or forcing them to abruptly discontinue using medical marijuana until products can be laboratory tested, poses an immediate risk to the health and safety of these patients, some of whom are terminally ill.

**Subject:** Medical Use of Marijuana.

**Purpose:** To clarify requirements for laboratories seeking approval to test medical marijuana products in New York State.

**Text of emergency/proposed rule:** Pursuant to the authority vested in the Commissioner of Health by Section 3369-a of the Public Health Law (PHL), Section 1004.14 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) is hereby amended, and pursuant to Section 502 of the PHL, Subpart 55-2 of Title 10 is amended, to be effective upon filing with the Secretary of State, to read as follows:

Section 1004.14 is amended to read as follows:

(a) Medical marijuana products produced by a registered organization shall be examined in a laboratory located in New York State that is licensed by the [Federal Drug Enforcement Administration (DEA)] *department's Bureau of Narcotic Enforcement* and approved for the analysis of medical marijuana by the department in accordance with article 5 of the Public Health Law and Subpart 55-2 of this Title.

\* \* \*

(g) Testing for contaminants in the final medical marijuana product shall include but shall not be limited to those analytes listed below. The department shall make available a list of required analytes and their acceptable limits as determined by the commissioner.

Analyte:

E. coli

Pseudomonas (for products to be vaporized)

Salmonella species

Enterococcus species

Bile tolerant gram negative bacteria, specifically including *Klebsiella* species

*Clostridium botulinum*

*Aspergillus* species

*Mucor* species

*Penicillium* species

Thermophilic Actinomycetes species

[Aflatoxins A1,] *Aflatoxins* B1, B2, G1, G2

Ochratoxin A

Antimony

Arsenic

Cadmium

Chromium

Copper

Lead

Nickel

Zinc

Mercury

Any pesticide used during production of the medical marijuana product

Any growth regulator used during production of the medical marijuana product

Any other analyte as required by the commissioner

(h) *laboratories performing final product testing pursuant to this section must report all results to the department, in a manner and timeframe prescribed by the department.*

([h]i) Stability testing shall be performed on each brand and form of medical marijuana product as follows:

(1) For testing of open products, stability testing shall be performed for each extract lot, at time zero when opened and then, at a minimum, at 60 days from the date of first analysis. This shall establish use of the product lot within a specified time once opened.

(2) For testing of unopened products, until stability studies have been completed, a registered organization may assign a tentative expiration date based on available stability information. The registered organization must concurrently have stability studies conducted by an approved laboratory to determine the actual expiration date of an unopened product.

(3) For stability testing of both opened and unopened products, each brand shall retain a total THC and total CBD concentration in milligrams per single dose that is consistent with section 1004.11(c)(3) of this Part. If stability testing demonstrates that a product no longer retains a consistent concentration of THC and CBD pursuant to section 1004.11(a)(2) of this Part, the product shall be deemed no longer suitable for dispensing or consumption. The department may request further stability testing of a brand to demonstrate the ongoing stability of the product produced over time.

(4) The department may waive any of the requirements of this subdivision upon good cause shown.

([i]l) The laboratory shall track and use an approved method to dispose of any quantity of medical marijuana product that is not consumed in samples used for testing. Disposal of medical marijuana shall mean that the medical marijuana has been rendered unrecoverable and beyond reclamation.

([j]k) Any submitted medical marijuana products that are deemed unsuitable for testing shall be returned to the registered organization under chain of custody.

Subdivision (b) of section 55-2.15 is amended to read as follows:

(b)(1) Prior to performing testing for any medical marijuana, medical marijuana product or final medical marijuana product, a laboratory physically located within New York State shall submit a request to the department, and receive an initial or revised certificate of approval that includes the specialty of medical marijuana testing and the approved method(s) the laboratory is authorized to employ as stipulated in sections 55-2.1 and 55-2.5 of this Subpart, in addition to a valid [and federally-recognized Drug Enforcement Administration registration] *Class 8 Analytical Laboratory license, issued by the department's Bureau of Narcotic Enforcement*. The certificate of approval shall also list the specific subcategories, analytes, and approved methods included in the approval. No laboratory shall examine a sample related to medical marijuana without certification of approval specific to this category and meeting all other provisions within this Subpart; and

