RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

NOTICE OF ADOPTION

Importation of Cervids Susceptible to Chronic Wasting Disease ("CWD")

I.D. No. AAM-34-18-00001-A
Filing No. 20
Filing Date: 2019-01-14
Effective Date: 2019-01-30

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

Action taken: Amendment of section 68.3 of Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 18, 72 and 74

Subject: Importation of cervids susceptible to Chronic Wasting Disease (''CWD'').

Purpose: To help control the spread of CWD into the State's cervid population.

Text or summary was published in the August 22, 2018 issue of the Register, I.D. No. AAM-34-18-00001-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 Smith, D.V.M., Director, Division of Animal Industry, NYS Dept. of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, (518) 457-3502, email: David.Smith@agriculture.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

A hearing was held on October 25, 2018 to consider whether 1 NYCRR section 68.3(b) should be amended to extend the ban upon the importation into New York of cervids that are susceptible to contracting Chronic Wasting Disease ("CWD susceptible cervids), until August 1, 2023 ("the proposed rule"). At the hearing, five people commented and, thereafter, three people submitted written comments, regarding the proposed rule.

One commentator stated that the ban upon the importation of captive cervids should not include reindeer; however, 1 NYCRR 68.3(b), as amended, will cover only cervids of the genus Alces, Odocoileus, and Cervis and not cervids of the genus Rangifer (i.e., reindeer).

One commentator supported the proposed rule as written. Another commentator advocated that the proposed rule should be amended so that the ban upon the importation of CWD susceptible cervids would last for ten years, until August 1, 2028, and three commentators advocated that such ban should be made permanent. The Department of Agriculture and Markets ("Department") declines to amend the proposed rule to extend the ban upon the importation of CWD susceptible cervids beyond August 1, 2023; the Department believes that an extension of the ban until August 1, 2023 strikes the proper balance between an unduly long ban that could be made unnecessary if an effective ante-mortem test is developed to determine if a CWD susceptible cervid has contracted that disease, and a ban that is of insufficient duration to adequately promote the objective that the State's cervid population remain, apparently, CWD-free.

Two commentators were opposed to the proposed rule. One commentator stated that the proposed ban would not prevent wild cervids, located outside the State, that had contracted CWD from coming into the State and infecting its wild and/or captive cervids with that disease. The Department acknowledges that the proposed rule will not ensure that the State's cervid population remains, apparently, CWD-free but believes that an extension of the ban upon the importation of CWD susceptible cervids, until August 1, 2023, will greatly contribute to that objective.

Another commentator also stated that the proposed rule will not be effective, for the reason set forth by the other commentator who opposed the proposed rule, and also stated that cervid farmers should be able to import CWD susceptible cervids if those animals have been examined by a veterinarian and found to be free of CWD. The Department, however, declines to withdraw the proposed rule to "lift" the ban on importation, for the reason set forth above, and further declines to amend it to allow for importation as suggested by this commentator because, as set forth above, there is, presently, no satisfactory test to determine, ante-mortem, if a cervid has or has not contracted CWD.

State Commission of Correction

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Inmate Confinement and Deprivation

I.D. No. CMC-05-19-00004-P

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

Proposed Action: Addition of Part 7075, sections 7004.7, 7005.12, 7006.9(d), 7025.5, 7028.6(c), 7040.4(f), (g), 7040.5(e), (f); amendment of sections 7003.3(j)(6), 7006.7(c), 7006.9(a)(5), 7006.11(a), 7013.10(c), 7022.2(a), 7024.11, 7026.3, 7028.2(d), 7070.7(h) and (j) of Title 9 NYCRR.

Statutory authority: Correction Law, section 45(6) and (15)

Subject: Inmate confinement and deprivation.

Purpose: Require local correctional facilities to record, review and report inmate cell confinement and essential service deprivation.

Substance of proposed rule (Full text is posted at the following State website: www.scoc.ny.gov): A new Part 7075 of Title 9 NYCRR is established that generally requires:

(a) disciplinary or administratively segregated inmates must be allowed out of their cells for a minimum of four (4) hours a day;

(b) disciplinary or administratively segregated inmates who are under eighteen (18) years of age or known by security, health or mental health personnel to be pregnant, within eight (8) weeks of delivery or pregnancy outcome, having a mental or physical disability, or having a serious mental illness must be allowed out of their cells for a minimum of four (4) hours a day, exclusive of entitled exercise periods;

(c) a jail's chief administrative officer (CAO) may deny an inmate such four (4) hour period only when it would pose a threat to the safety, security or good order of the facility;

(d) any CAO determination to deny such four (4) hour period must be reviewed at least every seven (7) days, with such review to include consultation with appropriate facility health staff;

(e) any disciplinary or administrative segregation of an inmate who is under 18 years of age, known by security, health or mental health personnel to be pregnant, within eight (8) weeks of delivery or pregnancy outcome, having a mental or physical disability, or having a serious mental illness, must be reviewed at intervals not to exceed seven (7) days, with such review to include consultation with appropriate facility health staff;

(f) essential services (any items or services guaranteed inmates by regulation, such as clothing, outdoor exercise, toiletries, books, bedding, religious services, etc.) may not be withheld as punishment;

(g) jail CAO may only deny an essential service where necessary to preserve the safety, security or good order of the facility;

(h) any CAO decision to withhold an essential service must be reviewed every seven (7) days; and

(i) any such CAO determination or review must be made in writing, shall state the specific reasons considered, and be maintained in a centralized record.

Existing SCOC jail regulations are amended to require the following:

(a) reporting of certain inmate cell confinement and essential service deprivation to SCOC;

(b) Segregated inmates who are under eighteen (18) years of age or known by security, health or mental health personnel to be pregnant, within eight (8) weeks of delivery or pregnancy outcome, having a mental or physical disability, or having a serious mental illness shall be entitled to two (2) hours of daily exercise;

(c) daily CAO review of any educational services denial or restriction; and

(d) cell plumbing may be turned off only when necessary for facility safety and security, but inmate must be allowed to flush the toilet and be provided access to a sink at two (2) hour intervals.

Text of proposed rule and any required statements and analyses may be obtained from: Deborah Slack-Bean, Associate Attorney, Commission of Correction, Alfred E. Smith State Office Building, 80 S. Swan Street, 12th Floor, Albany, New York 12210, (518) 485-2346, email: Deborah.Slack-Bean@scoc.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.

Regulatory Impact Statement

The New York State Commission of Correction (''Commission'') seeks to add a new Part 7075, amend paragraph (6) of subdivision (j) of section 7003.3, add a new section 7004.7, add a new section 7005.12, amend subdivision (c) of section 7006.7, amend paragraph (5) of subdivision (a) of section 7006.9, add a new subdivision (d) of section 7006.9, amend subdivision (a) of section 7006.11, amend subdivision (c) of section 7013.10, amend subdivision (a) of section 7022.2, amend section 7024.11, add a new section 7025.5, amend section 7026.3, amend subdivision (d) of section 7028.2, add a new subdivision (c) of section 7028.6, add a new subdivision (f) of section 7040.4, add a new subdivision (g) of section 7040.4, add a new subdivision (e) of section 7040.5, add a new subdivision (f) of section 7040.5, amend subdivision (h) of section 7070.7, and amend subdivision (j) of section 7070.7 of Title 9 NYCRR.

1. Statutory authority:

Subdivision (6) of section 45 of the Correction Law authorizes the Commission to promulgate rules and regulations establishing minimum standards for the care, custody, correction, treatment, supervision, discipline, and other correctional programs for all person confined in the correctional facilities of New York State. Subdivision (15) of section 45 of the Correction Law allows the Commission to adopt, amend or rescind such rules and regulations as may be necessary or convenient to the performance of its functions, powers and duties.

2. Legislative objectives:

By vesting the Commission with this rulemaking and oversight authority, the Legislature intended the Commission to enact regulations that better enable the agency to identify and monitor local correctional facilities for misuse of inmate cell confinement or essential service deprivation.

3. Needs and benefits:

While New York State Correction Law provides jail administrators the discretion and authority to confine inmates as necessary for order and discipline, there exists no statutory or regulatory requirement that such determinations and their justification be documented, reviewed on a timely basis to assess if continuation is warranted, or reported to the New York State Commission of Correction (SCOC), as the jail oversight and regulatory entity. Consequently, SCOC's ability to sufficiently monitor and oversee such confinement, and deprivations of essential inmate services, is limited by an absence of regulations requiring jails to record, review and report this activity.

Recent, publicized civil rights actions, SCOC field work, and formal inmate grievances appealed to SCOC's Citizen's Policy and Complaint Review Council have revealed a prevalent misuse of solitary confinement and deprivation of essential services in county jails, particularly as applied to the 16 and 17-year-old inmate population. Such confinement has included the solitary segregation of inmates, for insufficient reasons and prolonged periods, that likely violate the Eighth and Fourteenth Amendments of the U.S. Constitution. Similar unlawful and unconstitutional inmate treatment has occurred in jails' improper deprivation of essential inmate services, such as access to health services, participation in compulsory educational services, the provision of clothing, bedding and toiletries, access to printed materials and publications, participation in outdoor exercise, and access to religious services and materials.

As a resolution, SCOC has developed local correctional facility regulations which provide segregated inmates a presumptive minimum of four (4) hours a day out of their cell and continuous access to all essential services. Segregated inmates under the age of eighteen (18) years, and segregated inmates known by security, health or mental health personnel to be pregnant, within eight (8) weeks of delivery or pregnancy outcome, having a mental or physical disability, or having a serious mental illness, are provided a presumptive minimum of four (4) hours a day out of their cell, exclusive of an entitled two (2) hours of recreation time. While the four (4) hour period and access to essential services may be denied when necessary to preserve facility safety and security, the regulations require the facility administration to record, review and report such determinations in a manner that allows for sufficient oversight by SCOC.

4. Costs:

a. Costs to regulated parties for the implementation of and continuing compliance with the rule: Minimal. Any determination by local correctional facility administrators to deny segregated inmates four (4) hours out-of-cell time, to segregate any inmate under the age of eighteen (18), or known by security, health or mental health personnel to be pregnant, within eight (8) weeks of delivery or pregnancy outcome, having a mental or physical disability, or having a serious mental illness, or to deny an essential inmate service to any inmate must be made in writing, reviewed every seven (7) days, and in certain circumstances reported to SCOC. Consequently, compliance with the proposed rule would result only in minimal costs associated with such recordkeeping and reporting.

b. Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. The regulation does not apply to state agencies or governmental bodies. As set forth above in subdivision (a), any additional costs to local governments would be minimal.

c. This statement detailing the projected costs of the rule is based upon the Commission's oversight and experience relative to the operation and function of a local correctional facility.

5. Local government mandates:

The regulation imposes a duty on local correctional facilities to provide segregated inmates a presumptive minimum of 4 hours a day out of their cell and continuous access to all essential services. While the 4-hour period and access to essential services may be denied when necessary to preserve facility safety and security, the regulations require the jail to record, review and report such determinations in a manner that allows for sufficient oversight.

6. Paperwork:

As set forth above, any determination by local correctional facility administrators to deny segregated inmates four (4) hours out-of-cell time, to segregate any inmate under the age of eighteen (18), or known by security, health or mental health personnel to be pregnant, within eight (8) weeks of delivery or pregnancy outcome, having a mental or physical disability, or having a serious mental illness, or to deny an essential inmate service to any inmate must be made in writing, reviewed every seven (7) days, and in certain circumstances reported to SCOC.

7. Duplication:
The rule does not duplicate any existing State or Federal requirement.
8. Alternatives:
The alternative, not promulgating regulations requiring local correctional facilities to record, review and report determinations to subject inmates to cell confinement and deprive essential inmate services, was dismissed by SCOC due to the agency's immediate need to sufficiently monitor and oversee such confinement and deprivation.
9. Federal standards:
There are no applicable minimum standards of the federal government.
10. Compliance schedule:
Each local correctional facility is expected to be able to achieve compliance with the proposed rule once effective, which shall occur immediately upon publication of a Notice of Adoption in the State Register.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required pursuant to subdivision three of section 202-b of the State Administrative Procedure Act because the rule does not impose an adverse economic impact on small businesses or local governments. The proposed rule seeks only to establish regulations requiring local correctional facilities to record, review and report certain determinations to confine an inmate to a cell or deprive an inmate of essential services. Considering that such determinations are relatively infrequent, it will not have an adverse impact on small businesses or local governments, nor impose any additional significant reporting, recordkeeping, or other compliance requirements on small businesses or local governments.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required pursuant to subdivision four of section 202-bb of the State Administrative Procedure Act because the rule does not impose an adverse impact on rural areas. The proposed rule seeks only to establish regulations requiring local correctional facilities to record, review and report certain determinations to confine an inmate to a cell or deprive an inmate of essential services. Considering that such determinations are relatively infrequent, it will not impose an adverse economic impact on rural areas, nor impose any additional significant recordkeeping, reporting, or other compliance requirements on private or public entities in rural areas.

Job Impact Statement

A job impact statement is not required pursuant to subdivision two of section 201-a of the State Administrative Procedure Act because the rule will not have a substantial adverse impact on jobs and employment opportunities, as apparent from its nature and purpose. The proposed rule seeks only to establish regulations requiring local correctional facilities to record, review and report certain determinations to confine an inmate to a cell or deprive an inmate of essential services. As such, there will be no impact on jobs and employment opportunities.

Department of Corrections and Community Supervision

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Standard Conditions of Release and Parole Revocation Guidelines

I.D. No. CCS-05-19-00006-P

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

Proposed Action: Repeal of sections 8003.2, 8005.20; addition of new sections 8003.2, 8005.20; and amendment of section 8002.6 of Title 9 NYCRR.

Statutory authority: Executive Law, section 259-c(1), (2), (6), (11) and 259-i(3)

Subject: Standard Conditions of Release and Parole Revocation Guidelines.

Purpose: Establish standard conditions of release and provide a workable structure for applying appropriate parole revocation penalties.

Substance of proposed rule (Full text is posted at the following State website: http://www.doccs.ny.gov): The Board of Parole proposes to repeal and replace 9 N.Y.C.R.R. section 8003.2 (Release conditions), to provide for new standard conditions of release to be imposed on every individual released to the supervision of the Department of Corrections and Community Supervision. The new conditions include conditions substantially similar to current standard conditions, but revised and reorganized for clarity and comprehensibility, amendments to current standard conditions and a new condition relating to maintaining contact with the parole officer and residing at an approved address.

The Board also proposes to repeal and replace 9 N.Y.C.R.R. section 8005.20 and to amend 9 N.Y.C.R.R. section 8002.6(b), which pertain to the penalties for individuals found to have violated the conditions of their release in an important respect.

The proposed 9 N.Y.C.R.R. section 8005.20 would create new guidelines for assessing penalties that emphasize categories based on current violative behavior, and assign a new set of available penalties based on the severity of such violative behavior. Additionally, the new guidelines will expand the availability of Department of Corrections and Community Supervision alternative program dispositions (dispositions which allow the violator to avoid service of a time assessment by completing the DOCCS program), and the creation of a violation category in which the maximum available penalty is the imposition of such an alternative program disposition. Under the proposed 9 N.Y.C.R.R. section 8002.6(b), the calculation of time assessments would commence upon the completion of adjudicatory proceedings, and will be deemed a hold to the maximum expiration of the sentence on occasions in which the imposed assessment exceeds the time remaining on such violator's sentence.

The full text of the proposed rules may be found at the Department of Corrections and Community Supervision website at www.doccs.ny.gov.

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

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

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

Regulatory Impact Statement

1. Statutory Authority: Section 259-c(11) of the New York Executive Law authorizes the New York State Board of Parole to "make rules for the conduct of its work, a copy of such rules and of any amendments thereto to be filed by the chairman with the secretary of state". Executive Law § 259-c(1) and (2) empowers the Board to determine the conditions of release of those individuals released to community supervision under the jurisdiction of the Department of Corrections and Community Supervision. Pursuant to sections 259-c(6) and 259-i(3) of the Executive Law, the Legislature has conferred upon the Board the exclusive authority to revoke the parole, conditional release or post-release supervision status of any such person, as well as their re-release to supervision, based upon violations of the conditions of release.

2. Legislative Objectives: Executive Law § 259-c(1) and (2), in relevant part, direct the Board of Parole to determine the conditions of release of those individuals granted parole release or who are presumptively released, conditionally released, or subject to a period of post release supervision. Executive Law §§ 259-c(6) and 259-i(3) then confer upon the Board the exclusive authority over determinations of whether to revoke the release status of these individuals while they remain subject to the jurisdiction of the Department of Corrections and Community Supervision. The proposed rules, consistent with the Board's rulemaking authority under Executive Law § 259-c(11), assist and guide the Board in the performance of its obligations in setting conditions of release and in the release revocation ("parole revocation") process. The purpose of the proposed changes is to improve the standard conditions of release and the disposition of parole revocation cases.

3. Needs and Benefits: Consistent with Executive Law § 259-(c)(1) and (2), which impose a duty on the Board to establish conditions of release, 9 N.Y.C.R.R. § 8003.2 sets forth a list of the standard conditions of release to be imposed by the Board upon every individual supervised by the Department of Corrections and Community Supervision. While not the exclusive universe of the conditions that a releasee may be subject to, conditions within 9 N.Y.C.R.R. § 8003.2 serve as a baseline and minimum for the conduct that is deemed acceptable and consistent with the goals of public safety and successful reintegration into society. The rule further establishes that the releasee may be subject to additional conditions imposed by the Board or authorized representatives of the Department of Corrections and Community Supervision. As the experience of the Board and DOCCS has grown, this experience has better positioned the Board to discern releasee behaviors that are contrary to the aforementioned goals. The proposed 9 N.Y.C.R.R. § 8003.2 is thus more finely calibrated to prevent criminogenic behavior without restricting behavior which may be consistent with or even facilitate a positive re-integration into society.

The Board is further obligated to determine whether to revoke the release of individuals subject to community supervision by DOCCS. Executive Law §§ 259-(c)(6) and 259-i(3). Executive Law § 259-i(3) establishes the basic parameters and due process rights associated with the parole revocation process, including setting forth a time limit on that process, and broadly speaking, providing that revocation dispositions may include return to incarceration or restoration to supervision. 9 N.Y.C.R.R. § 8005.20 contains parole revocation guidelines that structure appropriate penalties for parole violators whose release is revoked at the end of the revocation process. The current guidelines divide violators into categories by considering underlying crime of conviction, criminal history and current violative behavior. Within the current guidelines, there is a heavy emphasis on the violator's crime of conviction, which in many cases, predetermines their category. The proposed replacement changes the category system to place a much heavier emphasis on current violative behavior, and assign a new set of corresponding available penalties. Among these changes is an expansion of the availability of Department of Corrections and Community Supervision alternative program dispositions and the creation of a violation category in which the maximum available penalty is the imposition of such an alternative program disposition. Moreover, time assessment penalty ranges are included that are congruous with the level of severity of the violative behavior at issue. 9 N.Y.C.R.R. § 8002.6(b) addresses the manner of calculation of any time assessment that may be imposed in connection with a parole revocation, and the proposed changes serve as a complement to the proposed 9 N.Y.C.R.R. § 8005.20 that will assist the efficiency of the Board's operations pursuant to 9 N.Y.C.R.R. § 8005.20 and its obligations under Executive Law § 259-i(3).

4. Costs: These proposed regulatory changes will not impose any costs beyond those already experienced.

5. Local Government Mandates: These regulatory changes do not impose any obligations on local governments.

6. Paperwork: These regulatory changes do not impose any new or additional paperwork requirements on regulated parties.

7. Duplication: These regulatory changes will not duplicate any existing state or federal rule.

8. Alternatives: Because this rulemaking governs the procedures and guidelines applied by the Board and its hearing officers and employees in a quasi-adjudicatory function, there are no alternatives other than to amend the regulations.

9. Federal Standards: There are no federal standards.

10. Compliance Schedule: The Board intends to implement these rules within 6 months from the publication of its notice of adoption.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Business and Local Government is not being submitted with this notice, for the proposed rule changes will have no adverse impact upon small businesses and local governments, nor do the rule changes impose any reporting, record keeping or other compliance requirements upon small businesses and local governments. The proposed rules only affect the practices of the Board of Parole and its officers and employees in setting conditions of release to community supervision and adjudicating violations thereof.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice, for the proposed rules will have no adverse impact upon rural areas, nor do the proposed rules impose any reporting, record keeping or other compliance requirements upon rural areas. The proposed rules only affect the practices of the Board of Parole and its officers and employees in setting conditions of release to community supervision and adjudicating violations thereof.

Job Impact Statement

A Job Impact Statement is not being submitted with this notice, for the proposed rules will have no adverse impact upon jobs or employment opportunities, nor do the proposed rules impose any reporting, record keeping or other compliance requirements upon employers. The proposed rules only affect the practices of the Board of Parole and its officers and employees in setting conditions of release to community supervision and adjudicating violations thereof.

Department of Economic Development

EMERGENCY RULE MAKING

START-UP NY Program

I.D. No. EDV-05-19-00001-E
Filing No. 13
Filing Date: 2019-01-09
Effective Date: 2019-01-09

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 information 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 April 8, 2019.

Text of rule and any required statements and analyses may be obtained from: Thomas Regan, 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-05-19-00002-E
Filing No. 14
Filing Date: 2019-01-09
Effective Date: 2019-01-09

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; and 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

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires April 8, 2019.

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

nesses choosing to participate in the Empire Zones program. Annual compliance costs are estimated to be negligible for both small and larges businesses. Local governments are unaffected by this rule.

5. Economic and technological feasibility

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

6. Minimizing adverse impact

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

7. Small business and local government participation

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

Education Department

ERRATUM

I.D. No. EDU-19-18-00006-RP, pertaining to To Implement New York State's Every Student Succeeds Act (ESSA) Plan, published in the December 26, 2018 issue of the *State Register*, indicated that public comment would be received until 30 days after publication of the Notice.

The public comment period for this Notice has been extended until February 9, 2019.

EMERGENCY RULE MAKING

English Language Learner Grade Span Requirement

I.D. No. EDU-47-18-00010-E

Filing No. 22

Filing Date: 2019-01-15

Effective Date: 2019-02-04

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

Action taken: Amendment of section 154-2.3(i) of Title 8 NYCRR.

Statutory authority: Education Law, sections 207, 208, 305, 315, 2117, 2854(1)(b) and 3204

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary, beginning with the 2018-2019 school year, to implement Regents policy to permit certain eligible school districts to seek a waiver from the requirement in Commissioner's Regulations section 154-2.3(i) which provides that the maximum allowable grade span for grouping instruction in grades 1-12 English as a new language or bilingual education classes is two contiguous grades, except for English language learners in a special class.

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 60-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), would be the March 2019 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the March meeting, would be March 27, 2019, the date a Notice of Adoption would be published in the State Register.

Therefore, emergency action is necessary at the January 2019 Regents meeting for the preservation of the general welfare in order to ensure that eligible school districts have enough notice that they may seek such waiver for the 2018-2019 school year and to ensure that the emergency rule adopted at the November 2018 meeting remains continuously in effect until it can be adopted as a permanent rule. It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the March 2019 Regents meeting, which is the first scheduled meeting after expiration of the 60-day public comment period prescribed in the SAPA for State agency rule makings.