(2) the department may withhold or limit its approval if the department is not satisfied that:

(i) the laboratory has in place adequate policies, procedures, and facility security (physical and cyber security) to ensure proper: collection; labeling; accessioning; preparation; analysis; result reporting for; and disposal of and storage of medical marijuana, medical marijuana product or

final medical marijuana product as defined in section 55-2.15(a) of this Subpart; or

(ii) the laboratory is able to meet the requirements applicable to it as set forth in title V-A of article 33 of the Public Health Law, and section 1004.14 of this Title.

***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 July 2, 2019.

***Text of rule and any required statements and analyses may be obtained from:*** Katherine Ceroalo, DOH, Bureau of Program Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqa@health.ny.gov

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

***Public comment will be received until:*** 60 days after publication of this notice.

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

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

##### ***Statutory Authority:***

The Commissioner is authorized pursuant to Section 3369-a of the Public Health Law (PHL) to promulgate rules and regulations necessary to effectuate the provisions of Title V-A of Article 33 of the PHL. Pursuant to Section 502 of the PHL, the Commissioner is authorized to promulgate rules and regulations necessary to effectuate the provisions and purpose of Title I of Article 5 of the PHL.

##### ***Legislative Objectives:***

The legislative objective of Title V-A is to comprehensively regulate the manufacture, sale and use of medical marijuana, by striking a balance between potentially relieving the pain and suffering of those individuals with serious medical conditions, as defined in Section 3360(7) of the Public Health Law, and protecting the public against risks to its health and safety. The legislative objective of Section 502 of the PHL is to regulate the approval of environmental laboratories and the examination of samples or specimens that could contribute to pollution or be contaminated.

##### ***Needs and Benefits:***

The proposed regulations are necessary to remove the requirement that laboratories seeking Environmental Laboratory Approval Program (ELAP) certification to test medical marijuana products in New York State be registered by the Drug Enforcement Administration (DEA). The DEA recently indicated that it is not registering commercial laboratories to perform testing in state regulated medical marijuana programs. Therefore, the removal of this requirement is necessary in order for an independent commercial laboratory to obtain ELAP approval to perform medical marijuana testing in New York State. A failure to certify independent laboratories to perform such testing could result in delays in medical marijuana availability to patients suffering from serious conditions. The amended regulations also clarify that laboratories seeking to perform medical marijuana testing must first obtain a class 8 analytical laboratory license from the Department of Health's Bureau of Narcotics Enforcement (BNE), in addition to meeting all other ELAP standards. The amended regulations also fix the spelling of the word "Aflatoxins" and remove the requirement for testing of Aflatoxin A1. Finally, the amended regulations will require medical marijuana testing laboratories to report all results to the Department.

##### ***Costs:***

##### ***Costs to the Regulated Entity:***

Laboratories seeking ELAP approval to test medical marijuana will benefit from the removal of the DEA registration requirement, as there are costs associated with obtaining such registration.

##### ***Costs to Local Government:***

The proposed rule does not require the local government to perform any additional tasks; therefore, it is not anticipated to have an adverse fiscal impact.

##### ***Costs to the Department of Health:***

The proposed rule does not require the Department of Health to perform any additional tasks; therefore, it is not anticipated to have an adverse fiscal impact.

##### ***Local Government Mandates:***

The proposed amendments do not impose any new programs, services, duties or responsibilities on local government.

##### ***Paperwork:***

Laboratories performing final product testing will be required to report all test results to the department, in a manner and timeframe prescribed by the department. It is anticipated that this reporting will be performed electronically to the department so that no additional paperwork would be required.

##### ***Duplication:***

No relevant rules or legal requirements of the Federal and State governments duplicate, overlap or conflict with this rule.

**Alternatives:**

The Department's Wadsworth Center could continue to be the sole provider responsible for conducting all testing for medical marijuana. However, this option is not viable given that the Wadsworth Center's capacity to conduct all of the necessary testing on every medical marijuana product is diminishing as the medical marijuana program expands with additional registered organizations and expanded product offerings.