Subject: English Language Learner Grade Span Requirement.

Purpose: To provide a one-year renewable waiver to expand the allowable grade span for ENL and BE classes to three contiguous grades.

Text of emergency rule: Subdivision (i) of section 154-2.3 of the Regulations of the Commissioner of Education is amended, to read as follows:

(i) Grade Span.

(1) The maximum allowable grade span for grouping instruction in grades 1-12 English as a new language or bilingual education classes is two contiguous grades, except for English language learners in a special class, as defined by section 200.1(uu) of this Title. *Provided, however, that beginning with the 2018-2019 school year the Commissioner may waive such requirement for school districts with enrollment of fewer than thirty English language learner students and permit such districts to utilize a maximum allowable grade span for instruction in grades 1-12 English as a new language or bilingual education classes of three contiguous grades, except for English language learners in a special class, as defined by section 200.1(uu) of this Title. A district seeking permission for such a waiver shall annually submit to the commissioner for approval an application on a form prescribed by the commissioner which must include:*

(i) data regarding the number and percentages of English language learners enrolled in the district, along with data regarding the number of certified bilingual education and English to speakers of other languages teachers in the district;

(ii) evidence that the district will ensure that all English language learners receive grade and age appropriate instructional support if the waiver is granted; and

(iii) evidence regarding the district's efforts to meet the two grade span requirement of this subparagraph prior to seeking a waiver.

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-47-18-00010-EP, Issue of November 21, 2018. The emergency rule will expire March 15, 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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Education Law 208(not subdivided) grants the authority to confer by diploma under their seal such degrees as they deem proper, and to award certificates, diplomas and degrees on persons who satisfactorily meet those requirements.

Education Law 305(1) and (3) authorizes the Commissioner to enforce the educational policies of this State and execute all educational policies determined by the Regents and shall prescribe the licensing of teachers employed in this State.

Education Law 2117 requires the school authorities of each school district to make a report to the Commissioner upon any particular matter relating to their schools whenever such report shall e required by Commissioner.

Education Law 2854(1)(b) provides that charter schools shall be exempt from all other state and local laws, rules, regulations or policies governing public or private schools, boards of education, school districts and political subdivisions, including those relating to school personnel and students, except as specifically provided in the school's charter or in this article.

Education Law 3204(2) and (2-a) requires that instruction only be given by a component instruction and that in the teaching of subjects of instruction, English shall be the language of instruction. It also requires that each district that is receiving foundation aid develop a comprehensive plan to meet the educational needs of pupils of limited English proficiency.

2. LEGISLATIVE OBJECTIVES:

The purpose of the proposed amendment is to provide a one-year renewable waiver to allow districts with fewer than 30 ELLs to seek approval from the Commissioner to expand the allowable grade span for ENL and BE classes to three contiguous grades.

3. NEEDS AND BENEFITS:

In January 2017, the New York State Council of School Superintendents (NYSCOSS) contacted the Department to request regulatory flexibility in meeting the requirement in section 154-2.3(i) of the Commissioner's regulations which provides that the maximum allowable grade span for grouping instruction in grades 1-12 English as a new language ("ENL") or bilingual education ("BE") classes is two contiguous grades, except for English language learners ("ELLs") in a special class. NYSCOSS expressed concerns about the challenge of hiring additional staff in order to limit ENL and BE classes to two contiguous grades, given the statewide shortage of certified ENL and BE teachers.

The Department understands these concerns, and in particular the challenges that smaller districts and districts with few ELLs may face in meeting the two contiguous grade span requirement in section 154-2.3(i) of the Commissioner's regulations. However, the Department must counterbalance these concerns with the need to ensure that ELLs in ENL and BE classes have access to age and grade appropriate instruction. In accordance with the Department's Blueprint for ELL Success, ELLs – like other students – are entitled to "materials and instructional resources that are linguistically age/grade appropriate." The proposed amendment seeks to balance these concerns by creating a one-year renewable waiver allowing districts with fewer than 30 ELLs to seek approval from the Commissioner to expand the allowable grade span for ENL and BE classes to three contiguous grades.

Districts seeking the waiver will be required to provide key demographic information such as the total number and percentage of ELLs in the district as well as in particular schools, and the number of available certified BE and English for speakers of other languages ("ESOL") teachers to serve them. Districts will also be required to submit a justification explaining how they will ensure that all ELLs receive appropriate support if a waiver is granted, as well as the efforts the district has made to comply with the two grade span requirement of section 154-2.3(i) given its current staffing.

In order to better enable districts to meet the two grade span requirement of section 154-2.3(i), as well as to set forth best practices to support districts that apply for this waiver, the Department will issue an accompanying guidance document entitled "School District Justification to Expand the Maximum Allowable Grade Span to Three Contiguous Grades in 1-12 English as a New Language (ENL) or Bilingual Education (BE) Classes." Contained in this guidance are questions and answers regarding which districts qualify for the waiver, best practices and guidance regarding instructional grouping practices, and recommended solutions for common challenges.

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:

The purpose of the proposed amendment is to provide a one-year renewable waiver allowing districts with fewer than 30 ELLs to seek approval from the Commissioner to expand the allowable grade span for ENL and BE classes to three contiguous grades.

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 March 2019 meeting. If adopted at the March 2019 meeting, the proposed amendment will become effective on March 27, 2019.

Regulatory Flexibility Analysis

(a) Small businesses:

The proposed amendment seeks to balance these concerns by creating a one-year renewable waiver allowing districts with fewer than 30 ELLs to seek approval from the Commissioner to expand the allowable grade span for ENL and BE classes to three contiguous grades. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local governments:

1. EFFECT OF RULE:

The proposed amendment applies to school districts across the State.

2. COMPLIANCE REQUIREMENTS:

In January 2017, the New York State Council of School Superintendents (NYSCOSS) contacted the Department to request regulatory flexibility in meeting the requirement in section 154-2.3(i) of the Commissioner's regulations which provides that the maximum allowable grade span for grouping instruction in grades 1-12 English as a new language ("ENL") or bilingual education ("BE") classes is two contiguous grades, except for English language learners ("ELLs") in a special class. NYSCOSS expressed concerns about the challenge of hiring additional staff in order to limit ENL and BE classes to two contiguous grades, given the statewide shortage of certified ENL and BE teachers.

The Department understands these concerns, and in particular the challenges that smaller districts and districts with few ELLs may face in meeting the two contiguous grade span requirement in section 154-2.3(i) of the Commissioner's regulations. However, the Department must counterbalance these concerns with the need to ensure that ELLs in ENL and BE classes have access to age and grade appropriate instruction. In accordance with the Department's Blueprint for ELL Success, ELLs – like other students – are entitled to "materials and instructional resources that are linguistically age/grade appropriate." The proposed amendment seeks to balance these concerns by creating a one-year renewable waiver allowing districts with fewer than 30 ELLs to seek approval from the Commissioner to expand the allowable grade span for ENL and BE classes to three contiguous grades.

Districts seeking the waiver will be required to provide key demographic information such as the total number and percentage of ELLs in the district as well as in particular schools, and the number of available certified BE and English for speakers of other languages ("ESOL") teachers to serve them. Districts will also be required to submit a justification explaining how they will ensure that all ELLs receive appropriate support if a waiver is granted, as well as the efforts the district has made to comply with the two grade span requirement of section 154-2.3(i) given its current staffing.

In order to better enable districts to meet the two grade span requirement of section 154-2.3(i), as well as to set forth best practices to support districts that apply for this waiver, the Department will issue an accompanying guidance document entitled "School District Justification to Expand the Maximum Allowable Grade Span to Three Contiguous Grades in 1-12 English as a New Language (ENL) or Bilingual Education (BE) Classes." Contained in this guidance are questions and answers regarding which districts qualify for the waiver, best practices and guidance regarding instructional grouping practices, and recommended solutions for common challenges.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

The proposed amendments will not impose any additional program, service, duty, responsibility or costs beyond those imposed by the statute.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment seeks to balance these concerns by creating a one-year renewable waiver allowing districts with fewer than 30 ELLs to seek approval from the Commissioner to expand the allowable grade span for ENL and BE classes to three contiguous grades.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

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

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

This proposed amendment applies to all school districts 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:

In January 2017, the New York State Council of School Superintendents (NYSCOSS) contacted the Department to request regulatory flexibility in meeting the requirement in section 154-2.3(i) of the Commissioner's regulations which provides that the maximum allowable grade span for grouping instruction in grades 1-12 English as a new language ("ENL") or bilingual education ("BE") classes is two contiguous grades, except for English language learners ("ELLs") in a special class. NYSCOSS expressed concerns about the challenge of hiring additional staff in order to limit ENL and BE classes to two contiguous grades, given the statewide shortage of certified ENL and BE teachers.

The Department understands these concerns, and in particular the challenges that smaller districts and districts with few ELLs may face in meeting the two contiguous grade span requirement in section 154-2.3(i) of the Commissioner's regulations. However, the Department must counterbalance these concerns with the need to ensure that ELLs in ENL and BE classes have access to age and grade appropriate instruction. In accordance with the Department's Blueprint for ELL Success, ELLs – like other students – are entitled to "materials and instructional resources that are linguistically age/grade appropriate." The proposed amendment seeks to balance these concerns by creating a one-year renewable waiver allowing districts with fewer than 30 ELLs to seek approval from the Commissioner to expand the allowable grade span for ENL and BE classes to three contiguous grades.

Districts seeking the waiver will be required to provide key demographic information such as the total number and percentage of ELLs in the district as well as in particular schools, and the number of available certified BE and English for speakers of other languages ("ESOL") teachers to serve them. Districts will also be required to submit a justification explaining how they will ensure that all ELLs receive appropriate support if a waiver is granted, as well as the efforts the district has made to comply with the two grade span requirement of section 154-2.3(i) given its current staffing.

In order to better enable districts to meet the two grade span requirement of section 154-2.3(i), as well as to set forth best practices to support districts that apply for this waiver, the Department will issue an accompanying guidance document entitled "School District Justification to Expand the Maximum Allowable Grade Span to Three Contiguous Grades in 1-12 English as a New Language (ENL) or Bilingual Education (BE) Classes." Contained in this guidance are questions and answers regarding which districts qualify for the waiver, best practices and guidance regarding instructional grouping practices, and recommended solutions for common challenges.

3. COSTS:

The proposed amendment does not impose any costs on regulated parties.

4. MINIMIZING ADVERSE IMPACT:

The purpose of the proposed amendment is to provide a one-year renewable waiver allowing districts with fewer than 30 ELLs to seek approval from the Commissioner to expand the allowable grade span for ENL and BE classes to three contiguous grades.

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 is to provide a one-year renewable waiver allowing districts with fewer than 30 ELLs to seek approval from the Commissioner to expand the allowable grade span for ENL and BE classes to three contiguous grades.

Because there is a demonstrated shortage of ELL and BE teachers, it is evident from the nature of the proposed amendment that it will have little or 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.

Assessment of Public Comment

Following the public comment period required under the State Administrative Procedure Act, the Department received the following comments:

1. COMMENT:

One commenter expressed the position that the regulation puts students at a disadvantage by grouping them in more than two continuous grades, on account of both developmental and instructional appropriateness. The commenter felt that the skills covered across three grade spans would be too broad to cover in a single classroom.

DEPARTMENT RESPONSE:

The Department agrees that it is critical to provide instruction that is both developmentally and instructionally appropriate. The Department has limited the waiver's availability to districts with low English Language Learner enrollment of thirty or less students district-wide. Districts seeking the waiver will be required to provide key demographic information such as the total number and percentage of ELLs in the district as well as in particular schools, and the number of available certified BE and English for speakers of other languages ("ESOL") teachers to serve them. Districts will also be required to submit a justification explaining how they will ensure that all ELLs receive appropriate support if a waiver is granted, as well as the efforts the district has made to comply with the two grade span requirement of section 154-2.3(i) given its current staffing.

The Department also issued an accompanying guidance document entitled "School District Justification to Expand the Maximum Allowable Grade Span to Three Contiguous Grades in 1-12 English as a New Language (ENL) or Bilingual Education (BE) Classes." Contained in this guidance are questions and answers regarding which districts qualify for the waiver, best practices and guidance regarding instructional grouping practices, and recommended solutions for common challenges. The Department is also available for technical assistance and support as districts implement this temporary waiver.

2. COMMENT:

Two commenters expressed support for the regulation, on account of benefits to smaller districts and schools. One commenter expressed that the regulation will help smaller schools which may not have sufficient resources to meet the two grade span requirement. The commenter further expressed that developmental differences may not be as great in higher grades and that differences in instructional needs can be accommodated by differentiation of lesson plans. Another commenter observed that in small districts, English as a New Language teachers often have to work in more than one school or even more than one district and across many grades, in which case it can be instructionally beneficial to group students based on proficiency across multiple grades.

DEPARTMENT RESPONSE:

It is not necessary for the Department to respond as these comments are in support of the proposed regulation.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Administration of Certain Vaccines by Pharmacy Interns

I.D. No. EDU-05-19-00016-EP

Filing No. 24

Filing Date: 2019-01-15

Effective Date: 2019-01-15

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

Proposed Action: Amendment of sections 63.4 and 63.9 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2), 6527(7), 6801(2), (4), 6802(22), 6806, 6902(1), 6909(7); L. 2018, ch. 359

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

Specific reasons underlying the finding of necessity: The proposed amendment to the Regulations of the Commissioner of Education is necessary to implement chapter 359 of the Laws of 2018 (chapter 359), which amended Education Law section 6806, effective December 7, 2018, to allow the administration of immunizations by a pharmacy intern, certified to administer immunizations, under the immediate and personal supervision of a licensed pharmacist certified to immunize. Chapter 359 was enacted, in part, to make immunizations more readily available and to provide certified pharmacy interns with valuable hands on clinical experience, while under the oversight and supervision of a licensed pharmacist, who is certified to administer immunizations.

Chapter 359 permits a pharmacy intern to receive a certificate of administration which permits administration of immunizations under the immediate and personal supervision of a licensed pharmacist certified to administer immunizations; establishes procedures and requirements for a pharmacy intern to receive a certificate of administration; and requires a patient to be informed that a pharmacy intern, certified to administer immunizations, will be administering the immunization and that the patient must be given the option of having the immunization administered by the certified pharmacist.

Chapter 359 directs the Commissioner to promulgate regulations that establish standards for training of a pharmacy intern in the following areas:

techniques for screening individuals and obtaining informed consent; techniques of administration; indications, precautions and contraindications in the use of an agent or agents; recordkeeping of immunization and information; and handling emergencies, including anaphylaxis and needlestick injuries. Chapter 359 also requires the Commissioner to promulgate rules and regulations relating to the documentation required from the dean or other appropriate official of the registered program that the pharmacy intern has completed the required training.

The proposed addition of subdivision (d) to section 63.4 of the Regulations of the Commissioner of Education establishes the requirements for a pharmacy intern to obtain a certificate to administer immunizations and establishes the required training coursework for such certification.

The proposed amendment to subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education authorizes a certified pharmacist to delegate the administration of immunizations to a pharmacy intern that is properly trained and certified to administer immunizations under the immediate personal supervision of the certified pharmacist.

In addition, the proposed amendment to subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education requires the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, to be informed when a certified pharmacy intern will be administering the immunization and consent to it. The proposed amendment further provides that, if the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, does not consent, then the certified pharmacist will administer the immunization.

Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for permanent adoption, after expiration of the required 60-day comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), would be the May 6-9, 2019 Regents meeting. Furthermore, pursuant to SAPA 203(1), the earliest effective date of the proposed rule, if adopted at the May meeting would be May 22,2019, the date the Notice of Adoption would be published in the State Register.

Therefore, emergency action is necessary at the January 2019 meeting for the preservation of the public health and general welfare in order to immediately conform the Regulations of the Commissioner of Education to the requirements of Chapter 359, which is already in effect, to, inter alia, authorize the administration of immunizations by a pharmacy intern, certified to administer immunizations, after completing required training, under the immediate and personal supervision of a licensed pharmacist certified to administer immunizations, in order to improve the public's access to immunizations and provide certified pharmacy interns with valuable hands on clinical experience.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the May 2019 Regents meeting, which is the first scheduled meeting after the 60-day public comment period prescribed in SAPA for State agency rule makings.

Subject: Administration of certain vaccines by pharmacy interns.

Purpose: To implement the provisions of chapter 359 of the Laws of 2018.

Text of emergency/proposed rule: 1. Subdivision (d) of section 63.4 of the Regulations of the Commissioner of Education is added, as follows:

(d) Requirements for a certificate to administer immunizations. No pharmacy intern shall administer immunizing agents without a certificate of administration issued by the department. For purposes of this section, a certified pharmacy intern shall mean a limited permit holder who is issued a certificate of administration pursuant to this subdivision. To meet the requirements for a certificate of administration, the pharmacy intern shall submit an application, on a form prescribed by the department. Each application shall contain an attestation by the dean, or other appropriate official of the registered program that the applicant has completed the required training, as specified in section 6808 of the Education Law, and present satisfactory evidence of completion of the requirements set forth in one of the following subparagraphs:

(1) Training course. Completion of a training course in the administration of immunizations acceptable to the Commissioner and the Commissioner of Health, within the three years immediately preceding application for a certificate of administration. Such course shall include, but not be limited to, instruction in:

(i) techniques for screening patients and for obtaining informed consent;

(ii) techniques in the administration of immunizing agents, including the injection of a harmless, non-medicinal saline solution into voluntary recipients;

(iii) indications, precautions and contraindications in the use of immunizing agents;

(iv) handling of emergencies including needlestick injuries and anaphylaxis, including the use of medications required for emergency treatment of anaphylaxis;

(v) cardio-pulmonary resuscitation techniques; and

(vi) recordkeeping and reporting of immunizations and information; or

(2) A pharmacy intern that has completed a training course associated with Doctor of Pharmacy degree pursuant to the requirements in section 63.9(b)(3)(ii).

2. Subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education is amended, as follows:

(b) Immunizations

(1) …

(2) …

(3) …

(4) With the exception of a certified pharmacy intern, a certified pharmacist shall not delegate the administration of immunizations to another person. For purposes of this section, a certified pharmacy intern shall mean a pharmacy intern who is certified to administer immunization as specified in section 6808 of the Education Law and has completed the requirements set forth in subdivision (d) of section 63.4 of this Part. Such a certified pharmacy intern may only administer immunizations under the immediate personal supervision of the certified pharmacist.

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

(i) . . .

(ii) . . .

(iii) . . .

(iv) . . .

(v) a certified pharmacist shall not allow a certified pharmacy intern to administer immunizations unless the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, is informed that the pharmacy intern will be administering the immunization and the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, consents to administration of the immunization by the certified pharmacy intern. If the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, does not consent to administration by the certified pharmacy intern, then the option to receive the immunization from a certified pharmacist shall be provided.

[(v)] *(vi)* a certified pharmacist shall provide written instructions to the recipient regarding the appropriate course of action in the event of contraindications or adverse reactions, which statements are required to be developed by a competent entity knowledgeable about the adverse reactions of the immunization agent which shall be administered, such as the Centers for Disease Control of the U.S. Department of Health and Human Services, which issues vaccine information statements;

[(vi)] *(vii)* a certified pharmacist, when administering an immunization in a pharmacy, shall provide for an area that provides for the patient's privacy, such area shall include:

(a) a clearly visible posting of the most current "Recommended Adult Immunization Schedule" published by the advisory committee for immunization practices (ACIP); and [the certified pharmacist shall provide a copy of the appropriate vaccine information statement to the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, before administering the immunization;

(b) education materials on influenza vaccines for children as determined by the commissioner and the commissioner of the department of health.

[(vii)] *(viii)* a certified pharmacist shall provide a copy of the appropriate vaccine information statement to the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, before administering the immunization;

[viii] *(ix)* a certified pharmacist shall provide to each recipient or other person legally responsible when the recipient is incapable of consenting to immunization, a signed certificate of immunization with the recipient's name, date of immunization, address of administration, administering pharmacist, immunization agent, manufacturer and lot number. With the consent of the recipient or a person legally responsible when the recipient is incapable of consenting, the certified pharmacist shall communicate this information to the recipient's primary health care practitioner, if one exists, within one month of the administration of such immunization, and such communication may be transmitted in electronic format;

[(ix)] *(x)* a certified pharmacist shall report any adverse outcomes as may be required by Federal law on the vaccine adverse event reporting system form of the Centers for Disease Control of the U.S. Department of Health and Human Services, or on the successor form;

[(x)] *(xi)* a certified pharmacist shall ensure that a record of all

persons immunized including the recipient's name, date, address of administration, administering pharmacist, immunization agent, manufacturer and lot number is recorded and maintained in accordance with section 29.2(a)(3) of this Title;

[(xi)] *(xii)* to the extent required by the Public Health Law, the Education Law and/or the New York City Health Code, a certified pharmacist shall report the administration of any immunizations to the New York State Department of Health and/or the New York City Department of Health and Mental Hygiene, in a manner required by the Commissioner of Health of the State of New York or of the City of New York, as applicable. Such report shall not include any individually identifiable health information unless:

(a) such information is otherwise required by law; or

(b) the recipient has consented to the disclosure of such information, in which case the information may be included to the extent permitted by law; and

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

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

[(xiv)] *(xv)* Reporting of administration of immunizing agent;

(a) when a licensed pharmacist administers an immunizing agent, he or she shall report such administration by electronic transmission or facsimile to the patient's attending primary health care practitioner or practitioners, if any, unless the patient is unable to communicate the identity of his or her primary health care practitioner, and, to the extent practicable, make himself or herself available to discuss the outcome of such immunization, including any adverse reactions, with the attending primary health care practitioner, or to the statewide immunization registry or the citywide immunization registry, as established pursuant to sections 2168 of the Public Health Law and 11.07 of the New York City Health Code, respectively.

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 April 14, 2019.

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

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

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:

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

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

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

Subdivision (7) of section 6527 of the Education Law authorizes physicians to prescribe and order a patient specific order or non-patient specific regimen to a licensed pharmacist for administering immunizations to prevent, inter alia, influenza and pneumococcal disease and medications required for emergency treatment of anaphylaxis.

Section 6801 of the Education Law defines the practice of the profession of pharmacy and establishes various requirements relating to the administration of immunizations by licensed pharmacists, including, inter alia, the training requirements licensed pharmacists must satisfy to become certified to administer immunizations, reporting requirements for all vaccines administered by certified pharmacists and requirements regarding the provision of information by the certified pharmacist, regarding the immunization, to either the patient or the person legally responsible for the patient, as well as the requirement that a certified pharmacist, when administering an immunization in a pharmacy, provide for an area that provides for the patient's privacy.

Paragraphs (a) and (b) of subdivision (22) of section 6802 of the Education Law defines the terms administer and immunizing agent and authorizes licensed pharmacists to execute patient specific and non-patient specific orders prescribed by a licensed physician or certified nurse practitioner to administer immunizations to prevent influenza, pneumococcal, acute herpes zoster, meningococcal, tetanus, diphtheria or pertussis disease and medications required for emergency treatment of anaphylaxis to adults and influenza immunizations to children between two and eighteen years of age and medications required for emergency treatment of anaphylaxis resulting from such immunizations.

Subdivision (2) of section 6806 of the Education Law, as amended by Chapter 359 of the Laws of 2018, provides that a pharmacy intern may receive a certificate of administration if he or she provides satisfactory evidence to the Commissioner the he or she meets the requirements in subdivision (3) of section 6806 of the Education Law, as amended by Chapter 359 of the Laws of 2018.

Subdivision (3) of section 6806 of the Education Law, as amended by Chapter 359 of the Laws of 2018, directs the Commissioner, in consultation with the Commissioner of the State Department of Health, to promulgate regulations that establish standards for training of a pharmacy intern, seeking a certificate of administration, in the following areas: techniques for screening individuals and obtaining informed consent; techniques of administration; indications, precautions and contraindications in the use of an agent or agents; recordkeeping of immunization and information; and handling emergencies, including anaphylaxis and needlestick injuries. Chapter 359 also requires that to receive a certificate of administration, a pharmacy intern must submit an application, on a form prescribed by the State Education Department, from the dean or other appropriate official of the registered program that the intern has completed the required training pursuant to the Commissioner's Regulations.

Subdivision (6) of section 6806 of the Education Law, as amended by Chapter 359 of the Laws of 2018, provides that a pharmacy intern, certified to administer immunizations, can only administer immunizations under the immediate personal supervision of a licensed pharmacist certified to administer vaccines; and requires that the person receiving the vaccine must be informed that a pharmacy intern, certified to administer immunizations, will be administering the vaccine and advise him or her that he or she has the option to receive the immunization from a certified pharmacist instead. Paragraph (1) of section 6902 of the Education Law defines the practice of the profession of nursing for registered professional nurses.

Subdivision (7) of section 6909 of the Education Law authorizes nurse practitioners to prescribe and order a patient specific order or non-patient specific regimen to a licensed pharmacist for administering immunizations to prevent, inter alia, influenza.

2. LEGISLATIVE OBJECTIVES:

The proposed rule is necessary to conform the Regulations of the Commissioner of Education to Chapter 359 of the Laws of 2018.

3. NEEDS AND BENEFITS:

Pharmacists licensed in New York State were first authorized to administer immunizations to prevent influenza and pneumococcal disease in December 2008. In order to administer such immunizations, a pharmacist must be certified by the Department following completion of a satisfactory training program. Since that time, more than 14,800 registered pharmacists in New York State have received the required certification. In 2012 and 2013, vaccinations against acute herpes zoster (shingles) and meningococcal disease, respectively, were added to the types of immunizations that appropriately certified pharmacists are authorized to administer. Additionally, in 2018, pharmacists were authorized to administer seasonal influenza immunizations to children between two and eighteen years of age.

The proposed rule implements Chapter 359 of the Laws of 2018 (Chapter 359), which, effective December 7, 2018, inter alia, amended Education Law section 6806 to allow the administration of immunizations by certain pharmacy interns who are certified to administer immunizations under the immediate and personal supervision of a licensed pharmacist certified to immunize. Chapter 359 was enacted, in part, to make immunizations more readily available and to provide certified pharmacy interns with valuable hands-on clinical experience, while under the oversight and supervision of a licensed pharmacist, who is certified to administer immunizations.

Chapter 359 permits a pharmacy intern to receive a certificate of administration which permits administration of immunizations under the immediate and personal supervision of a licensed pharmacist certified to administer immunizations; establishes procedures and requirements for a pharmacy intern to receive a certificate of administration; and requires a

patient to be informed that a pharmacy intern, certified to administer immunizations, will be administering the immunization and that the patient be given the option to have the immunization administered by the certified pharmacist.

Chapter 359 directs the Commissioner to promulgate regulations that establish standards for training of a pharmacy intern in the following areas: techniques for screening individuals and obtaining informed consent; techniques of administration; indications, precautions and contraindications in the use of an agent or agents; recordkeeping of immunization and information; and handling emergencies, including anaphylaxis and needlestick injuries. Chapter 359 also requires that to receive a certificate of administration, a pharmacy intern must submit an application, on a form prescribed by the State Education Department, from the dean or other appropriate official of the registered program that the intern has completed the required training pursuant to the Commissioner's Regulations.

The proposed addition of subdivision (d) to section 63.4 of the Regulations of the Commissioner of Education establishes the requirements for a pharmacy intern to obtain a certificate to administer immunizations and establishes the required training for such certification. Additionally, as required by Chapter 359, Department staff have consulted with the New York State Department of Health regarding these proposed training requirement provisions.

The proposed amendment to subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education authorizes a certified pharmacist to delegate the administration of immunizations to a pharmacy intern who is properly trained and certified to administer immunizations under the immediate personal supervision of the certified pharmacist.

In addition, the proposed amendment to subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education requires the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, to be informed when a certified pharmacy intern will be administering the immunization and consent to it. The proposed amendment further provides that, if the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, does not consent, then the certified pharmacist will administer the immunization.

4. COSTS:

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

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

(c) Cost to private regulated parties. There are no mandatory costs to private regulated parties.

(d) Cost to the regulatory agency: There are no additional costs to the Department.

5. LOCAL GOVERNMENT MANDATES:

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

6. PAPERWORK:

The proposed rule does not impose any paperwork mandates because it does not require pharmacy interns to become certified to administer immunizations. For pharmacy interns, who choose to become certified to administer immunizations, they can only administer immunizations under the immediate personal supervision of a licensed pharmacist, who is certified to administer immunizations, this pharmacist would be responsible for complying with any of the reporting, recordkeeping or other requirements that certified licensed pharmacists must comply with when administering immunizations. For instance, such a pharmacist, pursuant to the provisions of section 63.9(b)(4), would be required to, inter alia, ensure that that the immunizations administered by pharmacy interns under his or her immediate personal supervision are reported to the patient's attending primary health care practitioner, and to the New York State Immunization Information System or if administered in New York City, to the Citywide Immunization Registry, as required by the Public Health Law or the New York City Health Code.

7. DUPLICATION:

There is no other state or federal requirements on the subject matter of the proposed rule. Therefore, the amendment does not duplicate other existing state or federal requirements.

8. ALTERNATIVES:

The proposed rule is necessary to conform the Regulations of the Commissioner of Education to Chapter 359 of the Laws of 2018. There are no significant alternatives to the proposed rule and none were considered.

9. FEDERAL STANDARDS:

There are no applicable federal standards for authorizing pharmacy interns, who are certified to administer immunization under the immediate personal supervision of a licensed pharmacist, who is certified to administer immunizations, to administer immunizations to patients, pursuant to patient specific or non-patient specific orders prescribed by a licensed physician or certified nurse practitioner.

10. COMPLIANCE SCHEDULE:

It is anticipated that the regulated parties will be able to comply with the proposed rule by the effective date.

Regulatory Flexibility Analysis

The purpose of the proposed rule is to implement Chapter 359 of the Laws of 2018 (Chapter 359), which, effective December 7, 2018, inter alia, amended Education Law section 6806 to allow the administration of immunizations by certain pharmacy interns who are certified to administer immunizations under the immediate and personal supervision of a licensed pharmacist certified to immunize. Chapter 359 was enacted, in part, to make immunizations more readily available and to provide certified pharmacy interns with valuable hands-on clinical experience, while under the oversight and supervision of a licensed pharmacist, who is certified to administer immunizations.

Chapter 359 permits a pharmacy intern to receive a certificate of administration which permits administration of immunizations under the immediate and personal supervision of a licensed pharmacist certified to administer immunizations; establishes procedures and requirements for a pharmacy intern to receive a certificate of administration; and requires a patient to be informed that a pharmacy intern, certified to administer immunizations, will be administering the immunization and that the patient be given the option to have the immunization administered by the certified pharmacist.

Chapter 359 directs the Commissioner to promulgate regulations that establish standards for training of a pharmacy intern in the following areas: techniques for screening individuals and obtaining informed consent; techniques of administration; indications, precautions and contraindications in the use of an agent or agents; recordkeeping of immunization and information; and handling emergencies, including anaphylaxis and needlestick injuries. Chapter 359 also requires that to receive a certificate of administration, a pharmacy intern must submit an application, on a form prescribed by the State Education Department, from the dean or other appropriate official of the registered program that the intern has completed the required training pursuant to the Commissioner's Regulations.

The proposed addition of subdivision (d) to section 63.4 of the Regulations of the Commissioner of Education establishes the requirements for a pharmacy intern to obtain a certificate to administer immunizations and establishes the required training for such certification. Additionally, as required by Chapter 359, Department staff have consulted with the New York State Department of Health regarding these proposed training requirement provisions.

The proposed amendment to subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education authorizes a certified pharmacist to delegate the administration of immunizations to a pharmacy intern who is properly trained and certified to administer immunizations under the immediate personal supervision of the certified pharmacist.

In addition, the proposed amendment to subdivision (b) of section 63.9 of the Regulations of the Commissioner of Education requires the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, to be informed when a certified pharmacy intern will be administering the immunization and consent to it. The proposed amendment further provides that, if the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, does not consent, then the certified pharmacist will administer the immunization.

The proposed rule does not impose any new reporting, recordkeeping, or other compliance requirements on local governments or have any adverse economic impact on small businesses or local governments. Because it is evident from the nature of the proposed amendment that it will not adversely affect small businesses or local governments, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required, and one has not been prepared.

Rural Area Flexibility Analysis

The purpose of the proposed amendment is to implement Chapter 359 of the Laws of 2018 (Chapter 359), which, effective December 7, 2018, inter alia, amended Education Law section 6806 to allow the administration of immunizations by certain pharmacy interns who are certified to administer immunizations under the immediate and personal supervision of a licensed pharmacist certified to immunize. Chapter 359 was enacted, in part, to make immunizations more readily available and to provide certified pharmacy interns with valuable hands-on clinical experience, while under the oversight and supervision of a licensed pharmacist, who is certified to administer immunizations. Chapter 359 permits a pharmacy intern to receive a certificate of administration which permits administration of immunizations under the immediate and personal supervision of a licensed pharmacist certified to administer immunizations; establishes procedures and requirements for a pharmacy intern to receive a certificate of

administration; and requires a patient to be informed that a pharmacy intern, certified to administer immunizations, will be administering the immunization and that the patient be given the option to have the immunization administered by the certified pharmacist.

Chapter 359 directs the Commissioner to promulgate regulations that establish standards for training of a pharmacy intern in the following areas: techniques for screening individuals and obtaining informed consent; techniques of administration; indications, precautions and contraindications in the use of an agent or agents; recordkeeping of immunization and information; and handling emergencies, including anaphylaxis and needlestick injuries. Chapter 359 also requires that to receive a certificate of administration, a pharmacy intern must submit an application, on a form prescribed by the State Education Department, from the dean or other appropriate official of the registered program that the intern has completed the required training pursuant to the Commissioner's Regulations.

The proposed amendment implements Chapter 359 by establishing the requirements for a pharmacy intern to obtain a certificate to administer immunizations, including, but not limited to, the required training for such certification, authorizing a certified pharmacist to delegate the administration of immunizations to a pharmacy intern who is properly trained and certified to administer immunizations under the immediate personal supervision of the certified pharmacist, requiring the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, to be informed when a certified pharmacy intern will be administering the immunization and consent to it, and providing that, if the recipient, or the person legally responsible for the recipient when the patient is incapable of consenting to the immunization, does not consent, then the certified pharmacist will administer the immunization.

Chapter 359 does not provide any exceptions from these requirements for pharmacy interns, pharmacists, and pharmacies located in rural areas. Thus, the proposed amendment does not impact entities in rural areas of New York State because all New York State pharmacy interns, pharmacists, and pharmacies must comply with the same requirements. Accordingly, no further steps were needed to ascertain the impact of the proposed amendment on entities in rural areas and none were taken. Thus, a rural flexibility analysis is not required, and one has not been prepared.

Job Impact Statement

It is not anticipated that the propose rule will not impact jobs or employment opportunities. This is because the proposed amendment implements Chapter 359 of the Laws of 2018 (Chapter 359) by authorizing the administration of immunizations by certain pharmacy interns who are certified to administer immunizations under the immediate and personal supervision of a licensed pharmacist certified to immunize. Chapter 359 permits a pharmacy intern to receive a certificate of administration which permits administration of immunizations under the immediate and personal supervision of a licensed pharmacist certified to administer immunizations; establishes procedures and requirements for a pharmacy intern to receive a certificate of administration; and requires a patient to be informed that a pharmacy intern, certified to administer immunizations, will be administering the immunization and that the patient be given the option to have the immunization administered by the certified pharmacist. Chapter 359 directs the Commissioner to promulgate regulations that establish standards for training of a pharmacy intern in the following areas: techniques for screening individuals and obtaining informed consent; techniques of administration; indications, precautions and contraindications in the use of an agent or agents; recordkeeping of immunization and information; and handling emergencies, including anaphylaxis and needlestick injuries. Chapter 359 also requires that to receive a certificate of administration, a pharmacy intern must submit an application, on a form prescribed by the State Education Department, from the dean or other appropriate official of the registered program that the intern has completed the required training pursuant to the Commissioner's Regulations. Therefore, any impact on jobs or employment opportunities created by the proposed amendment is attributable to the statutory requirements, not the proposed amendment, which simply establishes standards that conform the requirements to the statute.

The proposed amendment will not have a substantial adverse impact on jobs and employment opportunities. Because it is evident from the nature of the proposed amendment that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Assessments and Student Official Transcripts and Permanent Records

I.D. No. EDU-05-19-00017-EP
Filing No. 25
Filing Date: 2019-01-15
Effective Date: 2019-01-15

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

Proposed Action: 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 public health and general welfare.

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to continue the effectiveness of the Commissioner's regulations for the purpose of implementing the provisions of Education Law § 305(45) and (46) as added by Part AA, Subpart B of Chapter 56 of the Laws of 2014 and as amended by Section 35 of Part CCC of Chapter 59 of the Laws of 2018.

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 60-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 201(1) and (5), would be the May 2019 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed rule, if adopted at the May 2019 meeting, would be May 22, 2019, the date a Notice of Adoption would be published in the State Register.

Therefore, emergency action is necessary at the January 2019 Regents meeting for the preservation of the general welfare to timely implement the provisions of section 35 of Part CCC of Chapter 59 of the Laws of 2018.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the May Regents meeting, which is the first scheduled meeting after expiration of the 60-day public comment period prescribed in the SAPA for State agency rule makings.

Subject: Assessments and Student Official Transcripts and Permanent Records.

Purpose: To continue the effectiveness of part AA, subpart B of ch.56, L. 2014 as amended by section 35 of part CCC of ch. 56, L.2018.

Text of emergency/proposed 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] *December 31, 2019*:

(a) 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 purposed 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 proposed rule making. The emergency rule will expire April 14, 2019.

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

Data, views or arguments may be submitted to: Jhone M. Ebert, Senior

Deputy Commissioner, Education Policy, New York State Education Department, 89 Washington Avenue, Room 2M West, Albany, NY 12234, (518) 474-3862, email: regcomments@nysed.gov

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:

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 P{art 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.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority 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.

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.

However, 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 are necessary to extend these provisions an additional year to timely implement the legislation.

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 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 Chapter 56 of the Laws of 2014, as amended by Chapter 59 of the Laws of 2018, 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 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, for the period commencing on April 1, 2014 and expiring on December 31, 2019, 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.

8. ALTERNATIVES:

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. 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 Chapter 56 of the Laws of 2014, as amended by Chapter 59 of the Laws of 2018.

Regulatory Flexibility Analysis

(a) Small businesses:

The proposed amendment will not impose any additional compliance requirements and is necessary to 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 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 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.

However, 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 are necessary to extend these provisions an additional year to timely implement the legislation.

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 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 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.

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 Chapter 56 of the Laws of 2014, as amended by Chapter 59 of the Laws of 2018, 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, for the period commencing on April 1, 2014 and expiring on December 31, 2019, 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 Chapter 56 of the Laws of 2014, as amended by Chapter 59 of the Laws of 2018, 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 Chapter 56 of the Laws of 2014, as amended by Chapter 59 of the Laws of 2018, 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.

Job Impact Statement

The proposed rule 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 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.

NOTICE OF ADOPTION

Certificate Progression Pathway

I.D. No. EDU-40-18-00007-A
Filing No. 21
Filing Date: 2019-01-15
Effective Date: 2019-01-30

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

Action taken: Amendment of section 80-3.7 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207, 205, 3001, 3004 and 3006

Subject: Certificate Progression Pathway.

Purpose: Initial Certificate Requirements for Individuals Who Have a Graduate Degree and Two Years of Postsecondary Teaching Experience.

Text or summary was published in the October 3, 2018 issue of the Register, I.D. No. EDU-40-18-00007-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 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

P-20 Principal Preparation Pilot Program

I.D. No. EDU-40-18-00008-A
Filing No. 23
Filing Date: 2019-01-15
Effective Date: 2019-01-30

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 80-3.10 of Title 8 NYCRR.

Statutory authority: Education Law, sections 102, 207, 305, 3004, 3006, 3006-a and 3009

Subject: P-20 Principal Preparation Pilot Program.

Purpose: To establish the requirements for the P-20 Principal Preparation Pilot Program.

Text or summary was published in the October 3, 2018 issue of the Register, I.D. No. EDU-40-18-00008-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 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

School Breakfast Programs

I.D. No. EDU-40-18-00011-A

Filing No. 27

Filing Date: 2019-01-15

Effective Date: 2019-01-30

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

Action taken: Amendment to section 114.1 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided), 209(not subdivided), 305(1), (2); L. 1976, ch. 537, sections 4 and 5 as amended by L. 2018, ch. 56

Subject: School Breakfast Programs.

Purpose: To initiate, maintain, or expand school breakfast programs and make technical amendments to conform to Federal requirements.

Text or summary was published in the October 3, 2018 issue of the Register, I.D. No. EDU-40-18-00011-EP.

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

Text of rule and any required statements and analyses may be obtained from: Kirti Goswami, New York State Education Department, Office of Counsel, 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 Action and Proposed Rule Making in the State Register on October 3, 2018, the State Education Department received the following comments:

1. COMMENT:

Most commenters applauded the Department's overall efforts to require all public elementary or secondary schools with at least 70 percent or more of its students eligible for free or reduced–price meals under the National School Lunch Program to offer all students a school breakfast after the instructional day has begun, referred to as Breakfast After the Bell, beginning in the 2018-19 school year, and each school year thereafter.

DEPARTMENT RESPONSE:

No response is necessary, as the comments are supportive.

2. COMMENT:

Some commenters advocated that this rulemaking should apply to charter schools.

DEPARTMENT RESPONSE:

The rulemaking implements the statutory requirements and expressly applies to all public elementary or secondary schools, not including charter schools authorized by Article 56 of the Education Law, with at least 70 percent or more of its students eligible for free or reduced–price meals under the National School Lunch Program. The rulemaking implements the requirements of the statute and is necessary to conform the Regulations of the Commissioner to Section 2 of Part B of Chapter 56 of the Laws of 2018. Thus, no revisions are necessary.

3. COMMENT:

Some commenters advocated for stronger language in the rulemaking to allow schools that are required to implement a Breakfast after the Bell program to have the ability to implement a Breakfast after the Bell program that best "removes barriers to breakfast participation" and "increases access to school breakfast." One commenter suggested the rulemaking specifically define breakfast service delivery models including "Breakfast in the classroom," "Grab and Go" and "Second Chance Breakfast."

DEPARTMENT RESPONSE:

The rulemaking implements the requirements of the statute, which provides that schools which are required to implement a Breakfast After the Bell program must consult with teachers, parents, students, and members of the community to determine the breakfast service delivery model(s) that best suits its students. The language in the statue also provides that service delivery models may include, but are not limited to, breakfast in the classroom, grab and go breakfast, and second chance breakfast, which would include breakfast served in the cafeteria. The Department has issued guidance and best practices for this initiative and anticipates updating such guidance and best practices in the future, as necessary. Therefore, no revisions are necessary.

4. COMMENT:

Some commenters requested additional language be provided in this rulemaking to clarify and strengthen the requirements for schools seeking waivers from the requirements for establishing a Breakfast after the Bell program.

DEPARTMENT RESPONSE:

The rulemaking is consistent with the statute and necessary to conform the regulations to Section 2 of Part B of Chapter 56 of the Laws of 2018 which provides that affected schools may annually apply to the Commissioner for a waiver from establishing a school breakfast program, which may be granted upon a demonstration of: (1) a lack of need for a Breakfast after the Bell program because of a successful existing breakfast program; or (2) providing a Breakfast after the Bell program would cause economic hardship for the school. The Department has issued guidance and best practices for this initiative and anticipates updating such guidance and best practices in the future, as necessary. Thus, no revisions are necessary at this time.

5. COMMENT:

One commenter suggested that schools required to implement a Breakfast after the Bell program be required to "establish and adopt a school board policy to ensure student access to school breakfast."

DEPARTMENT RESPONSE:

This comment is outside the scope of the statutory requirements. Accordingly, no change to the regulation is needed.

NOTICE OF ADOPTION

Prohibition Against Meal Shaming

I.D. No. EDU-40-18-00012-A

Filing No. 26

Filing Date: 2019-01-15

Effective Date: 2019-01-30

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

Action taken: Addition of section 114.5 to Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided), 209(not subdivided), 305(1), (2) and 908 as added by L. 2018, ch. 56, part B, section 1

Subject: Prohibition against meal shaming.

Purpose: Requires certain schools to develop a plan to prohibit against meal shaming or treating pupils with unpaid meal fees differently.

Text of final rule: 1. That the emergency action taken at the September 2018 Board of Regents meeting to add a new section 114.5 of the Regulations of the Commissioner of Education be repealed, effective December 11, 2018.

2. A new section 114.5 is added to the Regulations of the Commissioner of Education as follows:

§ 114.5 Prohibition against meal shaming.

(a) All public school districts, charter schools and non-public schools in the state that participate in the National School Lunch Program or School Breakfast Program in which there is a school at which all pupils are not eligible to be served breakfast and lunch under the Community Eligibility Provision or Provision Two of the federal National School Lunch Act, 42 U.S.C. Sec. 1751 et seq., shall develop a plan to ensure that a pupil whose parent or guardian has unpaid school meal fees is not

shamed or treated differently than a pupil whose parent or guardian does not have unpaid school meal fees. The plan shall be submitted to the Commissioner by July 1, 2018 in conformance with this section. After submission of such plan, the school or school district shall adopt and post the plan on its website.