**Federal Standards:**

Federal requirements do not include provisions for a medical marijuana program.

**Compliance Schedule:**

There is no compliance schedule imposed by these amendments, which shall be effective upon filing with the Secretary of State.

**Regulatory Flexibility Analysis**

No regulatory flexibility analysis is required pursuant to section 202-b(3)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose reporting, recordkeeping or other compliance requirements on small businesses or local governments.

**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. The regulatory amendment clarifying laboratory requirements does not mandate a laboratory to participate or register with the medical marijuana program. Hence, no cure period is necessary.

**Rural Area Flexibility Analysis**

No Rural Area Flexibility Analysis is required pursuant to Section 202-bb(4)(a) of the State Administration Procedure Act (SAPA). It is apparent from the nature of the proposed regulation that it will not impose any adverse impact on rural areas, and the rule does not impose any new reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

**Job Impact Statement**

No job impact statement is required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have an adverse impact on jobs and employment opportunities.

**NOTICE OF ADOPTION****HIV Uninsured Care Programs**

**I.D. No.** HLT-51-18-00001-A

**Filing No.** 315

**Filing Date:** 2019-04-05

**Effective Date:** 2019-04-24

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

**Action taken:** Amendment of Subpart 43-2 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 201(1)(o), (p) and 2776(1)(e)

**Subject:** HIV Uninsured Care Programs.

**Purpose:** To amend the HIV Uninsured Care Programs to align program eligibility elements with other health care access programs.

**Text or summary was published** in the December 19, 2018 issue of the Register, I.D. No. HLT-51-18-00001-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of Program Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqa@health.ny.gov

**Initial Review of Rule**

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2024, which is no later than the 5th year after the year in which this rule is being adopted.

**Assessment of Public Comment**

The New York State Department of Health (Department) received one comment during the public comment period from the New York City Department of Health and Mental Hygiene ("NYCDOHMH").

Comment: The comment expressed support for the proposed amendments to Subpart 43-2 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York. Specifically, NYCDOHMH supported: changing the program name to "Uninsured Care

Programs" (UCP) to reflect the scope of the programs; expanding the UCP financial eligibility from 435 percent of the Federal Poverty Level (FPL) to up to 500 percent FPL; eliminating the required employer contribution of 50 percent or more of the total cost of the health insurance premium for the employee to be eligible for premium payment assistance; and the amendments reflecting gender neutrality, replacing binary language, and replacing "physician" with "clinical practitioner" to describe authorized providers.

Response: These comments in support are noted by the Department. No changes have been made to the regulations in response to these comments.

**Public Service Commission****PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED****Waiver of Tariff Rules and a Related Commission Regulation**

**I.D. No.** PSC-17-19-00010-P

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

**Proposed Action:** The Public Service Commission is considering a petition filed by Morning View LLC that requests waiver of Niagara Mohawk Power Corporation d/b/a National Grid's tariff provisions regarding the extension of electric and gas lines before service is required.

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

**Subject:** Waiver of tariff rules and a related Commission regulation.

**Purpose:** To consider whether a waiver of tariff rules and a Commission regulation are just and reasonable and in the public interest.

**Substance of proposed rule:** The Public Service Commission (Commission) is considering a petition filed by Morning View LLC (Petitioner), on March 22, 2019, that requests waiver of Niagara Mohawk Power Corporation d/b/a National Grid's (National Grid or the Company) tariff provisions, and a related Commission regulation, regarding the extension of electric and gas lines before service is required.

The Commission's regulations at 16 NYCRR § 100.3 provide that a non-residing applicant for electric service must provide a deposit to the utility equal to the estimated cost of construction. The deposit is returned to the applicant, on a pro rata basis, as each new customer takes service from the utility. Part 100.3(b) provides that any portion of the deposit remaining unrefunded five years after the date the utility is first ready to render service shall be retained by the utility. National Grid's electric tariff, PSC 220 Rule 16.6, incorporates the Commission's regulation and provides that the deposit may take the form of a letter of credit. Rule 16.6.2 specifies that any portion of the letter of credit remaining after the five year period shall be retained by the Company. National Grid's gas tariff, PSC 219, Rule 10.4 provides substantially similar requirements for non-residing applicants requesting the extension of gas facilities.