(b) The plan shall include, but not be limited to, the following elements:

(1) a statement that the school or school district shall provide the student with the student's meal of choice for that school day of the available reimbursable meal choices for such school day, if the student requests one, unless the student's parent or guardian has specifically provided written permission to the school to withhold a meal, provided that the school or school district shall only be required to provide access to reimbursable meals, not a la carte items, adult meals, or other similar items;

(2) an explanation of how staff will be trained to ensure that the school or school district's procedures are carried out correctly and how the affected parents and guardians will be provided with assistance in establishing eligibility for free or reduced-price meals for their children;

(3) procedures requiring the school or school district to notify the student's parent or guardian that the student's meal card or account balance is exhausted and unpaid meal charges are due. The notification procedures may include a repayment schedule, but the school or school district may not charge any interest or fees in connection with any meals charged;

(4) a communication procedure designed to support eligible families enrolling in the National School Lunch Program or School Breakfast Program. Such communication procedures shall also include a process for determining eligibility when a student owes money for five or more meals, wherein the school or school district shall:

(i) make every attempt to determine if a student is directly certified to be eligible for free meals;

(ii) make at least two attempts, not including the application or instructions included in a school enrollment packet, to reach the student's parent or guardian and have the parent or guardian fill out a meal application; and

(iii) require a school or school district to contact the parent or guardian to offer assistance with a meal application, determine if there are other issues within the household that have caused the child to have insufficient funds to purchase a school meal and offer any other assistance that is appropriate;

(5) a clear explanation of procedures designed to decrease student distress or embarrassment, provided that, no school or school district shall:

(i) publicly identify or stigmatize a student who cannot pay for a meal or who owes a meal debt by any means including, but not limited to, requiring that a student wear a wristband or hand stamp;

(ii) require a student who cannot pay for a meal or who owes a meal debt to do chores or other work to pay for meals;

(iii) require that a student throw away a meal after it has been served because of the student's inability to pay for the meal or because money is owed for earlier meals;

(iv) take any action directed at a pupil to collect unpaid school meal fees. A school or school district may attempt to collect unpaid school meal fees from a parent or guardian, but shall not use a debt collector, as defined in Section 803 of the Federal Consumer Credit Protection Act, 15 U.S.C. Sec. 1692a; or

(v) discuss any outstanding meal debt in the presence of other students;

(6) a clear explanation of the procedure to handle unpaid meal charges, provided that nothing in this section is intended to allow for the unlimited accrual of debt;

(7) procedures to enroll in the free and reduced price lunch program, provided that such procedures shall include that, at the beginning of each school year, a school or school district shall provide a free, printed meal application in every school enrollment packet, or if the school or school district chooses to use an electronic meal application, provide in school enrollment packets an explanation of the electronic meal application process and instructions for how parents or guardians may request a paper application at no cost;

(c) if a school or school district becomes aware that a student who has not submitted a meal application is eligible for free or reduced-fee meals, the school or school district shall complete and file an application for the student pursuant to title 7 CFR 245.6(d) (Code of Federal Regulations, 2018 edition, Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001: 2018—available at Office for Counsel, New York State Education Building, Room 148, 89 Washington Avenue, Albany, NY 12231); and

(d) school liaisons required for homeless, foster, and migrant students shall coordinate with the nutrition department to make sure such students receive free school meals, in accordance with federal law.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 114.5(b)(4).

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 122234, (518) 473-2183, email: legal@nysed.gov

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

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on October 3, 2018 and publication of a Notice of Emergency Adoption in the State Register on December 26, 2018, the following nonsubstantive revisions were made to the proposed rule:

- § 114.5(b)(4) was amended to reflect the correct title of the Federal Child Nutrition Program.

The above revisions to the proposed rule do not require any revisions to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2021, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

As of December 3, 2018, the Department has received the following comments:

1. COMMENT:

Several commenters expressed the position that the regulation restricts food service staff from communicating with students or informing them of their school food balances. According to a few commenters "until this law we were able to talk to students about their accounts by reminding them they are getting low on funds or that would you please tell your parent you need to bring in money. It was handled in a delicate and meaningful way. You should be able to take into consideration the age of the child and gauge your discussion with the student accordingly. Now that we cannot say anything to the student they think there is money on their account because we are not asking them for money when they purchase a meal." Many commenters expressed concern that they are expressly prohibited from having any communication with a child relative to school meals. One commenter applauded the Department's overall efforts to require schools to have a policy prohibiting meal shaming but advocated for stronger language in the rulemaking to expressly prohibit schools from communicating with children relative to their meal accounts and require schools to communicate with "only the parent or guardian of the household."

DEPARTMENT RESPONSE:

It appears that these commenters misunderstood the intent of Education Law § 908, as added by Section 1 of Part B of Chapter 56 of the Laws of 2018, and this rulemaking. The statute and rulemaking do not expressly prohibit school food staff from communicating with the child regarding school meals; however, the statute and regulation require the school to develop a plan to ensure that a pupil whose parent or guardian has unpaid school meal fees is not shamed or treated differently than a pupil whose parent or guardian does not have unpaid school meal fees. The language in the statute and regulation specifically states that such plans must include a clear explanation of procedures designed to decrease student distress or embarrassment, provided that, no school or school district shall: publicly identify or stigmatize a student who cannot pay for a meal or who owes a meal debt by any means including, but not limited to, requiring that a student wear a wristband or hand stamp; require a student who cannot pay for a meal or who owes a meal debt to do chores or other work to pay for meals; require that a student throw away a meal after it has been served because of the student's inability to pay for the meal or because money is owed for earlier meals; take any action directed at a pupil to collect unpaid school meal fees; or discuss any outstanding meal debt in the presence of other students. This is not an all-inclusive ban on communication with the student; however, school staff must be mindful of their language and manner, understanding of the child and the presence of other pupils when discussing food service account balances. The Department has issued guidance and best practices for this initiative and anticipates updating such guidance and best practices in the future, as necessary. The rulemaking is consistent with the statute and necessary to conform the regulations to Education Law § 908. Thus, no revisions are necessary at this time.

2. COMMENT:

Some commenters expressed concern that the rulemaking will place additional responsibilities on school food staff to collect outstanding unpaid meal charges. A few commenters requested additional funding to compensate for school food service employees' time, effort, materials and postage relative to collecting outstanding meal charges.

DEPARTMENT RESPONSE:

While the Department is sympathetic to the commenters' concerns, the rulemaking implements the requirements of the statute. Therefore, no revisions are necessary.

3. COMMENT:

Commenter requested additional funding in the event that the school initiates litigation in small claims court to collect unpaid meal charges.

DEPARTMENT RESPONSE:

The rulemaking implements the requirements of the statute. This comment is also outside the scope of the rulemaking and as such, no revisions are necessary.

4. COMMENT:

Several commenters expressed frustration and concerns that the regulation will result in unlimited meal charges and an increase in unpaid meal account balances. Many commenters stated that unpaid meal charges have significantly increased since the statute and regulation became effective. One commenter suggested that the rulemaking should expressly allow schools to set limits on unpaid meal account balances and require schools to provide alternative lunches for children in grades nine through twelve once an unpaid meal account balance limit has been reached.

DEPARTMENT RESPONSE:

While the Department is sympathetic to the commenters' concerns, the rulemaking implements the statutory requirements and expressly requires a school to develop a plan that includes a clear explanation of the procedure to handle unpaid meal charges and specifically states that nothing is intended to allow for the unlimited accrual of debt. In addition, the legislation requires schools to provide students with the students' meal choice of the available reimbursable meal choices for the school day; therefore, alternative lunches for students who have unpaid meal balances are expressly prohibited. The Department has issued guidance and best practices for this initiative and anticipates updating such guidance and best practices in the future, as necessary. The rulemaking implements the requirements of the statute and is necessary to conform the Regulations of the Commissioner to Education Law § 908. Thus, no revisions are necessary at this time.

5. COMMENT:

One commenter inquired whether the school may withhold transcripts and diplomas until unpaid meal account balances have been collected.

DEPARTMENT RESPONSE:

The rulemaking requires the school to develop a plan that includes a clear explanation of the procedure to handle unpaid meal charges. Moreover, this comment is outside the scope of the regulation. Accordingly, no change to the regulation is warranted.

6. COMMENT:

Several commenters expressed frustration and concern that this rulemaking allows a child to charge all school meals including a la carte items and second meals which may result in an escalation of unpaid meal account balances. Some commenters also expressed frustration and concern that school food staff must provide a student access to a second meal or a la carte items when the student has money to pay for such items but has outstanding unpaid meal charges.

DEPARTMENT RESPONSE:

While the rulemaking specifically requires the school or school district to provide access to a reimbursable meal, it does not require that a la carte items, adult meals, or other similar items, which would include second meals, be provided. It is in within the school's discretion as to how to address a la carte food items and second meals.

Nevertheless, the rulemaking specifically states that a school must not take any action directed at a pupil to collect unpaid school meal fees. Schools may not use a child's money to repay previously unpaid charges if the child intended to use the money to purchase a second meal or a la carte item.

The Department has issued guidance and best practices on this initiative and anticipates updating such guidance and best practices in the future, as necessary. The rulemaking is consistent with the statute and necessary to conform the Regulations of the Commissioner to Education Law § 908. Therefore, the Department does not believe any change to the rulemaking is warranted.

7. COMMENT:

One commenter requested clarification on whether a school may utilize an "administrative prerogative application" in the event that a parent or guardian cannot be successfully contacted regarding a student's unpaid meal balance.

DEPARTMENT RESPONSE:

This comment is outside the scope of the proposed rulemaking. However, 7 CFR 245.6(d) provides local school officials the discretion to complete an application for a child known to be eligible for meal benefits if, after household applications have been disseminated, the household has not applied. This option is intended for limited use upon individual situations and must not be used to make eligibility determinations for categories or groups of children. This option must be used judiciously and may not be used when family income is above the eligibility guidelines, even though the children are coming to school without a meal or money. Family economic status must remain the criterion for administratively making the decision to provide the student access to free or reduced price meals. Schools are encouraged to review Department guidance on this issue.

8. COMMENT:

A few commenters expressed concern that this rulemaking requires a school to provide a reimbursable meal when the child's parent expressly requested that the child not be allowed to charge a reimbursable meal.

DEPARTMENT RESPONSE:

The rulemaking specifically states that the school's plan must include a statement that the school or school district shall provide the student with the student's meal of choice for that school day of the available reimbursable meal choices for such school day, if the student requests one, unless the student's parent or guardian has specifically provided written permission to the school to withhold a meal. If a school has documentation from a parent requesting that their child not receive a reimbursable meal, a reimbursable meal is not required to be provided. The implementation of this provision is at the discretion of a local school food authority. The Department has issued guidance and best practices on the initiative and anticipates updating such guidance and best practices in the future, as necessary. The rulemaking is consistent with the statute and necessary to conform the Regulations of the Commissioner to Education Law § 908, Thus, no revisions are necessary at this time.

9. COMMENT:

Several commenters echoed previously received comments and expressed concern relating to unlimited accrual of unpaid meal account balances. One commenter suggested that the rulemaking should expressly allow schools to set limits on unpaid meal account balances and require schools to provide alternative lunches for children in grades nine through twelve once an unpaid meal account balance limit has been reached.

DEPARTMENT RESPONSE:

Please see response to Comment #4. In addition, the legislation requires schools to provide students with the students' meal choice of the available reimbursable meal choices for the school day; therefore, alternative lunches for students who have unpaid meal balances are expressly prohibited.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Transitional H Pathway for School District Business Leader Certifications

I.D. No. EDU-05-19-00007-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 80-5.25 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101, 207, 305, 3001, 3004 and 3009

Subject: Transitional H Pathway for School District Business Leader Certifications.

Purpose: To Expand the Type of Eligible Experiences for the Transitional H Pathway for School District Business Leader Certification.

Text of proposed rule: Clause (c) of subparagraph (i) of paragraph (3) of subdivision (a) of section 80-5.25 of the Regulations of the Commissioner of Education shall be amended to read as follows:

(c) The candidate shall have completed at least three years of experience as a licensed certified public accountant *who is* auditing *or working in the business office of one or more* New York State school districts, BOCES and/or municipalities in New York State, as determined by the Commissioner;

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: petra.maxwell@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) and (3) authorizes the Commissioner to enforce the educational policies of this State and execute all educational policies determined by the Regents and shall prescribe the licensing of teachers employed in this State.

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 districts from paying the salary of an unqualified teacher.

2. LEGISLATIVE OBJECTIVES:

The purpose of the proposed amendment to § 80-5.25 of the Regulations of the Commissioner of Education is to expand the type of eligible experiences for the Transitional H pathway for School District Business Leader certification.

3. NEEDS AND BENEFITS:

School district business leaders (SDBLs) are important assets to school districts and BOCES, with their duties ranging from day-to-day operations to long-range planning. At its January 2018 meeting, the Board of Regents established the Transitional H pathway for individuals who hold a valid license and registration as a New York State Certified Public Accountant, allowing them to be employed for up to three years as an SDBL while they complete the requirements for a Professional SBDL certificate and helping to meet the demand to fill SDBL positions.

The eligibility requirements for the Transitional H certificate include at least three years of experience as a licensed certified public accountant auditing New York State school districts, boards of cooperative educational services (BOCES), and/or municipalities in New York State. The proposed amendment to § 80-5.25 of the Commissioner's Regulations would also allow individuals who have at least three years of experience as a licensed certified public accountant working in the business office of one or more New York State school districts, BOCES, and/or municipalities in New York State to be eligible for the Transitional H certificate.

Licensed certified public accountants who have experience in the business office of one or more New York State school districts, BOCES, and/or municipalities in New York State would be excellent candidates for the Transitional H certificate given their background in areas such as fiscal management, facilities management, and human resources. Expanding the Transitional H certificate eligibility requirements to include this type of experience would increase the pool of qualified candidates for this certificate and therefore increase the number of candidates in the pipeline for SDBL certification, which would address the need for SDBLs in the near future due to impending retirements.

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 May 2019 meeting. If adopted at the May 2019 meeting, the proposed amendment will become effective on May 22, 2019.

Regulatory Flexibility Analysis

The purpose of the proposed amendment to § 80-5.25 of the Regulations of the Commissioner of Education is to expand the type of eligible experiences for the Transitional H pathway for School District Business Leader certification.

The eligibility requirements for the Transitional H certificate include at least three years of experience as a licensed certified public accountant auditing New York State school districts, boards of cooperative educational services (BOCES), and/or municipalities in New York State. The proposed amendment to § 80-5.25 of the Commissioner's Regulations would also allow individuals who have at least three years of experience as a licensed certified public accountant working in the business office of one or more New York State school districts, BOCES, and/or municipalities in New York State, as determined by the Commissioner, to be eligible for the Transitional H certificate.

Licensed certified public accountants who have experience in the business office of one or more New York State school districts, BOCES, and/or municipalities in New York State would be excellent candidates for the Transitional H certificate given their background in areas such as fiscal management, facilities management, and human resources. Expanding the Transitional H certificate eligibility requirements to include this type of experience would increase the pool of qualified candidates for this certificate and therefore increase the number of candidates in the pipeline for School District Business Leader certification, which would address the need for School District Business Leaders in the near future due to impending retirements.

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 candidates for the Transitional H certificate, 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 § 80-5.25 of the Regulations of the Commissioner of Education is to expand the type of eligible experiences for the Transitional H pathway for School District Business Leader certification.

The eligibility requirements for the Transitional H certificate include at least three years of experience as a licensed certified public accountant auditing New York State school districts, boards of cooperative educational services (BOCES), and/or municipalities in New York State. The proposed amendment to § 80-5.25 of the Commissioner's Regulations would also allow individuals who have at least three years of experience as a licensed certified public accountant working in the business office of one or more New York State school districts, BOCES, and/or municipalities in New York State, as determined by the Commissioner, to be eligible for the Transitional H certificate.

Licensed certified public accountants who have experience in the business office of one or more New York State school districts, BOCES, and/or municipalities in New York State would be excellent candidates for the Transitional H certificate given their background in areas such as fiscal management, facilities management, and human resources. Expanding the Transitional H certificate eligibility requirements to include this type of experience would increase the pool of qualified candidates for this certificate and therefore increase the number of candidates in the pipeline for School District Business Leader certification, which would address the need for School District Business Leaders in the near future due to impending retirements.

3. COSTS:

The proposed amendment does not impose any costs on Transitional H certificate 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

The purpose of the proposed amendment to § 80-5.25 of the Regulations of the Commissioner of Education is to expand the type of eligible experiences for the Transitional H pathway for School District Business Leader certification.

The eligibility requirements for the Transitional H certificate include at least three years of experience as a licensed certified public accountant auditing New York State school districts, boards of cooperative educational

services (BOCES), and/or municipalities in New York State. The proposed amendment to § 80-5.25 of the Commissioner's Regulations would also allow individuals who have at least three years of experience as a licensed certified public accountant working in the business office of one or more New York State school districts, BOCES, and/or municipalities in New York State to be eligible for the Transitional H certificate.

Licensed certified public accountants who have experience in the business office of one or more New York State school districts, BOCES, and/or municipalities in New York State would be excellent candidates for the Transitional H certificate given their background in areas such as fiscal management, facilities management, and human resources. Expanding the Transitional H certificate eligibility requirements to include this type of experience would increase the pool of qualified candidates for this certificate and therefore increase the number of candidates in the pipeline for School District Business Leader certification, which would address the need for School District Business Leaders in the near future due to impending retirements.

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

Protecting Personally Identifiable Information

I.D. No. EDU-05-19-00008-P

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

Proposed Action: Addition of Part 121 to Title 8 NYCRR.

Statutory authority: Education Law, sections 2-d, 101, 207 and 305

Subject: Protecting Personally Identifiable Information.

Purpose: To implement the provisions of Education Law section 2-d.

Substance of proposed rule (Full text is posted at the following State website: http://www.counsel.nysed.gov/rules/full-text-indices): § 121.1 Definitions.

This section provides definitions for specific terms for this Part.

§ 121.2 Educational Agency Data Collection Transparency and Restrictions.

Prohibits educational agencies from selling personally identifiable information (PII) or using/disclosing it or allowing any other entity to use or disclose it for any marketing or commercial purpose. Educational agencies must incorporate provisions in its contracts with third party contractors that require the confidentiality of PII.

§ 121.3 Parents Bill of Rights for Data Privacy and Security.

Requires each educational agency to: publish on its website a parent's bill of rights for data privacy and security; include it with every contract where a third-party contractor will receive PII; include supplemental information for each contract such as the exclusive purposes for which the data will be used and; how the third-party contractor will comply with all applicable data protection and security requirements. The supplemental information must also be published on the educational agency's website.

§ 121.4 Parent Complaints of Breach or Unauthorized Release of Personally Identifiable Information.

Educational agencies must establish procedures for parents and eligible students to file complaints about breaches or unauthorized releases of student data. The procedure will require educational agencies to promptly acknowledge receipt of complaints, commence an investigation, and take the necessary precautions to protect any personally identifiable information.

§ 121.5 Data Security and Privacy Standard.

Adopts the National Institute for Standards and Technology Framework for Improving Critical Infrastructure Cybersecurity Version 1.1 (NIST Cybersecurity Framework or NIST CSF) as the standard for data security and privacy for educational agencies. Each educational agency must adopt and publish a data security and privacy policy that complies with the proposed regulations, aligns with the NIST CSF, and includes provisions that require every use of PII by the educational agency to benefit students and the educational agency and prohibits the inclusion of personally identifiable information in public reports or other documents. Each educational agency is required to publish its data security and privacy policy on its website and provide notice of the policy to all its officers and employees.

§ 121.6 Data Security and Privacy Plan.

Educational agencies must ensure that their contracts with third-parties that will receive PII include a data security and privacy plan that complies with Education Law § 2-d.

§ 121.7 Training for Educational Agency Employees.

Educational agencies must provide annual information privacy and security awareness training to their officers and employees with access to personally identifiable information. Such training may be delivered using online training tools and may be included as part of training the educational agency already offers to its workforce.

§ 121.8 Educational Agency Data Protection Officer.

Each educational agency must designate one or more employees to serve as the educational agency's data protection officer(s) to be responsible for the implementation of the policies and procedures required in Education Law § 2-d and this Part, and to serve as the point of contact for data security and privacy for the educational agency.

§ 121.9 Third Party Contractors.

Third-party contractors that will receive PII must adopt technologies, safeguards and practices that align with the NIST Cybersecurity Framework; comply with the data security and privacy policy of the educational agency with whom it contracts; and comply with Education Law § 2-d; and the proposed regulations. Contractors are prohibited from selling PII or using it for any marketing or commercial purpose. Additionally, where a third-party contractor engages a subcontractor to perform its contractual obligations, the data protection obligations imposed on the third-party contractor are applicable to the subcontractor.

§ 121.10 Reports and Notifications of Breach and Unauthorized Release.

Third-party contractors must notify each educational agency with which it has a contract of any breach or unauthorized release of PII in accordance with requirements set forth in the proposed regulations. Educational agencies must report any breach or unauthorized release of PII to the Chief Privacy Officer and notify affected parents, eligible students, teachers and/or principals in the most expedient way possible in accordance with requirements set forth in the proposed regulations. The Chief Privacy Officer is required to report law enforcement any breach or unauthorized release that constitutes criminal conduct.

§ 121.11 Third Party Contractor Civil Penalties.

The Chief Privacy Officer has the authority to investigate reports of breaches or unauthorized releases and impose penalties on third party contractors for unauthorized releases or breaches of PII in accordance with requirements set forth in the proposed regulations.

§ 121.12 Right of Parents and Eligible Students to Inspect and Review Students Education Records.

Consistent with FERPA, parents and eligible students shall have the right to inspect and review a student's education record by making a request directly to the educational agency in a manner prescribed by the educational agency. Educational agencies are required to notify parents annually of their right to request to inspect and review their child's education record including any student data stored or maintained by an educational agency.

§ 121.13 Chief Privacy Officer's Powers.

The Chief Privacy Officer shall have the power to access all records, reports, audits, reviews, documents, papers, recommendations, and other materials maintained by an educational agency that relate to student data or teacher or principal data, which shall include but not be limited to records related to any technology product or service that will be utilized to store and/or process personally identifiable information as further described in the proposed regulations.

§ 121.14 Severability.

If any provision of this part or its application to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of the article or their application to other persons and circumstances, and those remaining provisions shall not be affected but shall remain in full force and effect.

Text of proposed rule and any required statements and analyses may be obtained from: Kirti Goswami, NYS Education Department, Office of Higher Education, 89 Washington Avenue, Room 975 EBA, Albany, NY 12234, (518) 474-2238, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Temitope Akinyemi, NYS Education Department, Office of Higher Education, 89 Washington Avenue, Room 975 EBA, Albany, NY 12234, (518) 474-6400, email: regcomments@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

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

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

Education Law section 2-d authorizes the Commissioner to enforce laws relating to the privacy and security of personally identifiable information (PII) of students, and certain annual professional performance review (APPR) data of teachers and principals.

2. LEGISLATIVE OBJECTIVES:

The purpose of the proposed rule is to implement Education Law section 2-d, as added by Chapter 56 of the Laws of 2014 which outlines certain requirements for educational agencies and their third-party contractors to ensure the privacy and security of the personally identifiable information of students, and certain annual professional performance review (APPR) data of teachers and principals (PII).

3. NEEDS AND BENEFITS:

The proposed rule, consistent with Education Law section 2-d, establishes certain requirements for educational agencies and their third-party contractors to ensure the security and privacy of PII.

4. COSTS:

a. Costs to State government: The proposed amendment implements Education Law section 2-d and does not impose any additional costs on State government, including the State Education Department, beyond those costs imposed by the statute.

b. Costs to local government: Education Law section 2-d, as added by Chapter 56 of the Laws of 2014, establishes certain requirements for educational agencies and their third-party contractors to ensure the security and privacy of PII. The proposed amendment does not impose any direct costs on local governments beyond those imposed by the statute.

The Department anticipates that educational agencies will need to dedicate existing staff to accomplish the duties required by the statute and/or the proposed rule. However, most educational agencies are or should be already performing these activities.

For example, § 121.7 requires educational agencies to provide annual information privacy and security awareness training to their officers and employees with access to personally identifiable information. However, such training may be delivered using online training tools and may be included as part of training the educational agency already offers to its workforce.

§ 121.8 requires each educational agency to designate one or more employees to serve as the educational agency's data protection officer(s) to be responsible for the implementation of the policies and procedures required in Education Law § 2-d and this Part, and to serve as the point of contact for data security and privacy for the educational agency. This requirement may be fulfilled by a current employee(s) of the educational agency who may perform this function in addition to other job responsibilities.

c. Costs to private regulated parties: The rule applies to third party vendors contracting with educational agencies and does not impose any costs on such parties beyond those costs imposed by the statute.

d. Costs to regulatory agency for implementing and continued administration of the rule: The Department anticipates that the regulatory agency will need to dedicate staff hours to accomplish the duties and oversight required by the statute and/or the proposed rule.

5. LOCAL GOVERNMENT MANDATES:

The majority of the requirements in the proposed amendment do not impose any program, service, duty or responsibility on educational agencies beyond those imposed by the statute. The proposed rule requires the following of educational agencies:

§ 121.2 prohibits educational agencies from selling personally identifiable information or using/disclosing it or allowing any other entity to use or disclose it for any marketing or commercial purpose. Educational agencies must incorporate provisions in its contracts with third party contractors that require the confidentiality of PII.

§ 121.3 requires each educational agency to adopt a parent's bill of rights for data privacy and security that is included with every contract an educational agency enters with a third-party contractor that receives personally identifiable information and is published on its website.

§ 121.4 requires educational agencies to establish procedures for parents and eligible students to file complaints about breaches or unauthorized releases of student data.

§ 121.5 requires each educational agency to adopt and publish a data security and privacy policy that complies with the regulations and aligns with the National Institute for Standards and Technology Framework for Improving Critical Infrastructure Cybersecurity Version 1.1 no later than December 31, 2019.

§ 121.6 requires each educational agency to ensure that its contracts with third-party contractors include a data security and privacy plan.

§ 121.7 requires educational agencies to provide annual information privacy and security awareness training to their officers and employees with access to personally identifiable information. Such training may be delivered using online training tools and may be included as part of training the educational agency already offers to its workforce.

§ 121.8 requires each educational agency to designate one or more employees to serve as the educational agency's data protection officer(s) to be responsible for the implementation of the policies and procedures required in Education Law § 2-d and this Part, and to serve as the point of contact for data security and privacy for the educational agency. This requirement may be fulfilled by a current employee(s) of the educational agency who may perform this function in addition to other job responsibilities.

§ 121.9 requires third-party contractors that will receive PII to adopt technologies, safeguards and practices that align with the NIST Cybersecurity Framework; comply with the data security and privacy policy of the educational agency with which it contracts; Education Law § 2-d; and the regulations.

§ 121.10 requires third-party contractors to notify each educational agency with which it has a contract of any breach or unauthorized release of personally identifiable information. Educational agencies must report breaches or unauthorized releases of PII to the Chief Privacy Officer and notify affected parents, eligible students, teachers and/or principals in accordance with the regulations.

§ 121.11 provides that the Chief Privacy Officer has the authority to investigate reports of breaches or unauthorized releases and may impose civil penalties on third party contractors for breaches or unauthorized releases of PII.

§ 121.12 provides that consistent with FERPA, parents and eligible students shall have the right to inspect and review a student's education record by making a request directly to the educational agency in a manner prescribed by the educational agency. Educational agencies are required to notify parents annually of their right to request to inspect and review their child's education record including any student data stored or maintained by an educational agency.

§ 121.13 addresses the Chief Privacy Officer's powers, including the power to access records and other materials maintained by an educational agency that relate to PII.

6. PAPERWORK:

§ 121.2 prohibits educational agencies from selling personally identifiable information or using/disclosing it or allowing any other entity to use or disclose it for any marketing or commercial purpose. Educational agencies must incorporate provisions in its contracts with third party contractors that require the confidentiality of PII.

§ 121.4 requires educational agencies to establish procedures for parents and eligible students to file complaints about breaches or unauthorized releases of student data.

§ 121.5 requires each educational agency to adopt and publish a data security and privacy policy that implements the requirements of this Part and aligns with the NIST CSF.

§ 121.6 requires educational agencies that enter into a contract with a third-party contracts to ensure that such contract includes a data security and privacy policy.

§ 121.10 requires third-party contractors to notify each educational agency with which it has a contract of any breach or unauthorized release of personally identifiable information. Educational agencies must report breaches or unauthorized releases of PII to the Chief Privacy Officer and notify affected parents, eligible students, teachers and/or principals in accordance with the regulations.

§ 121.12 provides that consistent with FERPA, parents and eligible students shall have the right to inspect and review a student's education record by making a request directly to the educational agency in a manner prescribed by the educational agency. Educational agencies are required to notify parents annually of their right to request to inspect and review their child's education record including any student data stored or maintained by an educational agency.

7. DUPLICATION:

The rule is necessary to implement Education Law section 2-d and does not duplicate existing State or Federal requirements.

8. ALTERNATIVES:

The rule is necessary to implement Education Law section 2-d. No significant alternatives were considered.

9. FEDERAL STANDARDS:

The rule is necessary to implement Education Law section 2-d. There are no applicable Federal standards.

10. COMPLIANCE SCHEDULE:

The proposed amendment will become effective on its stated effective date. As stated above, section 121.5 of the proposed regulation requires each educational agency to adopt and publish a data security and privacy policy that complies with the regulations and aligns with the National Institute for Standards and Technology Framework for Improving Critical Infrastructure Cybersecurity Version 1.1 no later than December 31, 2019.

Regulatory Flexibility Analysis

(a) Small businesses:

The purpose of the proposed rule is to implement Education Law section 2-d, as added by Chapter 56 of the Laws of 2014 which outlines certain requirements for educational agencies and their third-party contractors to ensure the privacy and security of the personally identifiable information of students, and certain annual professional performance review data of teachers and principals (PII).

1. EFFECT OF RULE:

The proposed rule, consistent with Education Law section 2-d, establishes certain requirements for educational agencies and their third-party contractors to ensure the security and privacy of PII. Some of the third-party contractors with educational agencies may be small businesses.

2. COMPLIANCE REQUIREMENTS:

Certain requirements in the proposed rule apply to small businesses that receive PII and do not impose any program, service, duty or responsibility on small businesses beyond those imposed by the statute. Compliance requirements are summarized as follows:

§ 121.2 prohibits educational agencies from selling personally identifiable information or using/disclosing it or allowing any other entity to use or disclose it for any marketing or commercial purpose. Educational agencies must incorporate provisions in its contracts with third party contractors that require the confidentiality of PII.

§ 121.3 requires each educational agency to adopt a parent's bill of rights for data privacy and security that is included with every contract an educational agency enters with a third-party contractor that receives personally identifiable information and is published on its website.

§ 121.4 requires educational agencies to establish procedures for parents and eligible students to file complaints about breaches or unauthorized releases of student data.

§ 121.5 requires each educational agency to adopt and publish a data security and privacy policy that complies with the regulations and aligns with the National Institute for Standards and Technology Framework for Improving Critical Infrastructure Cybersecurity Version 1.1 no later than December 31, 2019.

§ 121.6 requires each educational agency to ensure that its contracts with third-party contractors include a data security and privacy plan.

§ 121.7 requires educational agencies to provide annual information privacy and security awareness training to their officers and employees with access to personally identifiable information. Such training may be delivered using online training tools and may be included as part of training the educational agency already offers to its workforce.

§ 121.8 requires each educational agency to designate one or more employees to serve as the educational agency's data protection officer(s) to be responsible for the implementation of the policies and procedures required in Education Law § 2-d and this Part, and to serve as the point of contact for data security and privacy for the educational agency. This requirement may be fulfilled by a current employee(s) of the educational agency who may perform this function in addition to other job responsibilities.

§ 121.9 requires third-party contractors that will receive PII to adopt technologies, safeguards and practices that align with the NIST Cybersecurity Framework; comply with the data security and privacy policy of the educational agency with which it contracts; Education Law § 2-d; and the regulations.

§ 121.10 requires third-party contractors to notify each educational agency with which it has a contract of any breach or unauthorized release of personally identifiable information. Educational agencies must report breaches or unauthorized releases of PII to the Chief Privacy Officer and notify affected parents, eligible students, teachers and/or principals in accordance with the regulations.

§ 121.11 provides that the Chief Privacy Officer has the authority to investigate reports of breaches or unauthorized releases and may impose civil penalties on third party contractors for breaches or unauthorized releases of PII.

§ 121.12 provides that consistent with FERPA, parents and eligible students shall have the right to inspect and review a student's education record by making a request directly to the educational agency in a manner prescribed by the educational agency. Educational agencies are required to notify parents annually of their right to request to inspect and review their child's education record including any student data stored or maintained by an educational agency.

§ 121.13 addresses the Chief Privacy Officer's powers, including the power to access records and other materials maintained by an educational agency that relate to PII.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

See the Costs Section of the Regulatory Impact Statement that is published in the State Register on this publication date for an analysis of the costs of the proposed rule.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule may impose additional technological requirements on small businesses that receive PII. Economic feasibility is addressed above under Compliance Costs.

6. MINIMIZING ADVERSE IMPACT:

The rule is necessary to implement Education Law section 2-d, as added by Chapter 56 of the Laws of 2014. The rule has been carefully drafted to meet statutory requirements. Moreover, since the proposed amendment applies to all third party contractors across the State, in order ensure consistency and the privacy of PII across the State, it was not possible to establish different compliance and reporting requirements for regulated parties in rural areas, or to exempt them from the rule's provisions.

7. SMALL BUSINESS PARTICIPATION:

The proposed regulation was developed in consultation with stakeholders and the public. In the Spring of 2018, fourteen public forums were held across the state to receive public comment on the law; which included small businesses. Electronic comments were also accepted by the Department during this two-month period. These comments were critical to developing the implementing regulations.

(b) Local governments:

1. EFFECT OF RULE:

The proposed rule, consistent with Education Law section 2-d, establishes certain requirements for educational agencies and their third-party contractors to ensure the security and privacy of PII.

2. COMPLIANCE REQUIREMENTS:

The proposed rule applies to educational agencies and does not impose any program, service, duty or responsibility on educational agencies beyond those imposed by the statute. Compliance requirements are summarized as follows:

§ 121.2 prohibits educational agencies from selling personally identifiable information or using/disclosing it or allowing any other entity to use or disclose it for any marketing or commercial purpose. Educational agencies must incorporate provisions in its contracts with third party contractors that require the confidentiality of PII.

§ 121.3 requires each educational agency to adopt a parent's bill of rights for data privacy and security that is included with every contract an educational agency enters with a third-party contractor that receives personally identifiable information and is published on its website.

§ 121.4 requires educational agencies to establish procedures for parents and eligible students to file complaints about breaches or unauthorized releases of student data.

§ 121.5 requires each educational agency to adopt and publish a data security and privacy policy that complies with the regulations and aligns with the National Institute for Standards and Technology Framework for Improving Critical Infrastructure Cybersecurity Version 1.1 no later than December 31, 2019.

§ 121.6 requires each educational agency to ensure that its contracts with third-party contractors include a data security and privacy plan.

§ 121.7 requires educational agencies to provide annual information privacy and security awareness training to their officers and employees with access to personally identifiable information. Such training may be delivered using online training tools and may be included as part of training the educational agency already offers to its workforce.

§ 121.8 requires each educational agency to designate one or more employees to serve as the educational agency's data protection officer(s) to be responsible for the implementation of the policies and procedures required in Education Law § 2-d and this Part, and to serve as the point of contact for data security and privacy for the educational agency. This requirement may be fulfilled by a current employee(s) of the educational agency who may perform this function in addition to other job responsibilities.

§ 121.9 requires third-party contractors that will receive PII to adopt technologies, safeguards and practices that align with the NIST Cybersecurity Framework; comply with the data security and privacy policy of the educational agency with which it contracts; Education Law § 2-d; and the regulations.

§ 121.10 requires third-party contractors to notify each educational agency with which it has a contract of any breach or unauthorized release of personally identifiable information. Educational agencies must report breaches or unauthorized releases of PII to the Chief Privacy Officer and notify affected parents, eligible students, teachers and/or principals in accordance with the regulations.

§ 121.11 provides that the Chief Privacy Officer has the authority to investigate reports of breaches or unauthorized releases and may impose civil penalties on third party contractors for breaches or unauthorized releases of PII.

§ 121.12 provides that consistent with FERPA, parents and eligible students shall have the right to inspect and review a student's education

record by making a request directly to the educational agency in a manner prescribed by the educational agency. Educational agencies are required to notify parents annually of their right to request to inspect and review their child's education record including any student data stored or maintained by an educational agency.

§ 121.13 addresses the Chief Privacy Officer's powers, including the power to access records and other materials maintained by an educational agency that relate to PII.

3. PROFESSIONAL SERVICES:

The proposed amendment does not specifically require any regulated parties to use professional services.

However, § 121.7 requires educational agencies to provide annual information privacy and security awareness training to their officers and employees with access to personally identifiable information. Such training may be delivered using online training tools and may be included as part of training the educational agency already offers to its workforce.

§ 121.8 requires each educational agency to designate one or more employees to serve as the educational agency's data protection officer(s) to be responsible for the implementation of the policies and procedures required in Education Law § 2-d and this Part, and to serve as the point of contact for data security and privacy for the educational agency. This requirement may be fulfilled by a current employee(s) of the educational agency who may perform this function in addition to other job responsibilities.

4. COMPLIANCE COSTS:

See the Costs Section of the Regulatory Impact Statement that is published in the State Register on this publication date for an analysis of the costs of the proposed rule.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed regulation requires each educational agency to ensure it has a policy on data security and privacy. As required by Education Law § 2-d (5), the proposed regulation adopts the National Institute for Standards and Technology Framework for Improving Critical Infrastructure Cybersecurity Version 1.1 (NIST Cybersecurity Framework or NIST CSF) as the standard for data security and privacy for educational agencies. No later than December 31, 2019, each educational agency shall adopt and publish a data security and privacy policy that implements the requirements of this Part and aligns with the NIST CSF.

Economic feasibility is addressed above under Compliance Costs.

6. MINIMIZING ADVERSE IMPACT:

The rule is necessary to implement Education Law section 2-d, as added by Chapter 56 of the Laws of 2014. The rule has been carefully drafted to meet statutory requirements while providing flexibility to educational agencies, to the extent possible. For instance, § 121.8 requires each educational agency to designate one or more employees to serve as the educational agency's data protection officer(s) to be responsible for the implementation of the policies and procedures required in Education Law § 2-d and this Part, and to serve as the point of contact for data security and privacy for the educational agency. This requirement may be fulfilled by a current employee(s) of the educational agency who may perform this function in addition to other job responsibilities.

7. LOCAL GOVERNMENT PARTICIPATION:

The proposed regulation was developed in consultation with stakeholders and the public. In the Spring of 2018, fourteen public forums were held across the state to receive public comment on the law. Electronic comments were also accepted by the Department during this two-month period. These comments were critical to developing the implementing regulations. The Department has also coordinated with a Data Privacy Advisory Council (DPAC) and subset Regulatory Drafting Workgroup, to review drafts of the proposed regulation and provide an opportunity for stakeholder comment. The DPAC is comprised of stakeholders from a wide range of industry including parent advocates, administrative and teacher organizations as well as technical experts and district level staff. Finally, the Department is working with an Implementation Workgroup, comprised of RIC Directors, BOCES staff and district technical directors to receive feedback and ensure successful implementation of these regulations.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment applies to all educational agencies in the State, including those located in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

The majority of the requirements in the proposed amendment do not impose any program, service, duty or responsibility on educational agencies beyond those imposed by the statute.

§ 121.2 prohibits educational agencies from selling personally identifiable information or using/disclosing it or allowing any other entity to use or disclose it for any marketing or commercial purpose. Educational agencies must incorporate provisions in its contracts with third party contractors that require the confidentiality of PII.

§ 121.3 requires each educational agency to adopt a parent's bill of rights for data privacy and security that is included with every contract an educational agency enters with a third-party contractor that receives personally identifiable information and is published on its website.

§ 121.4 requires educational agencies to establish procedures for parents and eligible students to file complaints about breaches or unauthorized releases of student data.

§ 121.5 requires each educational agency to adopt and publish a data security and privacy policy that complies with the regulations and aligns with the National Institute for Standards and Technology Framework for Improving Critical Infrastructure Cybersecurity Version 1.1 no later than December 31, 2019.

§ 121.6 requires each educational agency to ensure that its contracts with third-party contractors include a data security and privacy plan.

§ 121.7 requires educational agencies to provide annual information privacy and security awareness training to their officers and employees with access to personally identifiable information. Such training may be delivered using online training tools and may be included as part of training the educational agency already offers to its workforce.

§ 121.8 requires each educational agency to designate one or more employees to serve as the educational agency's data protection officer(s) to be responsible for the implementation of the policies and procedures required in Education Law § 2-d and this Part, and to serve as the point of contact for data security and privacy for the educational agency. This requirement may be fulfilled by a current employee(s) of the educational agency who may perform this function in addition to other job responsibilities.

§ 121.9 requires third-party contractors that will receive PII to adopt technologies, safeguards and practices that align with the NIST Cybersecurity Framework; comply with the data security and privacy policy of the educational agency with which it contracts; Education Law § 2-d; and the regulations.

§ 121.10 requires third-party contractors to notify each educational agency with which it has a contract of any breach or unauthorized release of personally identifiable information. Educational agencies must report breaches or unauthorized releases of PII to the Chief Privacy Officer and notify affected parents, eligible students, teachers and/or principals in accordance with the regulations.

§ 121.11 provides that the Chief Privacy Officer has the authority to investigate reports of breaches or unauthorized releases and may impose civil penalties on third party contractors for breaches or unauthorized releases of PII.

§ 121.12 provides that consistent with FERPA, parents and eligible students shall have the right to inspect and review a student's education record by making a request directly to the educational agency in a manner prescribed by the educational agency. Educational agencies are required to notify parents annually of their right to request to inspect and review their child's education record including any student data stored or maintained by an educational agency.

§ 121.13 addresses the Chief Privacy Officer's powers, including the power to access records and other materials maintained by an educational agency that relate to PII.

3. COSTS:

See the "Costs" Section of the Regulatory Impact Statement that is published in the State Register on this publication date for an analysis of the costs of the proposed rule, which include costs for educational agencies across the State, including those located in rural areas.

4. MINIMIZING ADVERSE IMPACT:

The rule is necessary to implement Education Law section 2-d. The rule has been carefully drafted to meet statutory requirements while providing flexibility educational agencies. Since the statute applies to all educational agencies throughout the State, it was not possible to establish different compliance and reporting requirements for regulated parties in rural areas, or to exempt them from the rule's provisions.

5. RURAL AREA PARTICIPATION:

The proposed regulations were developed in consultation with stakeholders and the public. In the Spring of 2018, fourteen public forums were held across the state to receive public comment on the law including comment from those located in rural areas. Electronic comments were also accepted by the Department during this two-month period. These comments were critical to developing the implementing regulations. The Department has also coordinated with a Data Privacy Advisory Council (DPAC) and subset Regulatory Drafting Workgroup, to review drafts of the proposed regulation and provide an opportunity for stakeholder comment. The DPAC is comprised of stakeholders from a wide range of industry including parent advocates, administrative and teacher organizations as well as technical experts and district level staff including those located in rural areas. Finally, the Department is working with an Implementation

Workgroup, comprised of RIC Directors, BOCES staff and district technical directors to receive feedback and ensure successful implementation of these regulations.

Job Impact Statement

The purpose of the proposed rule is to implement Education Law section 2-d, as added by Chapter 56 of the Laws of 2014, which protects the privacy and security of personally identifiable information of students, and teacher and principal annual professional performance review (APPR) data. The law outlines certain requirements for educational agencies and the third-party contractors they utilize to ensure the security and privacy of protected information. Because it is evident from the nature of the proposed rule that it will have no impact on the number of jobs or employment opportunities in New York State, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

REVISED RULE MAKING
NO HEARING(S) SCHEDULED

Relates to Professional Development Plans and Other Related Requirements for School Districts and BOCES

I.D. No. EDU-40-18-00010-RP

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

Proposed Action: Amendment of sections 52.21, 75.8, 80-3.4, 80-3.10, 90.18, 100.2, 100.13, 100.15, 100.17, 100.19, 200.2, Subparts 57-2, 151-1, 154-2, Parts 30 and 80; repeal of section 80-3.6 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101, 305(1), 2017, 3004(1), 3006, 3006-a and 3009

Subject: Relates to professional development plans and other related requirements for school districts and BOCES.

Purpose: To improve the quality of teaching and learning for teachers and leaders for professional growth.

Substance of revised rule (Full text is posted at the following State website: http://www.counsel.nysed.gov/rules/full-text-indices): The proposed amendments to subdivision 100.2(dd) are designed to create greater coherence with other statutory and Department initiatives related to ensuring that all educators – teachers, teaching assistants, and school leaders - have the knowledge and skills necessary to meet the needs of all students. Specifically, the amendments further align the Commissioner's Regulations with requirements related to the Dignity for All Students Act (DASA), the Continuing Teacher and Leader Education (CTLE) statutory requirements, and the Department's recently approved Every Student Succeeds Act (ESSA) plan. These changes include:

- A shift in terminology from professional development to professional learning, which is consistent with the changes to the standards adopted by the PSPB. This shift is more than just a change in language. Professional organizations and educational researchers, including Learning Forward, the Learning Policy Institute (LPI), and the Association for Supervision and Curriculum Development (ASCD), have adopted this change in language, which emphasizes the importance of educators taking an active role in their continuous development. Rather than being passive recipients of information, educators should be active partners in determining the content of their learning, how their learning occurs, and how they evaluate its effectiveness.
- Requires the professional learning plan to describe how professional learning related to educator practice and curriculum development are culturally responsive and reflect the needs of the community that the school district or BOCES serves.
- Clarifying the Department's expectations regarding the use of data – both qualitative and quantitative – in determining appropriate professional learning and measuring its impact on educators and student learning, consistent with research on effective professional learning.
- Clarifying that professional learning plans must describe the professional learning opportunities that are available to teachers, teaching assistants, and school leaders, whereas the existing regulations do not consistently include references to educators other than teachers.
- Technical edits to remove references to dates, professional learning requirements for teachers, pupil personnel service providers and educational leaders, and certain structures in the New York City Department of Education that are no longer relevant.

Consistent with the shift in terminology from professional development to professional learning related to school district and BOCES professional learning plans, the amendments make conforming edits to other provisions of the Commissioner's Regulations. Specifically, Sections 52.21, 57-2, 75.8, 80-1, 80-2, 80-3, 80-5, 80-6, 90.18, 100.2, 100.13, 100.15, 100.17, 100.19, 151-1, 154-2, and 200.2 of the Commissioner's Regulations and 30-1, 30-2, and 30-3 of the Rules of the Board of Regents are amended to change references to professional development to professional learning. Additionally, Section 80-3.6 of the Commissioner's Regulations, which prescribed professional development requirements for teachers through the 2016-17 school year, is repealed since that school year has ended and the section is no longer applicable. Conforming edits were also made to other sections of Part 80 consistent with the repeal of Section 80-3.6.