Petitioner is a non-residing applicant. Petitioner provided National Grid with a letter of credit so that National Grid extended gas and electric service to a 33 house residential subdivision that Petitioner was, and is, developing in Syracuse, NY. The relevant five year period for this extension of gas and electric service ends on October 17, 2019. Petitioner anticipates having sold 13 of the 33 houses by that date. Petitioner requests a waiver of National Grid's tariff rules PSC 220 Rule 16.6.2, and PSC 219 Rule 10.4, and necessarily of Commission regulation 16 NYCRR § 100.3(b), so that Petitioner will have an additional 60 months, i.e., through October 17, 2024, to complete building and selling the remaining 20 houses, and having customers in those houses receive service from National Grid. Petitioner claims that a waiver is warranted based on delays in receiving permits from the City of Syracuse and the difficult housing market. Petitioner states that it would pay interest on the remaining balance of the letter of credit to make National Grid and its customers whole during the extended construction period.

The full text of the petition and the full record of the proceeding may be reviewed online at the Department of Public Service web page: [www.dps.ny.gov](http://www.dps.ny.gov). The Commission may adopt, reject or modify, in whole or in part, the action 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](mailto: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:** 60 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.

(19-M-0200SP1)

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

**Purchased Power Adjustment**

**I.D. No.** PSC-17-19-00011-P

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

**Proposed Action:** The Commission is considering a proposal filed by the Village of Frankfort to modify its electric tariff schedule, P.S.C. No. 2, to implement a Purchased Power Adjustment for Frankfort Industrial Park (IP PPA).

**Statutory authority:** Public Service Law, sections 39(4), 65 and 66

**Subject:** Purchased power adjustment.

**Purpose:** To ensure existing customers are not harmed by an increase in rates attributable to any incremental supply.

**Substance of proposed rule:** The Commission is considering a proposal filed by the Village of Frankfort (the Village) on March 29, 2019, to amend its electric tariff schedule, P.S.C. No. 2.

The Village proposes to implement a Purchased Power Adjustment (PPA) applicable to service within the Frankfort Industrial Park (IP). Implementation of the IP PPA is being proposed in accordance with the Commission's Order Granting Certificate, with Conditions (CPCN Order), issued August 20, 2010, in this proceeding. The CPCN Order approved the Village to serve a tract of land known as the Pumpkin Patch once it was developed, and now known as the Frankfort Industrial Park. The CPCN Order conditioned its approval for the Village to serve the IP if existing customers are not harmed by an increase in rates attributable to supplemental supply needed to service the IP. The Village proposes to pass all incremental supply costs to all customers located with the IP. The proposed amendment has an effective date of August 1, 2019.

The full text of the proposal and the full record of the proceeding may be reviewed online at the Department of Public Service web page: [www.dps.ny.gov](http://www.dps.ny.gov). The Commission may adopt, reject or modify, in whole or in part, the action 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:** 60 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.

(09-E-0299SP3)

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

**Establishment of a Consumer Awareness Program to Encourage Renewable Energy Resources and Energy Efficiencies in Westchester**

**I.D. No.** PSC-17-19-00012-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 establishing a program to encourage the installation of renewable energy resources and energy efficiencies in the county of Westchester.

**Statutory authority:** Public Service Law, sections 5, 65, 66 and 74-a

**Subject:** Establishment of a consumer awareness program to encourage renewable energy resources and energy efficiencies in Westchester.

**Purpose:** To encourage clean energy development in Westchester.

**Substance of proposed rule:** The Public Service Commission is considering establishing a consumer awareness program to encourage the installation of renewable energy resources and energy efficiencies in the county of Westchester, pursuant to Public Service Law (PSL) Section 74-a.

PSL § 74-a requires that the Commission, in consultation with the New York State Energy Research and Development Authority (NYSERDA) establish by order a program to encourage the installation of renewable energy resources and energy efficiencies in the county of Westchester, with renewable energy resources and energy efficiency defined by the Commission consistent with the most recent state energy plan pursuant to article six of the energy law.