Revised rule compared with proposed rule: Substantial revisions were made in sections 80-6.3(b)(4), (5) and 100.2(dd)(3).

Text of revised proposed rule and any required statements and analyses may be obtained from Kirti Goswami, NYS Education Department, Office of Higher Education, 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, Albany, NY 12234, (518) 486-3633, email: regcomments@nysed.gov

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

Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on October 3, 2018, the following substantial revisions were made to the proposed rule:

Section 100.2(dd)(3)(i)(a)(8) was amended to remove the following sentence: The level of involvement of individuals selected to be part of the professional learning team shall be determined by the school district or BOCES.

Section 100.2(dd)(3)(i)(b) was amended to replace the words "well represented" with a "majority" of teachers on the professional learning team.

Sections 80-6.3(b)(4) and (5) are amended to increase the number of hours of CTLE that can claimed for serving as a mentor teacher from 25 to 30 hours for mentoring a first year teacher and from 15 to 25 hours for mentoring a student teacher. These sections were also amended to the remove the restriction from claiming CTLE hours for mentoring a student teacher in instances where the mentor teacher receives remuneration from the educator preparation program.

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

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on October 3, 2018, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above revisions to the proposed rule do not require any revisions to the previously published Regulatory Flexibility Analysis.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on October 3, 2018, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The above revisions to the proposed rule do not require any revisions to the previously published Rural Area Flexibility Analysis.

Revised Job Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on October 3, 2018, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement submitted herewith.

The revised proposed rule will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the revised proposed rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

Following publication of the Notice of Proposed Rulemaking in the State Register on October 3, 2018 through December 2, 2018, the Department received the following comments on the proposed amendment:

1. COMMENT: The proposed changes emphasize the importance of providing educational leaders with professional learning opportunities and are consistent with nationally recognized research calling for educators' active involvement in their continuous development. The changes also codify the recommendations of the Professional Learning Team.

DEPARTMENT RESPONSE: No changes necessary. The Department agrees with the commenter. The intention of the proposed amendments is,

in part, to emphasize the importance of providing professional learning to educational leaders and to ensure that the Department's requirements are in line with research and best practice.

2. COMMENT: Several commenters expressed concern regarding the limitations in the proposed amendments on the number of CTLE hours that can be claimed for serving as a mentor to a student teacher or a first-year teacher, noting that providing high quality mentoring opportunities is an important, time intensive activity that varies from one school district to another. Thus, a State level cap should not be applied.

DEPARTMENT RESPONSE: The Department agrees that mentoring of student teachers and new teachers are important activities. When done as part of a systems approach to support, mentoring and induction have been shown to improve retention and early career effectiveness of educators. In response to the concerns raised by commenters, the revised proposed amendments increase the number of CTLE hours that teachers can claim for serving as a mentor. While the Department recognizes that the number of CTLE hours that can be claimed for such activities is less than the number of hours many educators invest in mentoring their colleagues, Education Law requires that the Department ensure that the CTLE activities undertaken by teachers be sufficient to improve the teacher's pedagogical skills, targeted at improving student performance. Therefore, the cap within the proposed amendments is intended to ensure that there are sufficient minimum CTLE hours remaining for educators serving as mentors to participate in additional activities that will develop their practice in service of improving outcomes for students. The Department did not intend for this provision to be interpreted as an acceptable number of hours to devote to mentoring.

3. COMMENT: Several commenters expressed concern regarding the proposed restriction on claiming CTLE hours for serving as a mentor to a student teacher in instances where remuneration is provided by the teacher preparation program, noting that such remuneration is typically nominal.

DEPARTMENT RESPONSE: The Department agrees with the comments and has removed this provision from the revised proposed amendments.

4. COMMENT: Two commenters expressed concern regarding the requirements for the composition of professional learning teams in the City School District of the City of New York. Specifically, the commenters did not agree with the requirement that teachers be well represented on such teams and instead requested that such teams include a majority of teachers.

DEPARTMENT RESPONSE: The Department agrees with the comments. The revised regulations replace the requirements that teachers on professional learning teams in the City School District of New York City be "well represented" and instead requires that the teams be composed of a majority of teachers.

5. COMMENT: Two commenters requested that the selection of members to serve on professional learning teams in the City School District of the City of New York be done through collective bargaining.

DEPARTMENT RESPONSE: The proposed amendments did not change the process for selecting the members serving on the professional learning teams in the City of New York.

6. COMMENT: The ceding of authority to school districts or BOCES to control the level of involvement of individuals selected to be part of the professional learning team undermines the ability of all members to contribute to the work of the team as equals.

DEPARTMENT RESPONSE: The Department has revised the regulation to remove the provision requiring that school districts and BOCES determine the level of involvement of professional learning team members.

Department of Financial Services

EMERGENCY RULE MAKING

Business Conduct of Mortgage Loan Servicers

I.D. No. DFS-05-19-00003-E
Filing No. 16
Filing Date: 2019-01-11
Effective Date: 2019-01-11

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

Action taken: Addition of Part 419 to Title 3 NYCRR.

Statutory authority: Banking Law, art. 12-D

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

Specific reasons underlying the finding of necessity: The legislature required the registration of mortgage loan servicers as part of the Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the "Mortgage Lending Reform Law") to help address the existing foreclosure crisis in the state. By registering servicers and requiring that servicers engage in the business of mortgage loan servicing in compliance with rules and regulations adopted by the Superintendent, the legislature intended to help ensure that servicers conduct their business in a manner that protects homeowners. Part 419 is intended to provide clear guidance to mortgage loan servicers as to the procedures and standards they should follow with respect to loan delinquencies. The rules impose a duty of fair dealing on loan servicers in their communications, transactions and other dealings with borrowers. In addition, the rule sets standards with respect to the handling of loan delinquencies and loss mitigation. The rule further requires specific reporting on the status of delinquent loans with the Department so that it has the information necessary to assess loan servicers' performance.

In addition to addressing mortgage loan delinquencies and loss mitigation, the rule addresses other areas of significant concern to homeowners, including the handling of borrower complaints and inquiries, the payment of taxes and insurance, crediting of payments and handling of late payments, payoff balances and servicer fees.

Fair and effective account management and loss mitigation practices are necessary to protect borrowers in the home mortgage lending market. Accordingly, it is imperative that Part 419 of the Superintendent's Regulations be promulgated on an emergency basis for the public's general welfare.

Subject: Business conduct of mortgage loan servicers.

Purpose: To implement the purpose and provisions of the Mortgage Lending Reform Law of 2008 with respect to mortgage loan servicers.

Substance of emergency rule (Full text is posted at the following State website: http://www.dfs.ny.gov/legal/regulations/emergency/banking/emergbanking.htm): Section 419.1 contains definitions of terms that are used in Part 419 and not otherwise defined in Part 418, including "Servicer", "Qualified Written Request" and "Loan Modification".

Section 419.2 establishes a duty of fair dealing for Servicers in connection with their transactions with borrowers, which includes a duty to pursue loss mitigation with the borrower as set forth in Section 419.11.

Section 419.3 requires compliance with other State and Federal laws relating to mortgage loan servicing, including Banking Law Article 12-D, RESPA, and the Truth-in-Lending Act.

Section 419.4 describes the requirements and procedures for handling to consumer complaints and inquiries.

Section 419.5 describes the requirements for a servicer making payments of taxes or insurance premiums for borrowers.

Section 419.6 describes requirements for crediting payments from borrowers and handling late payments.

Section 419.7 describes the requirements of an annual account statement which must be provided to borrowers in plain language showing the unpaid principal balance at the end of the preceding 12-month period, the interest paid during that period and the amounts deposited into and disbursed from escrow. The section also describes the Servicer's obligations with respect to providing a payment history when requested by the borrower or borrower's representative.

Section 419.8 requires a late payment notice be sent to a borrower no later than 17 days after the payment remains unpaid.

Section 419.9 describes the required provision of a payoff statement that contains a clear, understandable and accurate statement of the total amount that is required to pay off the mortgage loan as of a specified date.

Section 419.10 sets forth the requirements relating to fees permitted to be collected by Servicers and also requires Servicers to maintain and update at least semi-annually a schedule of standard or common fees on their website.

Section 419.11 sets forth the Servicer's obligations with respect to handling of loan delinquencies and loss mitigation, including an obligation to make reasonable and good faith efforts to pursue appropriate loss mitigation options, including loan modifications. This Section includes requirements relating to procedures and protocols for handling loss mitigation, providing borrowers with information regarding the Servicer's loss mitigation process, decision-making and available counseling programs and resources.

Section 419.12 describes the quarterly reports that the Superintendent may require Servicers to submit to the Superintendent, including information relating to the aggregate number of mortgages serviced by the Servicer, the number of mortgages in default, information relating to loss mitigation activities, and information relating to mortgage modifications.

Section 419.13 describes the books and records that Servicers are

required to maintain as well as other reports the Superintendent may require Servicers to file in order to determine whether the Servicer is complying with applicable laws and regulations. These include books and records regarding loan payments received, communications with borrowers, financial reports and audited financial statements.

Section 419.14 sets forth the activities prohibited by the regulation, including engaging in misrepresentations or material omissions and placing insurance on a mortgage property without written notice when the Servicer has reason to know the homeowner has an effective policy in place.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 10, 2019.

Text of rule and any required statements and analyses may be obtained from: George Bogdan, Department of Financial Services, One State Street, New York, NY 10004-1417, (212) 480-4758, email: george.bogdan@dfs.ny.gov

Regulatory Impact Statement

1. Statutory Authority.

Article 12-D of the Banking Law, as amended by the Legislature in the Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the "Mortgage Lending Reform Law"), creates a framework for the regulation of mortgage loan servicers. Mortgage loan servicers are individuals or entities which engage in the business of servicing mortgage loans for residential real property located in New York. That legislation also authorizes the adoption of regulations implementing its provisions. (See, e.g., Banking Law Sections 590(2) (b-1) and 595-b.)

Subsection (1) of Section 590 of the Banking Law was amended by the Mortgage Lending Reform Law to add the definitions of "mortgage loan servicer" and "servicing mortgage loans". (Section 590(1)(h) and Section 590(1)(i).)

A new paragraph (b-1) was added to Subdivision (2) of Section 590 of the Banking Law. This new paragraph prohibits a person or entity from engaging in the business of servicing mortgage loans without first being registered with the Superintendent. The registration requirements do not apply to an "exempt organization," licensed mortgage banker or registered mortgage broker.

This new paragraph also authorizes the Superintendent to refuse to register an MLS on the same grounds as he or she may refuse to register a mortgage broker under Banking Law Section 592-a(2).

Subsection (3) of Section 590 was amended by the Subprime Law to clarify the power of the banking board to promulgate rules and regulations and to extend the rulemaking authority regarding regulations for the protection of consumers and regulations to define improper or fraudulent business practices to cover mortgage loan servicers, as well as mortgage bankers, mortgage brokers and exempt organizations. The functions and powers of the banking board have since been transferred to the Superintendent of Financial Services, pursuant to Part A of Chapter 62 of the Laws of 2011, Section 89.

New Paragraph (d) was added to Subsection (5) of Section 590 by the Mortgage Lending Reform Law and requires mortgage loan servicers to engage in the servicing business in conformity with the Banking Law, such rules and regulations as may be promulgated by the Banking Board or prescribed by the Superintendent, and all applicable federal laws, rules and regulations.

New Subsection (1) of Section 595-b was added by the Mortgage Lending Reform Law and requires the Superintendent to promulgate regulations and policies governing the grounds to impose a fine or penalty with respect to the activities of a mortgage loan servicer. Also, the Mortgage Lending Reform Law amends the penalty provision of Subdivision (1) of Section 598 to apply to mortgage loan servicers as well as to other entities.

New Subdivision (2) of Section 595-b was added by the Mortgage Lending Reform Law and authorizes the Superintendent to prescribe regulations relating to disclosure to borrowers of interest rate resets, requirements for providing payoff statements, and governing the timing of crediting of payments made by the borrower.

Section 596 was amended by the Mortgage Lending Reform Law to extend the Superintendent's examination authority over licensees and registrants to cover mortgage loan servicers. The provisions of Banking Law Section 36(10) making examination reports confidential are also extended to cover mortgage loan servicers.

Similarly, the books and records requirements in Section 597 covering licensees, registrants and exempt organizations were amended by the Mortgage Lending Reform Law to cover servicers and a provision was added authorizing the Superintendent to require that servicers file annual reports or other regular or special reports.

The power of the Superintendent to require regulated entities to appear and explain apparent violations of law and regulations was extended by the Mortgage Lending Reform Law to cover mortgage loan servicers (Subdivision (1) of Section 39), as was the power to order the discontinuance of unauthorized or unsafe practices (Subdivision (2) of Section 39) and to order that accounts be kept in a prescribed manner (Subdivision (5) of Section 39).

Finally, mortgage loan servicers were added to the list of entities subject to the Superintendent's power to impose monetary penalties for violations of a law, regulation or order. (Paragraph (a) of Subdivision (1) of Section 44).

The fee amounts for mortgage loan servicer registration and branch applications are established in accordance with Banking Law Section 18-a.

2. Legislative Objectives.

The Mortgage Lending Reform Law was intended to address various problems related to residential mortgage loans in this State. The law reflects the view of the Legislature that consumers would be better protected by the supervision of mortgage loan servicing. Even though mortgage loan servicers perform a central function in the mortgage industry, there had previously been no general regulation of servicers by the state or the Federal government.

The Mortgage Lending Reform Law requires that entities be registered with the Superintendent in order to engage in the business of servicing mortgage loans in this state. The new law further requires mortgage loan servicers to engage in the business of servicing mortgage loans in conformity with the rules and regulations promulgated by the Banking Board and the Superintendent.

The mortgage servicing statute has two main components: (i) the first component addresses the registration requirement for persons engaged in the business of servicing mortgage loans; and (ii) the second authorizes the Superintendent to promulgate appropriate rules and regulations for the regulation of servicers in this state.

Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1 2009, addresses the first component of the mortgage servicing statute by setting standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for approving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as setting financial responsibility standards for mortgage loan servicers.

Part 419 addresses the business practices of mortgage loan servicers in connection with their servicing of residential mortgage loans. This part addresses the obligations of mortgage loan servicers in their communications, transactions and general dealings with borrowers, including the handling of consumer complaints and inquiries, handling of escrow payments, crediting of payments, charging of fees, loss mitigation procedures and provision of payment histories and payoff statements. This part also imposes certain recordkeeping and reporting requirements in order to enable the Superintendent to monitor services' conduct and prohibits certain practices such as engaging in deceptive business practices.

Collectively, the provisions of Part 418 and 419 implement the intent of the Legislature to register and supervise mortgage loan servicers.

3. Needs and Benefits.

The Mortgage Lending Reform Law adopted a multifaceted approach to the lack of supervision of the mortgage loan industry, particularly with respect to servicing and foreclosure. It addressed a variety of areas in the residential mortgage loan industry, including: i. loan originations; ii. loan foreclosures; and iii. the conduct of business by residential mortgage loans servicers.

Until July 1, 2009, when the mortgage loan servicer registration provisions first became effective, the Department regulated the brokering and making of mortgage loans, but not the servicing of these mortgage loans. Servicing is vital part of the residential mortgage loan industry; it involves the collection of mortgage payments from borrowers and remittance of the same to owners of mortgage loans; to governmental agencies for taxes; and to insurance companies for insurance premiums. Mortgage servicers also act as agents for owners of mortgages in negotiations relating to loss mitigation when a mortgage becomes delinquent. As "middlemen," moreover, servicers also play an important role when a property is foreclosed upon. For example, the servicer may typically act on behalf of the owner of the loan in the foreclosure proceeding.

Further, unlike in the case of a mortgage broker or a mortgage lender, borrowers cannot "shop around" for loan servicers, and generally have no input in deciding what company services their loans. The absence of the ability to select a servicer obviously raises concerns over the character and viability of these entities given the central part of they play in the mortgage industry. There also is evidence that some servicers may have provided poor customer service. Specific examples of these activities include: pyramiding late fees; misapplying escrow payments; imposing illegal prepayment penalties; not providing timely and clear information to borrowers; erroneously force-placing insurance when borrowers already have insurance; and failing to engage in prompt and appropriate loss mitigation efforts.

More than 2,000,000 loans on residential one-to-four family properties are being serviced in New York. Of these over 9% were seriously delinquent as of the first quarter of 2012. Despite various initiatives adopted at the state level and the creation of federal programs such as Making Home Affordable to encourage loan modifications and help at risk homeowners, the number of loans modified, have not kept pace with the number of foreclosures. Foreclosures impose costs not only on borrowers and lenders but also on neighboring homeowners, cities and towns. They drive down home prices, diminish tax revenues and have adverse social consequences and costs.

As noted above, Part 418, initially adopted on an emergency basis on July 1 2009, relates to the first component of the mortgage servicing statute – the registration of mortgage loan servicers. It was intended to ensure that only those persons and entities with adequate financial support and sound character and general fitness will be permitted to register as mortgage loan servicers. It also provided for the suspension, revocation and termination of licensees involved in wrongdoing and establishes minimum financial standards for mortgage loan servicers.

Part 419 addresses the business practices of mortgage loan servicers and establishes certain consumer protections for homeowners whose residential mortgage loans are being serviced. These regulations provide standards and procedures for servicers to follow in their course of dealings with borrowers, including the handling of borrower complaints and inquiries, payment of taxes and insurance premiums, crediting of borrower payments, provision of annual statements of the borrower's account, authorized fees, late charges and handling of loan delinquencies and loss mitigation. Part 419 also identifies practices that are prohibited and imposes certain reporting and record-keeping requirements to enable the Superintendent to determine the servicer's compliance with applicable laws, its financial condition and the status of its servicing portfolio.

Since the adoption of Part 418, 67 entities have been approved for registration or have pending applications and nearly 400 entities have indicated that they are a mortgage banker, broker, bank or other organization exempt from the registration requirements.

All Exempt Organizations, mortgage bankers and mortgage brokers that perform mortgage loan servicing with respect to New York mortgages must notify the Superintendent that they do so, and are required to comply with the conduct of business and consumer protection rules applicable to mortgage loan servicers.

These regulations will improve accountability and the quality of service in the mortgage loan industry and will help promote alternatives to foreclosure in the state.

4. Costs.

The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. Although mortgage loan servicers may incur some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Moreover, any additional costs are likely to be mitigated by the fact that many of the requirements of Part 419, including those relating to the handling of residential mortgage delinquencies and loss mitigation (419.11) and quarterly reporting (419.12), are consistent with or substantially similar to standards found in other federal or state laws, federal mortgage modification programs or servicers own protocols.

For example, Fannie Mae and Freddie Mac, which own or insure approximately 90% of the nation's securitized mortgage loans, have similar guidelines governing various aspects of mortgage servicing, including handling of loan delinquencies. In addition, over 100 mortgage loan servicers participate in the federal Making Home Affordable (MHA) program which requires adherence to standards for handling of loan delinquencies and loss mitigation similar to those contained in these regulations. Those servicers not participating in MHA have, for the most part, adopted programs which parallel many components of MHA.

Reporting on loan delinquencies and loss mitigation has likewise become increasingly common. The OCC publish quarterly reports on credit performance, loss mitigation efforts and foreclosures based on data provided by national banks and thrifts. And, states such as Maryland and North Carolina have adopted similar reporting requirements to those contained in section 419.12.

Many of the other requirements of Part 419 such as those related to handling of taxes, insurance and escrow payments, collection of late fees and charges, crediting of payments derive from federal or state laws and reflect best industry practices. The periodic reporting and bookkeeping and recordkeeping requirements are also standard among financial services businesses, including mortgage bankers and brokers (see, for example section 410 of the Superintendent's Regulations).

The ability by the Department to regulate mortgage loan servicers is expected to reduce costs associated with responding to consumers' complaints, decrease unnecessary expenses borne by mortgagors, and should assist in decreasing the number of foreclosures in this state.

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

5. Local Government Mandates.

None.

6. Paperwork.

Part 419 requires mortgage loan servicers to keep books and records related to its servicing for a period of three years and to produce quarterly reports and financial statements as well as annual and other reports requested by the Superintendent. It is anticipated that the quarterly reporting relating to mortgage loan servicing will be done electronically and would therefore be virtually paperless. The other recordkeeping and reporting requirements are consistent with standards generally required of mortgage bankers and brokers and other regulated financial services entities.

7. Duplication.

The regulation does not duplicate, overlap or conflict with any other regulations. The various federal laws that touch upon aspects of mortgage loan servicing are noted in Section 9 "Federal Standards" below.

8. Alternatives.

The Mortgage Lending Reform Law required the registration of mortgage loan servicers and empowered the Superintendent to prescribe rules and regulations to guide the business of mortgage servicing. The purpose of the regulation is to carry out this statutory mandate to register mortgage loan servicers and regulate the manner in which they conduct business. The Department circulated a proposed draft of Part 419 and received comments from and met with industry and consumer groups. The current Part 419 reflects the input received. The alternative to these regulations is to do nothing or to wait for the newly created federal bureau of consumer protection to promulgate national rules, which could take years, may not happen at all or may not address all the practices covered by the rule. Thus, neither of those alternatives would effectuate the intent of the legislature to address the current foreclosure crisis, help at-risk homeowners vis-à-vis their loan servicers and ensure that mortgage loan servicers engage in fair and appropriate servicing practices.

9. Federal Standards.

Currently, mortgage loan servicers are not required to be registered by any federal agencies, and there are no comprehensive federal rules governing mortgage loan servicing. Federal laws such as the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 et seq. and regulations adopted thereunder, 24 C.F.R. Part 3500, and the Truth-in-Lending Act, 15 U.S.C. section 1600 et seq. and Regulation Z adopted thereunder, 12 C.F.R. section 226 et seq., govern some aspects of mortgage loan servicing, and there have been some recent amendments to those laws and regulations regarding mortgage loan servicing. For example, Regulation Z, 12 C.F.R. section 226.36(c), was recently amended to address the crediting of payments, imposition of late charges and the provision of payoff statements. In addition, the recently enacted Dodd-Frank Wall Street Reform and Protection Act of 2010 (Dodd-Frank Act) establishes requirements for the handling of escrow accounts, obtaining force-placed insurance, responding to borrower requests and providing information related to the owner of the loan. Additionally, the newly created Bureau of Consumer Financial Protection established by the Dodd-Frank Act may soon propose additional regulations for mortgage loan servicers.

10. Compliance Schedule.

Similar emergency regulations first became effective on October 1, 2010.

Regulatory Flexibility Analysis

1. Effect of Rule:

The rule will not have any impact on local governments. The Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the "Mortgage Lending Reform Law") requires all mortgage loan servicers, whether registered or exempt from registration under the law, to service mortgage loans in accordance with the rules and regulations promulgated by the Banking Board or Superintendent. The functions and powers of the Banking Board have since been transferred to the Superintendent of Financial Services, pursuant to Part A of Chapter 62 of the Laws of 2011, Section 89. Of the 67 entities which have been approved for registration or have pending applications and the nearly 400 entities which have indicated that they are exempt from the registration requirements, it is estimated that very few are small businesses.

2. Compliance Requirements:

The provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers has two main components: it requires the registration by the Department of servicers who are not a bank, mortgage banker, mortgage broker or other exempt organizations (the "MLS Registration Regulations") , and it authorizes the Department to promulgate rules and

regulations that are necessary and appropriate for the protection of consumers, to define improper or fraudulent business practices, or otherwise appropriate for the effective administration of the provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers (the "Mortgage Loan Servicer Business Conduct Regulations").

The provisions of the Mortgage Lending Reform Law requiring registration of mortgage loan servicers which are not mortgage bankers, mortgage brokers or exempt organizations became effective on July 1, 2009. Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1 2009, sets for the standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for approving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as the financial responsibility standards for mortgage loan servicers.

Part 419 implements the provisions of the Mortgage Lending Reform Law by setting the standards by which mortgage loan servicers conduct the business of mortgage loan servicing. The rule sets the standards for handling complaints, payments of taxes and insurance, crediting of borrower payments, late payments, account statements, delinquencies and loss mitigation, fees and recordkeeping.

3. Professional Services:

None.

4. Compliance Costs:

The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. Although mortgage loan servicers may incur some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Moreover, any additional costs are likely to be mitigated by the fact that many of the requirements of Part 419, including those relating to the handling of residential mortgage delinquencies and loss mitigation (419.11) and quarterly reporting (419.12), are consistent with or substantially similar to standards found in other federal or state laws, federal mortgage modification programs or servicers own protocols.

For example, Fannie Mae and Freddie Mac, which own or insure approximately 90% of the nation's securitized mortgage loans, have similar guidelines governing various aspects of mortgage servicing, including handling of loan delinquencies. In addition, over 100 mortgage loan servicers participate in the federal Making Home Affordable (MHA) program which requires adherence to standards for handling of loan delinquencies and loss mitigation similar to those contained in these regulations. Those servicers not participating in MHA have, for the most part, adopted programs which parallel many components of MHA.

Reporting on loan delinquencies and loss mitigation has likewise become increasingly common. The OCC publishes quarterly reports on credit performance, loss mitigation efforts and foreclosures based on data provided by national banks and thrifts. And, states such as Maryland and North Carolina have adopted similar reporting requirements to those contained in section 419.12.

Many of the other requirements of Part 419 such as those related to handling of taxes, insurance and escrow payments, collection of late fees and charges, crediting of payments derive from federal or state laws and reflect best industry practices. The periodic reporting and bookkeeping and recordkeeping requirements are also standard among financial services businesses, including mortgage bankers and brokers (see, for example section 410 of the Superintendent's Regulations).

Compliance with the rule should improve the servicing of residential mortgage loans in New York, including the handling of mortgage delinquencies, help prevent unnecessary foreclosures and reduce consumer complaints regarding the servicing of residential mortgage loans.

5. Economic and Technological Feasibility:

For the reasons noted in Section 4 above, the rule should impose no adverse economic or technological burden on mortgage loan servicers that are small businesses.

6. Minimizing Adverse Impact:

As noted in Section 1 above, most servicers are not small businesses. Many of the requirements contained in the rule derive from federal or state laws, existing servicer guidelines utilized by Fannie Mae and Freddie Mac and best industry practices.

Moreover, the ability by the Department to regulate mortgage loan servicers is expected to reduce costs associated with responding to consumers' complaints, decrease unnecessary expenses borne by mortgagors, help borrowers at risk of foreclosure and decrease the number of foreclosures in this state.

7. Small Business and Local Government Participation:

The Department distributed a draft of proposed Part 419 to industry representatives, received industry comments on the proposed rule and met with industry representatives in person. The Department likewise distributed a draft of proposed Part 419 to consumer groups, received their comments on the proposed rule and met with consumer representatives to discuss the proposed rule in person. The rule reflects the input received from both industry and consumer groups.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas: Since the adoption of the Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the "Mortgage Lending Reform Law"), which required mortgage loan servicers to be registered with the Department unless exempted under the law, 67 entities have pending applications or have been approved for registration and nearly 400 entities have indicated that they are a mortgage banker, broker, bank or other organization exempt from the registration requirements. Only one of the non-exempt entities applying for registration is located in New York and operating in a rural area. Of the exempt organizations, all of which are required to comply with the conduct of business contained in Part 419, approximately 400 are located in New York, including several in rural areas. However, the overwhelming majority of exempt organizations, regardless of where located, are banks or credit unions that are already regulated and are thus familiar with complying with the types of requirements contained in this regulation.

Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services: The provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers has two main components: it requires the registration by the Department of servicers that are not a bank, mortgage banker, mortgage broker or other exempt organization (the "MLS Registration Regulations") , and it authorizes the Department to promulgate rules and regulations that are necessary and appropriate for the protection of consumers, to define improper or fraudulent business practices, or otherwise appropriate for the effective administration of the provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers (the "MLS Business Conduct Regulations").

The provisions of the Mortgage Lending Reform Law of 2008 requiring registration of mortgage loan servicers which are not mortgage bankers, mortgage brokers or exempt organizations became effective on July 1, 2009. Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1, 2010, sets forth the standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for approving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as the financial responsibility standards for mortgage loan servicers.

Part 419 implements the provisions of the Mortgage Lending Reform Law of 2008 by setting the standards by which mortgage loan servicers conduct the business of mortgage loan servicing. The rule sets the standards for handling complaints, payments of taxes and insurance, crediting borrower payments, late payments, account statements, delinquencies and loss mitigation and fees. This part also imposes certain recordkeeping and reporting requirements in order to enable the Superintendent to monitor services' conduct and prohibits certain practices such as engaging in deceptive business practices.

Costs: The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. The periodic reporting requirements of Part 419 are consistent with those imposed on other regulated entities. In addition, many of the other requirements of Part 419, such as those related to the handling of loan delinquencies, taxes, insurance and escrow payments, collection of late fees and charges and crediting of payments, derive from federal or state laws, current federal loan modification programs, servicing guidelines utilized by Fannie Mae and Freddie Mac or servicers' own protocols. Although mortgage loan servicers may incur some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, credit unions, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Of the 67 entities that have been approved for registration or that have pending applications, only one is located in a rural area of New York State. Of the few exempt organizations located in rural areas of New York, virtually all are banks or credit unions. Moreover, compliance with the rule should improve the servicing of residential mortgage loans in New York, including the handling of mortgage delinquencies, help prevent unnecessary foreclosures and reduce consumer complaints regarding the servicing of residential mortgage loans.

Minimizing Adverse Impact: As noted in the "Costs" section above, while mortgage loan servicers may incur some higher costs as a result of complying with the rules, the Department does not believe that the rule will impose any meaningful adverse economic impact upon private or public entities in rural areas. In addition, it should be noted that Part 418, which establishes the application and financial requirements for mortgage loan servicers, authorizes the Superintendent to reduce or waive the

otherwise applicable financial responsibility requirements in the case of mortgage loans servicers that service not more than 12 mortgage loans or more than $5,000,000 in aggregate mortgage loans in New York and which do not collect tax or insurance payments. The Superintendent is also authorized to reduce or waive the financial responsibility requirements in other cases for good cause. The Department believes that this will ameliorate any burden on mortgage loan servicers operating in rural areas.

Rural Area Participation: The Department issued a draft of Part 419 in December 2009 and held meetings with and received comments from industry and consumer groups following the release of the draft rule. The Department also maintains continuous contact with large segments of the servicing industry though its regulation of mortgage bankers and brokers and its work in the area of foreclosure prevention. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. The Department has utilized this knowledge base in drafting the regulation.

Job Impact Statement

Article 12-D of the Banking Law, as amended by the Mortgage Lending Reform Law (Ch. 472, Laws of 2008), requires persons and entities which engage in the business of servicing mortgage loans after July 1, 2009 to be registered with the Superintendent. Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1, 2009, sets forth the application, exemption and approval procedures for registration as a mortgage loan servicer, as well as financial responsibility requirements for applicants, registrants and exempted persons.

Part 419 addresses the business practices of mortgage loan servicers in connection with their servicing of residential mortgage loans. Thus, this part addresses the obligations of mortgage loan servicers in their communications, transactions and general dealings with borrowers, including the handling of consumer complaints and inquiries, handling of escrow payments, crediting of payments, charging of fees, loss mitigation procedures and provision of payment histories and payoff statements. This part also imposes certain recordkeeping and reporting requirements in order to enable the Superintendent to monitor services' conduct and prohibits certain practices such as engaging in deceptive business practices.

Compliance with Part 419 is not expected to have a significant adverse effect on jobs or employment activities within the mortgage loan servicing industry. The vast majority of mortgage loan servicers are sophisticated financial entities that service millions, if not billions, of dollars in loans and have the experience, resources and systems to comply with the requirements of the rule. Moreover, many of the requirements of the rule reflect derive from federal or state laws and reflect existing best industry practices.

Department of Health

NOTICE OF ADOPTION

Inpatient Psychiatric Services

I.D. No. HLT-25-18-00008-A
Filing No. 17
Filing Date: 2019-01-11
Effective Date: 2019-01-30

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

Action taken: Amendment of section 86-1.39 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807-c(4)(e-1)

Subject: Inpatient Psychiatric Services.

Purpose: To enhance reimbursement mechanisms for inpatient psychiatric services.

Text of final rule: Paragraph (2) of subdivision (e) of Section 86-1.39 is amended as follows:

(2) a rural adjustment factor of 1.2309 will be applied to the operating per diem for those hospitals designated as rural hospitals[;]. *For dates of service beginning on or after July 1, 2014, rural designation shall apply to hospitals located in an upstate region, as defined in subdivision (o) of this section, with population densities of 225 persons or fewer per square mile, based on the New York State 2010 Vital Statistics table of estimated population, land area, and population density*;

Subdivision (e) of section 86-1.39 is amended by amending paragraphs (5) and (6) and by adding a new paragraph (7) to read as follows:

(5) the payment methodology shall include one co-morbidity factor per stay and if more than one co-morbidity is presented, the co-morbidity that reflects the highest payment factor shall be used to adjust the per diem operating component; [and]

(6) a variable payment factor will be applied to the operating per diem for each day of the stay, with the factor for days 1 through 4 established at 1.2, the factor for days 5 through 11 established at 1.0, the factor for days 12 through 22 established at 0.96 and the factor for stays longer than 22 days established at 0.92[.]*; and*

(7) for dates of service beginning on or after July 1, 2014, a ten percent increase will be applied for hospitals located in an upstate region, as defined in subdivision (o) of this section.

Section 86-1.39 is amended by adding a new subdivision (o) to read as follows:

(o) For purposes of this section, the downstate region of New York State shall consist of the counties of Bronx, New York, Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Putnam and Dutchess, and the upstate region of New York State shall consist of all other counties.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 86-1.39(e)(2), (5), (6) and (o).

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: regsqna@health.ny.gov

Revised Regulatory Impact Statement

Statutory Authority:

The statutory authority for this regulation is contained in Section 2807-c(4)(e-1) of the Public Health Law (PHL), which authorizes the Commissioner to promulgate regulations, including emergency regulations, with regard to Medicaid reimbursement rates for Hospital services. Such rate regulations are set forth in Subpart 86-1 of Title 10 (Health) of the Official Compilation of Codes, Rules, and Regulations of the State of New York (NYCRR).

Legislative Objectives:

The legislative intent of PHL Article 28 is to provide for the protection and promotion of the health of the inhabitants of the State of New York by delivering high quality hospital inpatient psychiatric services in a safe and efficient manner at a reasonable cost.

Needs and Benefits:

The Office of Mental Health has been in communication with providers who have brought forth concerns of their inability to maintain financial stability by providing behavioral health services for their region. The Department of Health, in collaboration with the Office of Mental Health, proposes this amendment in order to enhance the reimbursement mechanisms for inpatient psychiatric services. The proposed amendment will modify which counties are designated as rural, which will increase the number of providers that qualify for additional reimbursement under the rural designation. The proposed amendment will also provide a ten percent increase to the statewide base price for facilities located in the upstate region, as defined within the regulations.

This amendment will afford a cash infusion needed to sustain financial stability by the affected providers. Without these changes, providers would be unable to maintain operation of their inpatient psychiatric units, thereby forcing closure of these units and causing undue hardship within the communities where these patients reside.

Costs:

Costs to Private Regulated Parties:

There will be no additional costs to private regulated parties.

Costs to State Government:

The change in reimbursement for rural designation and upstate facilities will result in an increased payment. However, these expenditures were previously allocated with the enacted 2014 / 2015 budget and, therefore, the amendment imposes no additional cost to the State.

Costs of Local Government:

Local districts' share of Medicaid costs is statutorily capped; therefore, there will be no additional costs to local governments as a result of this proposed regulation.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of this proposed regulation.

Local Government Mandates:

The proposed regulation does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

No additional paperwork is required of providers.

Duplication:

This regulation does not duplicate any existing federal, state or local government regulation.

Alternatives:
No significant alternatives are available.
Federal Standards:
The proposed regulation does not exceed any minimum standards of the federal government for the same or similar subject areas.
Compliance Schedule:
This rule shall take effect immediately upon publication of a Notice of Adoption in the State Register.

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

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

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.

NOTICE OF ADOPTION

Statewide Planning and Research Cooperative System (SPARCS)

I.D. No. HLT-34-18-00006-A

Filing No. 18

Filing Date: 2019-01-11

Effective Date: 2019-01-30

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

Action taken: Amendment of section 400.18 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2816

Subject: Statewide Planning and Research Cooperative System (SPARCS).

Purpose: To revise the SPARCS regulation related to data intake.

Text or summary was published in the August 22, 2018 issue of the Register, I.D. No. HLT-34-18-00006-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: regsqna@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 Department received one comment during the public comment period from the New York State Association of County Health Officials ("NYSACHO").
Comment:
The commenter requested amendments to the proposed regulation to clarify the responsibility of local health departments that operate facilities licensed under Article 28 of the Public Health Law (PHL) to submit data or report to SPARCS or an all-payer database.
Response:
The proposed amendments to the SPARCS regulation are limited to: (1) removing the requirement that facilities submit data through the Health Commerce System; (2) removing references to the Patient Review Instrument; and (3) clarifying that input data dictionary elements are protected by copyright law. The proposal does not impact any existing obligation to report data to SPARCS. No changes were made to the regulation as a result of this comment.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Midwifery Birth Center Services

I.D. No. HLT-05-19-00005-P

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

Proposed Action: Amendment of Parts 69, 400 and 405; addition of Part 795 to Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2801 and 2803(11)

Subject: Midwifery Birth Center Services.

Purpose: To set the standards for all birth centers to follow the structure of Article 28 requirements.

Substance of proposed rule (Full text is posted at the following State website:www.health.ny.gov/Laws & Regulations/Proposed Rulemaking): This regulation amends Title 10 of the New York Codes, Rules and Regulations to add a new Article 10 to the State Hospital Code and a new Part 795 – Midwifery Birth Centers.

The new Part 795 defines midwifery birth center and sets standards for such birth centers aligned with national evidence-based standards. Part 795 allows midwifery birth centers to demonstrate compliance with these regulations by obtaining accreditation from an accrediting organization approved by the Department, in lieu of routine surveillance by the Department.

Part 795 requires a midwifery birth center to have a center director, who may be a midwife. The center director may appoint a consulting physician and must have collaborative relationships as required by the Education Law and this regulation.

Part 795 sets standards for staffing at midwifery birth centers and requires at least two staff members with training and skills in resuscitation, one for the patient giving birth and one for the post-delivery neonate, to be present at every birth.

Part 795 requires midwifery birth centers to have quality assurance programs and plans for emergency care, including transfer when indicated.

Text of proposed 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: regsqna@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:
Chapter 397 of the Laws of 2016 amended the definition of hospital in section 2801 of the Public Health Law to add midwifery birth centers under the supervision of a midwife, and added a new subdivision 11 to section 2801 to give the New York State Department of Health (the Department) specific authority to establish regulations relating to the establishment, construction, and operation of midwifery birth centers, in consultation with representatives of midwives, midwifery birth centers, and general hospitals providing obstetric services.
The 2016 law supplemented the authority of the Department and the Public Health and Health Planning Council (PHHPC) under section 2803 of the Public Health Law to regulate health care facilities, including birth centers.
Legislative Objectives:
Chapter 397 of the Laws of 2016 was intended to remove barriers that restrict the establishment of freestanding birth centers led by licensed midwives and to permit the Department to determine, with consultation, which Article 28 certificate-of-need requirements are appropriate and reasonable for the scope of services provided by midwifery birth centers. Education Law requirements governing the practice of midwifery will continue to apply to all midwives, regardless of the practice setting.
Needs and Benefits:
There are currently only three freestanding birth centers in New York. All of these are directed by physicians. This regulation -- which encourages the creation of midwife-led centers -- will foster the growth of birth centers throughout New York.
Evidence shows that midwifery birth centers can offer high-quality, cost-effective maternity and neonatal care. Research indicates that freestanding birth centers operated by midwives tend to have low cesarean-section rates, fewer labor inductions, and successful parent bonding and breastfeeding without prolonged separation. Midwife-led birth centers promote wellness-based birth over technology and interventions. They consistently earn high patient satisfaction from women seeking a welcoming environment without restrictions on the presence of supportive staff, friends, and family members. They can provide more cost-effective maternity and neonatal care with outcomes that are comparable to births in other settings. Midwifery birth centers can play a vital part in serving the needs of mothers and families in New York State.
This regulation implements Chapter 397 of the Laws of 2016 by creating a new Part 795 authorizing midwifery birth centers. Under these regulations, the midwifery birth center director may be a licensed midwife

or a physician, provided that they maintain documentation of collaborative relationships required under Section 6951 of the Education Law.

These regulations allow midwifery birth centers to meet national standards set by a standards-setting agency selected by the Department in lieu of meeting some provisions of the State Hospital Code. This regulation also allows accreditation of midwifery birth centers in lieu of surveillance by the Department, although the Department retains the authority to inspect midwifery birth centers at its discretion. An accreditation agency can ensure high quality of care consistent with Department regulations and nationally recognized standards in a manner that is flexible and imposes less of a resource and cost burden on the Department.

A physician-led birth center that is a diagnostic and treatment center and is regulated under 10 NYCRR Part 754 must have a transfer agreement with a perinatal hospital located within 20 minutes' transport time from the birth center to the receiving hospital. Under this regulation, for a midwifery birth center, the surface travel time to reach a receiving perinatal hospital must be less than two hours under usual weather and road conditions. This will allow birth centers to be established in rural areas that would otherwise not have access to this type of care.

This regulation requires that the medical record for each patient at a midwifery birth center must contain a record of informed consent, including shared decision making, for birth center services. Public Health Law § 2805 d, which generally requires a patient's informed consent when receiving health care services, is applicable to midwifery birth centers.

Costs:

Costs to Private Regulated Parties:

A provider seeking to establish a midwifery birth center would require the approval of the Department as part of the Certificate of Need process. An application for a Certificate of Need for a midwifery birth center will be subject to a fee, established by Public Health Law § 2801-a, of $2,000. An additional fee of 0.55% of the midwifery birth center's total project cost would be assessed upon approval of the Certificate of Need.

A provider opting to obtain accreditation, in accordance with these proposed regulations, would also be subject to fees charged by the accreditation agency. According to a national accreditation organization for midwifery birth centers, the Commission on the Accreditation of Birth Centers, typical fee structures for birth centers are as follows: a new birth center would be charged an initial registration fee of 4,000 dollars and a follow-up visit fee, one year later of 3,300 dollars. After that, a 250 dollar-per-month fee is assessed during the lifetime of the accreditation. All of these costs are subject to change. Foundation grants may be available to potentially cover half of the costs for the initial and follow-up visit.

Costs to State and Local Governments:

The Department does not anticipate that any birth centers will be operated by State or local government.

Local ordinances would be enforced at midwifery birth centers in a comparable manner to any other local businesses.

Costs to the Department of Health:

There will be no additional costs to the Department, as systems already exist to approve and regulate birth centers and, as proposed, the services of the national standards setting body and accreditation would fulfill many obligations typically fulfilled by the Department.

Local Government Mandates:

The proposed regulations impose no new mandates on any county, city, town or village government.

Paperwork:

To become a new birth center, including a midwifery birth center, an applicant will need to follow certificate of need process as required by Public Health Law Article 28. This regulation does not create new reporting requirements.

Duplication:

There are no duplicative or conflicting rules.

Alternatives:

One alternative would be for the State to not allow accreditation of birth centers by a nationally recognized organization as evidence of compliance with minimum operational and construction standards. However, this alternative was rejected as inefficient and unnecessary.

Another alternative was to require midwifery birth centers to meet the exact same requirements as physician-led birth centers, other than allowing the center to be directed by a midwife. This alternative was rejected, because the Department believes that the Legislature intended and the public interest would best be served by the Department creating a regulatory framework that facilitates the establishment of distinct midwifery birth centers.

Federal Standards:

The proposed regulation does not exceed any minimum standards of the Federal government.

Compliance Schedule:

The proposed regulation will take effect upon a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

Effect of Rule:

The proposed regulations will apply to midwifery birth centers in New York State. This proposal will not impact local governments or small businesses unless they operate such facilities. Many of the midwifery birth centers will be small businesses under the definition in the State Administrative Procedure Act (SAPA). In such case, the flexibility afforded by the regulations is expected to minimize delays and any costs of compliance as described below.

Compliance Requirements:

Pursuant to this rule, midwifery birth centers that are small businesses will be required to maintain appropriate documentation of professional credentialing and agreements between the birth center and other receiving medical facilities.

These regulations utilize the approach of allowing accreditation instead of traditional surveillance. This is intended to allow for oversight to be performed by accrediting organizations with specific experience measuring standards of compliance for midwifery birth centers. Small businesses may be required to enter into a contractual relationship with an accrediting organization.

Professional Services:

This proposal is not expected to require any additional use of professional services.

Compliance Costs:

A provider seeking to establish a midwifery birth center would require the approval of the Department as part of the Certificate of Need process. An application for a Certificate of Need for a midwifery birth center will be subject to a fee, established by Public Health Law § 2801-a, of $2,000. An additional fee of 0.55% of the midwifery birth center's total project cost would be assessed upon approval of the Certificate of Need.

A provider opting to obtain accreditation, in accordance with these proposed regulations, would also be subject to fees charged by the accreditation agency. According to a national accreditation organization for midwifery birth centers, the Commission on the Accreditation of Birth Centers, typical fee structures for birth centers are as follows: a new birth center would be charged an initial registration fee of 4,000 dollars and a follow-up visit fee, one year later of 3,300 dollars. After that, a 250 dollar-per-month fee is assessed during the lifetime of the accreditation. All of these costs are subject to change and will vary by size of birth center. Foundation grants may be available to potentially cover half of the costs for the initial and follow-up visit.

Economic and Technological Feasibility:

This proposal is economically and technically feasible, as these regulations would enable the establishment of midwifery birth centers and do not impose requirements on existing birth centers.

Minimizing Adverse Impact:

No adverse impact is anticipated, as these regulations would enable the establishment of midwifery birth centers and do not impose requirements on existing birth centers.