The consumer awareness program could work in concert with the Westchester Clean Energy Action Plan announced on March 14, 2019 in Case 19-G-0080, as well as the actions conducted as part of, among other things, the Clean Energy Fund in Case 14-M-0094, the Con Edison Smart Solutions Program in Case 17-G-0606, and the System Energy Efficiency Plans in Case 18-M-0084. The consumer awareness program would be coordinated with NYSEERDA, Consolidated Edison Company of New York, Inc., and Westchester County.

The full record of this proceeding may be reviewed online at the Department of Public Service web page: [www.dps.ny.gov](http://www.dps.ny.gov). The Commission may adopt, reject or modify, in whole or in part, the action 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:** 60 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.

(19-M-0265SP1)

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

**Tariff Amendments Regarding Minimum Monthly Storage Inventory Levels**

**I.D. No.** PSC-17-19-00013-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 proposal filed by National Fuel Gas Distribution Corporation to modify its gas tariff schedule, P.S.C. No. 9, to adjust month end inventory level requirements applicable to ESCOs serving customers under SC 19.

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

**Subject:** Tariff amendments regarding minimum monthly storage inventory levels.

**Purpose:** To ensure safe and adequate service at just and reasonable rates charged to customers without undue preferences.

**Substance of proposed rule:** The Commission is considering a proposal filed by National Fuel Gas Distribution Corporation (NFG or the Company) on April 1, 2019, to modify its gas tariff schedule, P.S.C. No. 9, to adjust storage level inventory requirements applicable to Energy Service Companies (ESCOs) serving customers under Service Classification (SC) No. 19.

NFG proposes to adjust storage level inventory requirements for ESCOs serving customers under SC 19. The proposed process applies only for adjustments during the months of November, December and January. The Company also proposes to add new language allowing NFG to temporarily

ily adjust the storage inventory level requirements by posting notice on its website at least five business days prior to the last day of the first month to which an adjusted limit would apply. The proposed amendments have an effective date of August 1, 2019.

The full text of the proposal and the full record of the proceeding may be reviewed online at the Department of Public Service web page: [www.dps.ny.gov](http://www.dps.ny.gov). The Commission may adopt, reject or modify, in whole or in part, the action 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](mailto: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](mailto:secretary@dps.ny.gov)

**Public comment will be received until:** 60 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.

(19-G-0207SP1)

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

**Minor Rate Filing**

**I.D. No.** PSC-17-19-00014-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 proposed tariff amendments filed by the Municipal Commission of Boonville to P.S.C. No. 1—Electricity, to increase its total annual electric revenues by approximately \$291,141, or 6.5%.

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

**Subject:** Minor rate filing.

**Purpose:** To ensure safe and adequate service at just and reasonable rates charged to customers without undue preferences.

**Substance of proposed rule:** The Commission is considering a proposal, filed by the Municipal Commission of Boonville (Boonville or the Company) on March 8, 2019, to amend its tariff schedule, P.S.C. No. 1 – Electricity, to increase its total annual revenues by approximately \$291,141 or 6.5%.

Boonville states the increase is necessary due to: 1) increased health insurance expenditures; 2) repairs to the distribution system; and 3) increases to maintenance on its building, substation and tree trimming. In addition, Boonville plans to enact a weather normalization clause and update its Factor of Adjustment. The proposed amendments have an effective date of November 1, 2019.

The full text of the rate filing and the full record of the proceeding may be reviewed online at the Department of Public Service web page: [www.dps.ny.gov](http://www.dps.ny.gov). The Commission may adopt, reject, or modify, in whole or in part, the action 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](mailto: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](mailto:secretary@dps.ny.gov)

**Public comment will be received until:** 60 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.

(19-E-0177SP1)

## Department of Transportation

### NOTICE OF ADOPTION

**Regulation of Commercial Motor Carriers in New York State**

**I.D. No.** TRN-03-19-00001-A

**Filing No.** 326

**Filing Date:** 2019-04-09

**Effective Date:** 2019-04-24

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

**Action taken:** Repeal of sections 154-1.1(f), 154-2.1(e), 720.12(a), 721.3(f), 721.6, 750.3, 820.13, 855.2; addition of new sections 154-1.1(f), 154-2.1(e), 720.12(a), 721.3(f), 721.6, 750.3, 820.13 and 855.2 to Title 17 NYCRR.

**Statutory authority:** Transportation Law, sections 14(12), (18), 14-f(1)(a), 138(2), 140(2), art. 9-A, 49 USC, sections 30103, 31102, 31136 and 3114

**Subject:** Regulation of commercial motor carriers in New York State.

**Purpose:** The rule making updates title 49 CFR provisions incorporated by reference pursuant to regulation of commercial motor carriers.

**Text or summary was published** in the January 16, 2019 issue of the Register, I.D. No. TRN-03-19-00001-EP.

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

**Text of rule and any required statements and analyses may be obtained from:** David E. Winans, Associate Counsel, Department of Transportation, Division of Legal Affairs, 50 Wolf Rd., Albany, NY 12232, (518) 457-5793, email: [david.winans@dot.ny.gov](mailto:david.winans@dot.ny.gov)

**Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2022, which is no later than the 3rd year after the year in which this rule is being adopted.

**Assessment of Public Comment**

One comment was received from Tabner, Ryan and Keniry, LLP, attorneys representing from the Owner-Operator Independent Drivers Association, Inc. (OOIDA) in response to the Department's rulemaking proposal (TRN-03-19-00001-EP), published in the State Register on 1/16/19. The comment objects to so much of the rule update that would result in the adoption of the versions of Subpart B of 49 CFR Section 395 that requires that certain trucks be equipped with Electronic Logging Devices (ELDs) to record, store and produce data pertaining to driver hours of service. The comment is 28 pages in length and consists of arguments citing to various judicial decisions. The comment argues that the Department exceeds its authority by incorporating provisions of Title 49 Code of Federal Regulations (CFR), edition of 10/1/2017 into its regulations.

The comment makes general reference to the incorporation of federal motor carrier regulations, yet it addresses only the portion of the federal rules that, beginning with the 2016 rules that mandate the use of Electronic Logging Devices (ELDs) on some trucks. The comment characterizes these as the changes to federal rules on driver hours of service upon which the objections elaborate. The changes to which OOIDA objects reflect the transition in the recordation of driver hours of service via utilization of electronic logging devices (ELD) in commercial motor vehicles (see, Subpart B, 49 CFR Part 395). The comment characterizes this change as the "ELD Mandate."

The comment asserts that the adoption of the "ELD Mandate" (that has been adopted in 47 other states), constitutes a "warrantless search and seizure" violating the Fourth Amendment and the New York Constitution's warrant requirement. The comment asserts that the ELD Mandate violates Due Process. The comment asserts that by adopting the ELD Mandate as part of the FMCSA update, the State of New York "has done little more than delegate its legislative rulemaking authority to the federal government." The comment also asserts that the update that includes the ELD Mandate has been "inappropriately offered" as "Emergency Rulemaking."

The OOIDA comment includes arguments that have previously been used in legal challenges to the so-called "ELD Mandate" that is set forth in Subpart B of 49 CFR Part 395 and the related Appendix A. These same arguments were used in the most recent legal action against the State that was dismissed. *OOIDA v. Cathy Calhoun, Acting Commissioner of Transportation*, Albany County Supreme Court, Index No. 900445-18.

The OOIDA comment further argues that the federal rules that include

the ELD Mandate are “ambiguous” as concerns the exemption for pre-model-year 2000 trucks, as set forth in 49 CFR Section 395.8. The OOIDA comment concludes by asserting that “NYS DOT proposes to adopt sweeping changes to its motor carrier regulations without analyzing whether adopting and implementing them will offend the New York and United States constitutional privacy and search and seizure protections and due process protections.”

The federal motor carrier safety regulations were adopted by New York many years ago by references to the federal rules in state regulations. The regulations that pertain to driver hours of service are adopted in 17 NYCRR Section 820.6 that was initially adopted in 1986 and that is not amended by the pending changes. The current rule making serves only to update the version of the federal motor carrier rules that are referenced in the other rules and the versions incorporated are stated in 17 NYCRR Sections 154-1.1(f), 154-2.1(e), 720.12(a), 721.3(f), 721.6, 750.3, 820.13, and 855.2. As the revised rules pertain to the hours-of-service recordation and ELD requirements, the applicable version of the federal rules will be referenced in 17 NYCRR Section 820.13 as it relates to Section 820.6.