Small Business and Local Government Participation:

The Department convened a 49-member expert panel to make recommendations for the perinatal system in New York State, which includes freestanding birth centers, Level 1 hospitals, Level II hospitals, Level III hospitals, and Regional Perinatal Centers (RPCs), as described in 10 NYCRR Part 721. Regulated parties will also have an opportunity to submit comments during the notice and comment period.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

This rule applies uniformly throughout the state, including rural areas. Rural areas are defined as counties with a population less than 200,000 and counties with a population of 200,000 or greater that have towns with population densities of 150 persons or fewer per square mile. The following 43 counties have a population of less than 200,000 based upon the United States Census estimated county populations for 2010 (http://quickfacts.census.gov).

Allegany County	Greene County	Schoharie County
Cattaraugus County	Hamilton County	Schuyler County
Cayuga County	Herkimer County	Seneca County
Chautauqua County	Jefferson County	St. Lawrence County
Chemung County	Lewis County	Steuben County
Chenango County	Livingston County	Sullivan County
Clinton County	Madison County	Tioga County
Columbia County	Montgomery County	Tompkins County
Cortland County	Ontario County	Ulster County
Delaware County	Orleans County	Warren County

Essex County	Oswego County	Washington County
Franklin County	Otsego County	Wayne County
Fulton County	Putnam County	Wyoming County
Genesee County	Rensselaer County	Yates County
	Schenectady County	

The following counties have a population of 200,000 or greater and towns with population densities of 150 persons or fewer per square mile. Data is based upon the United States Census estimated county populations for 2010.

Albany County	Monroe County	Orange County
Broome County	Niagara County	Saratoga County
Dutchess County	Oneida County	Suffolk County
Erie County	Onondaga County	

There are no birth centers currently operating in rural areas.

Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services:

Pursuant to this rule, midwifery birth centers will be required to maintain appropriate documentation of professional credentialing and agreements between the birth center and other receiving medical facilities.

These regulations utilize the approach of allowing accreditation instead of traditional surveillance. This is intended to allow for oversight to be performed by accrediting organizations with specific experience measuring standards of compliance for midwifery birth centers. Birth centers may be required to enter into contractual relationships with these accrediting organizations.

Professional services such as midwifes and other health care practitioners will be needed to operate a midwifery birth center. It is also anticipated that staff will be needed to maintain the center and provide for a setting that is safe from biological or environmental hazards.

Costs:

A provider seeking to establish a midwifery birth center would require the approval of the Department as part of the Certificate of Need process. An application for a Certificate of Need for a midwifery birth center will be subject to a fee, established by Public Health Law § 2801-a, of $2,000. An additional fee of 0.55% of the midwifery birth center's total project cost would be assessed upon approval of the Certificate of Need.

A provider opting to obtain accreditation, in accordance with these proposed regulations, would also be subject to fees charged by the accreditation agency. According to a national accreditation organization for midwifery birth centers, the Commission on the Accreditation of Birth Centers, typical fee structures for birth centers are as follows: a new birth center would be charged an initial registration fee of 4,000 dollars and a follow-up visit fee, one year later of 3,300 dollars. After that, a 250 dollar-per-month fee is assessed during the lifetime of the accreditation. All of these costs are subject to change and will vary by size of birth center. Foundation grants may be available to potentially cover half of the costs for the initial and follow-up visit. These costs would be the same in a rural or non-rural area.

Minimizing Adverse Impact:

It is intended that midwifery birth centers will meet some of the needs of rural communities to provide birth services in the absence of a nearby hospital. The Department has added a standard within this rule allowing for midwifery birth centers to operate in any area of the state as long as the center is located within a two-hour road travel radius of a potential receiving hospital. This provision was specifically designed to allow for the possibility that a birth center could open in a rural community.

Allowing accreditation will minimize any adverse impact associated with the Department's surveillance process and will help to allow these centers to operate in rural communities.

Rural Area Participation:

The Department held meetings to seek input from practitioners in rural settings. The Department conducted outreach with state and national professional associations of midwifery birth centers, as well as representatives of midwives, midwifery birth centers, and general hospitals. This included practitioners practicing and intending to practice in rural settings. The proposed regulation will have a 60-day public comment period.

Job Impact Statement

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial adverse impact on jobs and/or employment opportunities.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Medicaid Reimbursement of Nursing Facility Reserved Bed Days for Hospitalizations

I.D. No. HLT-07-18-00002-RP

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

Proposed Action: Amendment of section 505.9 of Title 18 NYCRR; and amendment of section 86-2.40 of Title 10 NYCRR.

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

Subject: Medicaid Reimbursement of Nursing Facility Reserved Bed Days for Hospitalizations.

Purpose: To make changes relating to reserved bed payments made by Medicaid to nursing facilities.

Substance of revised rule (Full text is posted at the following State website: www.health.ny.gov/Laws&Regulations/Proposed-Rulemaking): The proposed amendments would make changes to subdivision (d) of section 505.9 of 18 NYCRR and to subdivision (a) and paragraph (4) of subdivision (ac) of section 86-2.40 of 10 NYCRR, relating to reserved bed payments made by Medicaid to nursing facilities during periods when the facility is holding the bed of a patient while the patient is hospitalized or on leave of absence from the facility. The changes are necessary to conform Department regulations to recent amendments to Public Health Law (PHL) § 2808(25), which place limits on the availability of Medicaid reserved bed payments to nursing facilities to reserve a bed for Medicaid recipients who are 21 years of age or older. The proposed amendments also clarify when reserve bed days should be included in the methodology utilized to calculate residential health care rates.

Section 505.9(d) of 18 NYCRR would be amended to provide that reserved bed payments for recipients age 21 and over who are temporarily hospitalized are only available with respect to recipients who are receiving hospice services in the facility.

Section 86-2.40(a) of 10 NYCRR would be amended to ensure that reserve bed days are included in the rate methodology utilized for specialty units. Section 86-2.40(ac)(4) of 10 NYCRR would be amended, with respect to nursing facility patients who are 21 years of age or older, to provide that Medicaid reserved bed day payments: (a) for patients who are hospitalized, will be made only for patients who are receiving hospice services within the facility, will be paid at 50 percent of the Medicaid rate otherwise payable to the facility with regard to such days of care, and will be available for a total of 14 days in any 12-month period; and (b) for patients who are on a leave of absence, will be paid at 95 percent of the Medicaid rate otherwise payable to the facility with regard to such days of care, and will be available for a total of 10 days in any 12-month period.

Revised rule compared with proposed rule: Substantial revisions were made in sections 505.9(d)(1), (2), (6), (i), (7), 86-2.40(a) and (ac)(4).

Text of revised proposed 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: regsqna@health.ny.gov

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

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

Revised Regulatory Impact Statement

Statutory Authority:

Social Services Law (SSL) section 363-a and Public Health Law section 201(1)(v) provide that the Department is the single State agency responsible for supervising the administration of the State's medical assistance ("Medicaid") program and for adopting such regulations, which shall be consistent with law, and as may be necessary to implement the State's Medicaid program. SSL section 365-a authorizes Medicaid coverage for specified medical care, services and supplies, together with such medical care, services and supplies as authorized in the regulations of the Department.

Legislative Objectives:

Chapter 57 of the Laws of 2017 amended Public Health Law (PHL) § 2808(25), which places limits on the availability of Medicaid payments to nursing facilities to reserve a bed for a Medicaid recipient 21 years of age or older who is temporarily absent from the facility. Generally, the amendments eliminated reserved bed payments for recipients age 21 and over who are temporarily hospitalized. However, it was not the intent of the Legislature or the Department to affect the availability of reserved bed

payments for temporary hospitalizations with respect to recipients under age 21 or recipients receiving hospice services in the nursing facility.

Needs and Benefits:

The proposed amendments are necessary to conform Department regulations governing Medicaid's reserved bed policy with the changes made to PHL § 2808(25) by Chapter 57 of the Laws of 2017, and to provide clarity with respect to the scope and intent of those statutory revisions.

The proposed amendments would make changes to paragraphs (1), (2), (6), and (7) of subdivision (d) of section 505.9 of 18 NYCRR. Paragraph (1), which sets forth the general rule regarding reserved bed payments, would be amended to provide that Medicaid will not pay to reserve a bed for a recipient in a nursing facility who is 21 years of age or older and temporarily hospitalized unless the recipient is receiving hospice services in the facility.

Paragraph (2) would be amended to provide that the department pays 95 percent of the Medicaid rate otherwise payable to the facility for a leave of absence, and 50 percent of such rate for a temporary hospitalization for recipients who are receiving hospice services in the facility.

Paragraphs (6) would be amended to provide that, as a condition of participating in the Medicaid program, nursing facilities must reserve beds in accordance with the regulation.

Paragraph (7) would be amended to make minor clarifications.

The proposed amendments would also make conforming changes to subdivision (a) and paragraph (4) of subdivision (ac) of section 86-2.40 of 10 NYCRR. These changes would clarify when reserve bed days should be included in the methodology utilized to calculate residential health care rates and would set forth payment amounts for Medicaid recipients 21 years of age or older.

A new subparagraph (v) would be added to provide that reserved bed day payments for Medicaid recipients 21 years of age or older in nursing facilities who are hospitalized will be made: only with respect to patients who are receiving hospice services within the facility; at 50 percent of the Medicaid rate otherwise payable to the facility with regard to such days of care; and for up to a combined aggregate of 14 days for any 12-month period.

A new subparagraph (vi) would be added to provide that reserved bed day payments for Medicaid recipients 21 years of age or older in nursing facilities during a leave of absence from the facility will be made: at 95 percent of the Medicaid rate otherwise payable to the facility with regard to such days of care; and for up to a combined aggregate of 10 days for any 12-month period.

Costs:

Costs to Regulated Parties:

The elimination of reserved bed day payments for those aged 21 and over in nursing facilities, and who are not receiving hospice services in the facility, will impose varying costs to nursing facilities based on the volume and length of reserved bed days within their facilities. For all nursing facilities reporting reserved bed days, the aggregate impact is estimated to be approximately $14M annually.

Costs to State Government:

There will be no additional costs to state government as a result of the proposed amendment.

Costs to Local Government:

There will be no additional costs to local government as a result of the proposed amendment.

Costs to the Department of Health:

There will be no additional costs to the Department as a result of the proposed amendment.

Local Government Mandate:

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

Paperwork:

The proposed amendments would not increase paperwork requirements.

Duplication:

There are no duplicative or conflicting rules identified.

Alternatives:

The proposed amendments would conform the regulations to changes made to Public Health Law (PHL) § 2808(25) and to the legislative intent underlying such changes. Therefore no alternatives were considered.

Federal Standards:

The regulatory amendment exceeds the minimum requirements set out in 42 CFR 483.15 on patient admission, transfer, and discharge rights. This amendment exceeds those requirements due to the sensitive nature and complex needs of Medicaid beneficiaries within nursing facilities. Residents of nursing facilities are often elderly and/or severely disabled, present with two or more chronic conditions, or are afflicted with mental/cognitive impairments. When necessary hospitalizations occur, it is imperative the patients return to their place of residency in the same bed and the same room.

Compliance Schedule:

Regulated parties are expected to comply with the proposed regulations when they become effective.

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

Changes made to the last published rule do not necessitate revisions to the previously published RFA, RAFA and JIS.

Assessment of Public Comment

The Department of Health received comments from various stakeholders, including representatives of skilled nursing facilities and nursing homes. Comments were received regarding the payments for patients, the costs to providers, the leave of absence policy, the necessity of a State Plan Amendment, and statutory authority which allows the regulation. In response to comments received, the Department has revised the rule to make it less burdensome on regulated parties and to simplify the regulatory requirements. The Department is publishing the revised rulemaking for additional public comment.

Office for People with Developmental Disabilities

NOTICE OF WITHDRAWAL

Telehealth

I.D. No. PDD-45-18-00001-W

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

Action taken: Notice of proposed rule making, I.D. No. PDD-45-18-00001-EP, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on November 7, 2018.

Subject: Telehealth.

Reason(s) for withdrawal of the proposed rule: Another EP was finally adopted, thus, this EP is no longer necessary.

Public Service Commission

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Transfer of Street Lighting Facilities

I.D. No. PSC-05-19-00009-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 Orange and Rockland Utilities, Inc. for the transfer of certain street lighting facilities to the Town of Warwick.

Statutory authority: Public Service Law, sections 65, 66 and 70

Subject: Transfer of street lighting facilities.

Purpose: To consider whether the transfer of certain street lighting facilities is in the public interest.

Substance of proposed rule: The Public Service Commission is considering a petition filed by Orange and Rockland Utilities, Inc. (Orange and Rockland) on December 26, 2018, requesting authorization to transfer to the Town of Warwick (Warwick) certain street lighting facilities located throughout Warwick. The facilities consist of luminaries, lamps, mast arms, their associated wiring, electrical connections, and appurtenances.

Orange and Rockland requests the Commission's approval of the transaction pursuant to Public Service Law § 70, as the original cost of the proposed assets to be transferred was greater than $100,000. The proposed purchase price is $89,957, plus any accrued taxes as set forth in the agreement attached to the petition. The Company proposes to defer 100 percent of the after-tax net proceeds on the sale, plus accrued interest at the Commission-approved Other Customer Provided Capital Rate, for the future benefit of Orange and Rockland's electric customers. The transfer

will not impact the reliability, safety, operation, or maintenance of Orange and Rockland's electric distribution system.

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. 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.

(18-E-0787SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Waiver of Certain Rules, E.G.5-Year Buildout and 7-Day Installation Requirements Pertaining to Cable Television Franchise

I.D. No. PSC-05-19-00010-P

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

Proposed Action: The Commission is considering a petition for certain waivers filed by Frontier Communications of New York, Inc. in connection with a cable television franchise for the Town of Wallkill in Orange County.

Statutory authority: Public Service Law, sections 215, 216 and 221

Subject: Waiver of certain rules, e.g. 5-year buildout and 7-day installation requirements pertaining to cable television franchise.

Purpose: To determine whether to waive any rules and regulations.

Substance of proposed rule: The Commission is considering a petition filed on November 26, 2018 by Frontier Communications of New York, Inc. (Frontier) for approval of its certificate of confirmation (certificate) for a cable television franchise with the Town of Wallkill, Orange County.

The certificate, if approved, will enable Frontier to offer advanced broadband services and provide a competitive wireline cable alternative to the monopoly wireline cable provider to some residents of the Town. In addition to facilitating cable competition in certain areas, the proposed franchise agreement would promote broadband deployment at speeds up to 100MBps and potentially lead to additional network build-out opportunities.

In connection with the proposed cable television franchise, Frontier requested waivers and/or partial waivers of certain cable franchise requirements found in 1) 16 NYCRR § 895.5(b)(1) and 895.5(c), which requires a five-year build-out of the primary service area; and 2) 16 NYCRR § 895.5(b)(3) and 890(b)(1), which establishes a seven-business day installation interval for providing service to certain dwellings.

Frontier submits that the requested waivers are necessary for a new entrant to the market, like Frontier, to compete against well-entrenched cable providers that have existing customer bases and substantially higher market capitalizations than Frontier. Frontier states that the proposed waivers mitigate the risks and challenges associated with competing with an incumbent service provider with a 100% market share.

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. 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.

(18-V-0725SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Notice of Intent to Submeter Electricity

I.D. No. PSC-05-19-00011-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 the notice of intent of W2005/Hines West Fifty-Third Realty, LLC to submeter electricity at 53 West 53rd Street, New York, New York.

Statutory authority: Public Service Law, sections 2, 4(1), 30, 32-48, 52, 53, 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Notice of intent to submeter electricity.

Purpose: To ensure adequate submetering equipment and consumer protections are in place.

Substance of proposed rule: The Commission is considering the notice of intent filed by W2005/Hines West Fifty-Third Realty, LLC on December 17, 2018, to submeter electricity at 53 West 53rd Street, New York, New York, located in the service territory of Consolidated Edison Company of New York, Inc. (Con Edison).

By stating its intent to submeter electricity, W2005/Hines West Fifty-Third Realty, LLC requests authorization to take electric service from Con Edison and then distribute and meter that electricity to its residents. Submetering of electricity to residential residents is allowed so long as it complies with the protections and requirements of the Commission's regulations in 16 NYCRR Part 96.

The full text of the notice of intent and the full record of the proceeding may be reviewed online at the Department of Public Service web page: 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.

(18-E-0769SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Waiver of Certain Rules, E.G. 5-Year Buildout and 7-Day Installation Requirements Pertaining to Cable Television Franchise

I.D. No. PSC-05-19-00012-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 a petition for certain waivers filed by Frontier Communications of New York, Inc. in connection with a cable television franchise for the Village of Washingtonville in Orange County.

Statutory authority: Public Service Law, sections 215, 216 and 221

Subject: Waiver of certain rules, e.g. 5-year buildout and 7-day installation requirements pertaining to cable television franchise.

Purpose: To determine whether to waive any rules and regulations.

Substance of proposed rule: The Commission is considering a petition filed on November 19, 2018 by Frontier Communications of New York, Inc. (Frontier) for approval of its certificate of confirmation (certificate) for a cable television franchise with the Village of Washingtonville, Orange County.

The certificate, if approved, will enable Frontier to offer advanced broadband services and provide a competitive wireline cable alternative to the monopoly wireline cable provider to some residents of the Village. In addition to facilitating cable competition in certain areas, the proposed franchise agreement would promote broadband deployment at speeds up to 100MBps and potentially lead to additional network build-out opportunities.

In connection with the proposed cable television franchise, Frontier requested waivers and/or partial waivers of certain cable franchise requirements found in 1) 16 NYCRR §§ 895.5(b)(1) and 895.5(c), which requires a five-year build-out of the primary service area; and 2) 16 NYCRR § 895.5(b)(3) and 890(b)(1), which establishes a seven-business day installation interval for providing service to certain dwellings.

Frontier submits that the requested waivers are necessary for a new entrant to the market, like Frontier, to compete against well-entrenched cable providers that have existing customer bases and substantially higher market capitalizations than Frontier. Frontier further submits that the requested waivers mitigate the risks and challenges associated with competing with an incumbent service provider with a 100% market share.

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. 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.

(18-V-0719SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Issuance of Long-Term Debt Securities

I.D. No. PSC-05-19-00013-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 petition filed by Consolidated Edison Company of New York, Inc. requesting permission to issue and sell new unsecured debt obligations.

Statutory authority: Public Service Law, section 69

Subject: Issuance of long-term debt securities.

Purpose: To provide funding to reimburse the Company's treasury for moneys expended for capital purposes.

Substance of proposed rule: The Public Service Commission is considering a petition filed by Consolidated Edison Company of New York, Inc. (the Company) on January 8, 2019, seeking approval to issue and sell unsecured debt obligations having a maturity of more than one year.

The requested approval would permit the Company to (i) issue and sell not to exceed $5.6 billion aggregate principal amount of unsecured debt obligations of the Company having a maturity of more than one year; (ii) enter into or continue one or more revolving credit agreements and issue and sell not to exceed $2.25 billion aggregate principal amount at any time outstanding of unsecured debt obligations having a maturity of more than one year pursuant to such agreement(s); and (iii) issue and sell not to exceed $2.5 billion of unsecured debt obligations having a maturity of more than one year. The Company will use the proceeds to reimburse its treasury for moneys expended for capital purposes through December 31, 2022.

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. The Commission may adopt, modify, or reject, 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-0012SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Transfer of Natural Gas Pipeline and Request for Lightened and Incidental Regulation

I.D. No. PSC-05-19-00014-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 a petition for a proposal to transfer a 2.1 mile long natural gas supply line from Selkirk Cogen Partners, L.P. to SABIC Innovative Plastics U.S., L.L.C. and request for lightened and incidental regulation.

Statutory authority: Public Service Law, sections 2(10)-(13), (21), (22), 5(1)(b), 66(13), 70 and 79-83

Subject: Transfer of natural gas pipeline and request for lightened and incidental regulation.

Purpose: To grant lightened and incidental regulation to SABIC Innovative Plastics, LLC and approve the transfer of a gas pipeline.

Substance of proposed rule: The Public Service Commission is considering a petition filed by Selkirk Cogen Partners, L.P. (Selkirk) and SABIC Innovative Plastics, L.L.C. (SABIC) (collectively, the Petitioners) on December 14, 2018 regarding an approximately 2.1-mile natural gas pipeline used for the sole purpose of delivering natural gas to a combined-cycle cogeneration facility and auxiliary boilers (the Facility) owned and operated by Selkirk.

Petitioners request a declaratory ruling that Public Service Commission (Commission) approval under Public Service Law (PSL) Section 70 is not required for Selkirk to transfer ownership of the pipeline to SABIC or, alternatively, approval of the transfer. Petitioners also request an order authorizing SABIC to own and operate the pipeline subject to the same lightened and incidental ratemaking regulatory regime that currently is applied to Selkirk. Finally, Petitioners explain that Selkirk holds a Certificate of Environmental Compatibility and Public Need (Certificate) governing the ownership and operation of the pipeline and request an order authorizing Selkirk to transfer the Certificate to SABIC.

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. The Commission may adopt, modify, or reject, 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.
(18-G-0771SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Transfer of Street Lighting Facilities to the City of Cortland

I.D. No. PSC-05-19-00015-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 Niagara Mohawk Power Corporation d/b/a National Grid for the transfer of its street lighting facilities located in the City of Cortland to the City of Cortland.

Statutory authority: Public Service Law, section 70(1)

Subject: Transfer of street lighting facilities to the City of Cortland.

Purpose: To determine whether to transfer street lighting facilities located in the City of Cortland.

Substance of proposed rule: The Public Service Commission (Commission) is considering a petition filed on December 21, 2018 by Niagara Mohawk Power Corporation, d/b/a National Grid (National Grid), requesting approval to transfer certain street lighting facilities located in the City of Cortland, New York (City) to the City.

Based on plant records, National Grid states that the original book cost of the facilities is approximately $1,575,239, and the net book value, is $1,023,435, as of October 31, 2018. National Grid proposes to transfer the street lighting facilities to the City for approximately $1,109,923, which is based on plant records as of June 30, 2018. National Grid explains that the agreement between it and the City provides that the purchase price will be adjusted (up or down) to the actual net book value at closing.

The full text of the petition and the full record of the proceeding may be viewed online at the Department of Public Service web page: 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.
(18-E-0783SP1)

Office of Temporary and Disability Assistance

NOTICE OF ADOPTION

Standard Utility Allowances (SUAs) for the Supplemental Nutrition Assistance Program (SNAP)

I.D. No. TDA-41-18-00002-A
Filing No. 15
Filing Date: 2019-01-10
Effective Date: 2019-01-30

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

Action taken: Amendment of section 387.12(f)(3)(v)(a)-(b) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 17(a)-(b), (j), 20(3)(d), 95; 7 United States Code, section 2014(e)(6)(C); 7 Code of Federal Regulations, section 273.9(d)(6)(iii)

Subject: Standard Utility Allowances (SUAs) for the Supplemental Nutrition Assistance Program (SNAP).

Purpose: These regulatory amendments set forth the federally-approved SUAs as of 10/1/18.

Text or summary was published in the October 10, 2018 issue of the Register, I.D. No. TDA-41-18-00002-EP.

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

Text of rule and any required statements and analyses may be obtained from: Richard P. Rhodes, Jr., Office of Temporary and Disability Assistance, 40 North Pearl Street, 16-C, Albany, NY 12243-0001, (518) 486-7503, email: richard.rhodesjr@otda.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
The agency received no public comment.