These rules do not automatically update to the most current version of the federal regulations so that the applicable versions of the federal regulations are referenced in the sections that are now being amended. New York has previously updated the rules to conform to the current federal rules as required by Executive Law Section 102. The current rule making only serves to update the applicable edition of the federal rules from the 2013 version to the 2017 edition. These rules are related to motor carrier safety. The regulations adopted by the Federal Motor Carrier Safety Administration (FMCSA) implement federal policy on commercial motor vehicle transportation.

The Department has evaluated and assessed the merits of the comments from OOIDA in consultation with the Office of Attorney General that has been defending the most recent legal challenges to the 2016 version of the federal rules on driver hours-of-service. As noted in the Regulatory Impact Statement, FMCSA undertook extensive study over a period of many years at great expense to formulate what they call a “Regulatory Evaluation of Electronic Logging Devices and Hours of Service” in support of the ELD rule in Part 395. This effort culminated in a document that is 170 pages in length. FMCSA published a synopsis of their findings in in 80 FR 78292 (publication date 12/16/2015). Copies of the documents have been posted on the Department’s webpage. The ELD mandate makes it more difficult for motor carriers to evade responsibility for HOS violations. The regulatory analysis at FMCSA included a cost-benefit analysis of the ELD mandate that estimates that implementation of the rule results in significant savings on paperwork (including labor expenses) and crash reductions that are valued at \$3,010 per year.

Concerning the objections to the manner of the rule making, the FMCSA required adoption of the provisions of 49 CFR Part 395 to be effective upon February 16, 2019. Therefore, the update to the 2017 edition of 49 CFR was accomplished by simultaneously filing an emergency adoption and filing a Notice of Proposed Rulemaking to provide for a 60-day public comment period prior to permanent adoption.

OOIDA previously challenged the adoption of the ELD mandate in an appeal to the 7th Circuit Court of Appeals. In *Owner-Operator Indep. Drivers Ass’n v. United States DOT*, 840 F.3d 879, 2016 U.S. App. LEXIS 19558 (7th Cir., Oct. 31, 2016), Plaintiff OOIDA challenged the federal ELD rule on several grounds, including the Fourth Amendment to the United States Constitution. The Seventh Circuit rejected all these challenges, holding, with respect to the Fourth Amendment, that the ELD rule meets all of the criteria for the “pervasively regulated industry” exception to the Fourth Amendment’s warrant requirement. See, *OOIDA v. USDOT*, 840 F.3d at 893-96. Since the 7th Circuit rejected their appeal, OOIDA has undertaken to challenge the implementation of the ELD mandate at the state level.

The Department has analyzed and assessed the objections raised by the OOIDA in their comment and concludes that the arguments lack merit under the controlling legal authority. Moreover, as provided in Transportation Law Article 9-A (Hours of Operation of Operators of Motor Trucks and Motor Buses), section 211 the commissioner is authorized to promulgate rules and regulations governing the hours of service of drivers of motor trucks and motor buses. Such rules and regulations can be no less protective of public safety than the rules and regulations promulgated by the federal government with respect to hours of labor of operation of motor trucks and motor buses.

The adoption of the pending rules is, of necessity, consistent with applicable provisions of federal law, including 49 USC section 31136 that provides the minimum safety standards of interstate commercial vehicle enforcement that must be adopted by the states. The foregoing makes it clear that there is no authority extended to states under federal law (U.S. Constitution, Article VI, Clause 2) to disregard these statutory provisions and the FMCSA regulations adopted under their authority, and New York Transportation Law contains a corollary mandate in this regard. New York

is therefore required to adopt and enforce the applicable Federal Motor Carrier Safety Regulations that include the updated version of Part 395 that includes the ELD Mandate and resolves to do so. In accordance with the above, New York finds that its proposed adoption of the pending rules shall proceed as originally drafted and published.